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VOLUME 1

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THE INCORPORATED COUNCIL OF LAW REPORTING
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ERRATA

Page 155. Appearances. *J. S. Hobhouse* is *not* of the Australian Bar.

Page 177, headnote, second line of heading. *Delete* "not."

Page 393, line 8 et seq. from bottom of page, should read as follows:—

"by way of profits tax if the notice dealt with under section 22 of the Act of 1947 had not been given.

Section 38 of the Act of 1947, to which I now refer, is the material section. The . . ."

Page 398, headnote, para. (2), line 4. *For* "£250" *read* "£500."

Page 553. In *Williams* v. *Port of Liverpool Stevedoring Co. Ltd. R. H. Forrest Q.C.* appeared with *Gordon Clover* for the second defendants.

Corrections should be made to footnotes as follows:

Page 65. Footnote 3: [1940] Ch. 333.

Page 96. Footnote 7: (1883) 8 P.D. 98.

Page 124. Footnote 4: (1839) 10 Ad. & E. 427.

Page 332. Footnote 2: 12 T.C. 955.

Page 474. Footnotes 10 and 11: [1921] 2 A.C. 544.

Page 499, headnote, line 6. *For* "which was" *read* "the 'after damage value being."

Page 502, line 2. *For* "The amount of this value payment" *read* "The value of the properties by reference to their state "after war damage."

Page 1079. Solicitors in *South of Scotland Electricity Board* v. *British Oxygen Co. Ltd.* should read *R. A. Flinn for Campbell, Smith, Mathison & Oliphant W.S., Edinburgh; Wright, Johnston & Mackenzie, Glasgow, and Biggart Lumsden & Co., Glasgow; Simpson, North Harley & Co. for Pringle & Clay W.S., Edinburgh*, and not as printed.

Page 1112: *Practice Direction.* For heading *Chancery Division* read *Court of Appeal.*

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8. —— *Practice—Indictment—Drafting and inspection.*
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9. —— *Practice — Venue — Committal by justices to foreign court to avoid delay—Whether necessary to commit to assizes on same circuit — Duty to avoid unnecessary expense.*
* Regina *v.* Streams. (Practice Note.)
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* Regina *v.* Devine (Practice Note)
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* Regina *v.* Staff Sub-Committee of London County Council's Education Committee. *Ex parte* Schonfeld (Practice Note) - C.A. 1 W.L.R. **430**

2. —— *Certiorari — Practice — Affidavits—Cross-examination of deponents—Power of the court to allow cross-examination—Circumstances in which cross-examination allowed—R.S.C., Ord.* 38, *Ord.* 59, *r.* 47.
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3. —— *Negligence — Surveyor — Property purchased in reliance on negligent report by surveyor—Measure of damages—"Value"—Cost of repair not recoverable—Damages measurable by difference in value of property as described and as it ought to have been described—Date of assessment—Quantum of damages not to be altered by fall in value of money between date when cause of action accrued and date of hearing of action.*
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* Simons *v.* W. H. Rhodes & Son Ltd.
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2. —— *Regulations—Safe means of access—Gangway—Breakage of gangway during unloading of ship—Ladder sole means of access—No steps taken by employers of stevedores to provide gangway — Whether "reasonably" practicable" to provide gangway — Prima facie failure by ship to comply with regulation—Onus of proof — Dock Regulations*, 1934 (*S.I.* 1934, *No.* 279), *regs.* 9 (*a*) (*b*), 50.
* Walter Wilson & Son Ltd. *v.* Summerfield - - Divl.Ct. 1 W.L.R. **1429**

3. —— *Regulations — Shipbuilding — Public dry dock—Several repairers contracting with shipowners — No notional occupier—Accident to shipowners' employee — Liability of shipowners — Shipbuilding Regulations*, 1931 (*S.R. & O.*, 1931, *No.* 133), *reg.* 10, "*Duties.*"
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* Bryers *v.* Canadian Pacific Steamships Ltd. - Liverpool Assizes 1 W.L.R. **1181**

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* Bhandari *v.* Advocates Committee
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2. —— *Landlord and tenant—Rent restriction — Jurisdiction of Rent Control Board—Finding by board of landlord and tenant relationship — Not res judicata in superior court—Increase of Rent (Restriction) Ordinance, No.* 22 *of* 1949, *as amended by the Increase of Rent (Restriction) (Amendment No.* 2) *Ordinance, No.* 34 *of* 1951, *s.* 5 (1) (*n*).
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2. —— *Per rem judicatam — Negligence — High Court Action—Claim and counterclaim for damages for negligence—Action in county court on same facts against both parties—County court action begun after issue of writ in High Court action—Contribution assessed by county court judge without objection although no contribution notice served—Whether parties bound by county court assessment of blame.*
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2. —— *Hearsay—Admissible to show fact that statement was made — Criminal law — Charge of carrying ammunition — Defence of duress—Hearsay evidence wrongly excluded—Implication from exclusion—Federation of Malaya Emergency Regulations*, 1951 (*as amended by L.N.* 363/1-7-52), *reg.* 4 (1) (*b*)—*Penal Code* (*Laws of the Federated Malay States, c.* 45), *s.* 94.
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2. —— *Dangerous machinery—Woodworking machine — Circular saw — No duty to comply with Act if compliance with regulations—Saw not used for sawing—Factories*

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7. —— *Divorce — Insanity — Evidence — Evidence from mental hospitals—Treatment delegated to consultants—Nature of evidence required—Affidavits from mental hospitals.*
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8. —— *Maintenance—High Court—Divorce —Death of husband — Accrued arrears under consent order—Maintenance for children until* 21 — *Maintenance payable from husband's*

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estate — Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 *Geo.* 5, *c.* 41), *s.* 1 (1)—*Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).
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12. —— *Divorce—Separation agreement — Covenant not to institute proceedings for restitution of conjugal rights "or otherwise"—No bar to proceedings for divorce.*
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14. —— *Maintenance — Justices — Arrears accrued when order apparently discharged—Further arrears — Enforcement — Arrears — Retrospective time-limit—Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *s.* 76.
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15. —— *Practice—Appeal—Decree absolute —Application of respondent wife for leave to appeal out of time—Husband's fraudulent conduct alleged—Wife's knowledge of decree nisi — Time and opportunity to appeal — Supreme Court of Judicature Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 31 (1) (*c*).
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16. —— *Practice (in matrimonial cases)—Costs—Costs against co-respondent—Absence of definite evidence that co-respondent knew respondent to be married—Inference from circumstances—Overriding discretion of court.*
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17. —— *Practice (in matrimonial cases)—Evidence — Proof of entry of birth — Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940/*L.*27), *r.* 25 (1) (*c*).
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19. —— *Settlement — Variation — Effect of subsequent events — Maintenance to child — Form of order—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.
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2. —— *Remand — Jurisdiction — Summary offence not punishable by a sentence of imprisonment—Remand for medical report—Power of magistrates' court to remand in custody—Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *ss.* 14 (3) (4), 26 (1), 105 (1) (*a*).
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2. —— *Act of* 1954 — *Business premises (Security of tenure)—Landlords' intention to reconstruct — Application for new tenancy — Relevant time of landlords' intention to reconstruct — At time of service of notice of opposition — Landlord and Tenant Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).
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3. —— *Act of* 1954 — *Business premises (Security of tenure)—Landlord's intention to reconstruct—Land leased as car park by a corporation — Application for new tenancy — Landlord's intention to carry out substantial work of construction not supported at date of hearing by proof of ability to carry out work—Development dependent on third party—Intention not sufficiently established—New tenancy granted—Landlord and Tenant Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).
* Reohorn *v.* Barry Corporation
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4. —— *Act of* 1954 — *Business premises (security of tenure)—Landlord's intention to reconstruct—Meaning of "intends"—Time of intention—Landlord and Tenant Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (*f*), 33.
* Fleet Electrics Ltd. *v.* Jacey Investments Ltd. Wills *v.* Jacey Investments Ltd. - C.A. 1 W.L.R. **1027**

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5. —— *Act of* 1954 — *Business premises (Security of Tenure)—Statutory extension of tenancy pending proceedings—Application for new tenancy refused — Appeal dismissed — Leave to appeal to House of Lords refused—Continuation of tenancy until application "finally disposed of"—Until expiry of time for application to House of Lords for leave to appeal—Landlord and Tenant Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 64.
Practice and Procedure — Landlord and tenant — Act of 1954 — *Application for new tenancy refused by judge and appeal dismissed—Application "finally disposed of."*
* Austin Reed Ltd. *v.* Royal Insurance Co. Ltd. (No. 2)
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6. —— *Act of* 1954 — *Business premises (Security of Tenure)—Terms of new tenancy—Restriction on existing user of premises imposed by county court judge—No evidence to justify restriction of user—Intention of Act—Improper exercise of discretion to determine terms of new lease — Landlord and Tenant Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *ss.* 23, 35.
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8. —— *Forfeiture of lease—Repudiation of landlord's title—Adverse title set up—Yearly tenancy—Oral disclaimer—Sale by tenant of "all . . . the interest of the vendor"—Whether purported sale of freehold interest—Whether disclaimer by denial of landlord's title.*
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10. —— *Rent restriction—Premises within the Acts — Shop — Business premises with living accommodation above—Covenant to use and occupy premises for certain named trades and business only—Tenant carrying on business and living on premises — Whether premises let as separate dwelling—Rent and Mortgage Interest Restrictions Act*, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3 (3).
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11. —— *Rent restriction—Repairs and rent—Notice of increase—Proceedings in county court by landlord to recover increase—Right of tenant to challenge validity of notice in such proceedings — Notice issued under mistaken assumption of repairs being landlord's sole responsibility—Power of county court to amend notice and correct errors — Housing Repairs and Rents Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 53), *ss.* 23 (1), (2), (5), 25 (1), (4), 26 (1), (2), (4), (5), *Sch. II*, 1, 4 (1), 5.
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12. —— *Rent restriction—Service tenancy—"Employment"—Premises let to tenant in consequence of employment by former landlord—Nature of employment changed—Claim for possession by new landlord — Whether tenant "ceased to be in that employment"—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 & 24 *Geo.* 5, *c.* 32), *Sched. I, para.* (*g*).
* Duncan *v.* Hay - C.A. 1 W.L.R. **1329**

13. —— *Repairs — Covenant — Breach — Notice—Covenant to keep structure in repair—Breach existing at date of lease—Implied condition of notice of want of repair.*
*Uniproducts (Manchester) Ltd. *v.* Rose Furnishers Ltd.
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14. —— *Restrictive covenant—Shop—Lease of shop for "trade or business of bread and "confectionery" — Lessors' covenant not to permit adjacent premises to be used for the trade or business for which the demised premises were let — Lease of adjoining premises to grocers—Sale of bread and confectionery by grocers—No breach of covenant.*
* Labone *v.* Litherland Urban District Council. Liverpool Co-operative Society Ltd., Third Parties
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15. —— Validity of ambiguous notice to quit. See Agriculture.

16. ——. See East Africa (Kenya); War Damage.

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2. —— *Costs — Divorce — Divorce Department—Wife's case conducted through Divorce Department — Recommendation for increased fee to wife's counsel—Allocation of cases to Divorce Department—Notional ability of husband to provide security for costs—Interpretation of regulation—Legal Aid and Advice Act*, 1949 (12 & 13 *Geo.* 6, *c.* 51), *s.* 6 (7)—*Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359), *regs.* 5 (10), 18 (5) *and Schedule. Barrister—Fees.*
* Bezzi *v.* Bezzi Sachs J. 1 W.L.R. **116**

3. —— *Costs — Order for costs against aided person — Variation — Procedure — Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359) (*as amended by the Legal Aid (General) (Amendment No.* 1) *Regulations*, 1954 (*S.I.* 1954, *No.* 166), *reg.* 26), *reg.* 17 (4).
* Corrick *v.* Northam (Practice Note)
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4. —— *Practice — Inspection of civil aid certificate—Legal Aid (General) Regulations*, 1950 (1950 *S.I. No.* 1359), *reg.* 15 (5) (6) (7).
* Practice Note (Legal Aid)
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5. —— Ward of court. See Infant.

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2. —— *Practice—Statement in open court—Settlement of libel action — Statement to be approved by judge in chambers—R.S.C., Ord.* 22, *r.* 2 (4).
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2. —— *Fiduciary duty—Servant technical adviser—Device invented by servant master's property — Subsequent agreement entitling servant to benefit of all his inventions—Invention before date of subsequent agreement of device relating to master's business on which servant's advice not sought by master—Whether servant entitled to device.*
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4. —— System of work—Ship. See Negligence.

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* Ong Bak Hin *v.* General Medical Council - - - J.C. 1 W.L.R. **515**

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* Regina *v.* Lacey C.-M.A.C. 1 W.L.R. **1495**

2. —— *Civil offence—Procedural provision—Civil offence committed in Germany—Driving without due care and attention—Failure to give warning of prosecution in accordance with Road Traffic Act*, 1930—*Army Act*, *s.* 41 (5)—*Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 12, 21.

* Regina *v.* Jennings C.-M.A.C. 1 W.L.R. **1497**

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* Bassett *v.* Evans Divl.Ct. 1 W.L.R. **925**

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* Robertson *v.* Cilia Upjohn J. 1 W.L.R. **1502**

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* Walsh *v.* Lord Advocate. H.L.(Sc.) 1 W.L.R. **1002**

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2. —— *Common employment—Joint negligence—Gang of workmen jointly negligent in unloading cargo—Member of gang injured—Whether duty owed to injured workman by fellow workmen—Liability of employer.*

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4. —— *Fire—Escape of—Fire due to negligence of workmen employed by occupier of premises—Liability of occupier for spread of fire to adjoining premises — Extra-hazardous acts—Need for special precautions—Effect of employing independent contractor.*

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* Balfour *v.* Barty-King. Hyder & Sons (Builders) Ltd. Third Parties Havers J. 1 W.L.R. **779**

5. —— Independent contractor — Safe system of work — Dangerous premises. See Invitor and Invitee.

6. —— Pleading. See Practice and Procedure.

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9. —— *Safe system of work — Dangerous premises—Coal mine—Unsafe roof in mine—Employers undertaking work under contract with occupiers of mine—Breach of statutory duty by occupiers — Accident to employee — Liability of employers.*

* Szumczyk *v.* Associated Tunnelling Co. Ltd. Liverpool Assizes 1 W.L.R. **98**

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* Morris *v.* West Hartlepool Steam Navigation Co. Ltd. H.L.(E.) 1 W.L.R. **177**

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11. —— *Safe system of work — Plant and equipment — Foreseeable risk — Employee struck in eye by particle of wire ejected from machine—Dangerous machinery not securely fenced in compliance with Factories Act*, 1937 *—Common law duty of employer to take reasonable care to protect employee against foreseeable risk.*

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* Kilgollan *v.* William Cooke & Co. Ltd. C.A. 1 W.L.R. **527**

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2. —— *Wages—Wages during incapacity— Recovery—Injury to constable through negligence of defendants—Wages during incapacity paid by receiver — Right of recovery by receiver from defendants of money paid— Power of receiver to sue defendants for wages.*

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* Receiver for the Metropolitan Police District *v.* Croydon Corporation Slade J. 1 W.L.R. **1113**

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7. —— *Interlocutory order — Meaning — Striking out pleading where no reasonable cause of action disclosed, or where action frivolous or vexatious — Further proceedings stayed—Whether order interlocutory or final —R.S.C., Ord.* 25, *r.* 4.

* Hunt *v.* Allied Bakeries Ltd. C.A. 1 W.L.R. **1326**

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10. —— *Pleadings — Negligence — Defence —Act of third party — Plaintiff injured by defective tool — Proposed defence that tool supplied by reputable firm — Defence to be pleaded—R.S.C., Ord.* 19, *rr.* 4, 15.

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13. —— *Summons for directions—Setting down action for trial — Chancery Division — Standing over of part of order concerning fixing of place and mode of trial until after discovery—R.S.C., Ord.* 30, *rr.* 1, 2; *R.S.C., Ord.* 36.

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15. —— *Trial—Mode of trial—Damages for breach of contract — Direction on plaintiff's application that liability be determined by judge and quantum of damages subsequently by official referee—Discovery as to damages to be deferred until liability established—No sufficient demarcation of the issues as pleaded —Separation impracticable and inconvenient —R.S.C., Ord.* 36, *r.* 7.

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16. —— *Trial—Venue—Transfer of action from London to Palatine Court after date of hearing in London fixed—Power of district registrar and of court to order transfer—Motion to discharge district registrar's order —Court of Chancery of Lancaster Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 49), *s.* 1.

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17. —— *Writ—Indorsement—"Liquidated "demand" — Claim for money fraudulently converted, or tracing order — Judgment in default of appearance — Whether claim for "liquidated demand"—Whether "liquidated "demand only"—R.S.C., Ord.* 3, *r.* 7; *Ord.* 13, *r.* 3.

* G. L. Baker Ltd. *v.* Barclays Bank Ltd. C.A. 1 W.L.R. **1409**

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2. —— Criminal cases. See Evidence.

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4. —— *Jurisdiction — "Judicial proceedings"—Canada—Act abolishing appeals to Privy Council—Saving for "judicial proceeding" commenced before coming into force of Act—Notices of appeal and dissatisfaction with tax assessment — Whether "judicial "proceeding" — Supreme Court Amendment Act, S.C.* 1949 (2*nd Sess.*), *c.* 37, *ss.* 3, 7—*Income War Tax Act, R.S.C.* 1927, *c.* 97, *ss.* 58, 59, 60, 63, 66, 69—*Supreme Court Act, R.S.* 1952, *c.* 259, *s.* 2 (*e*).

* St. Catharines Flying Training School Ltd. *v.* Minister of National Revenue J.C. 1 W.L.R. **1336**

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2. —— *Practice — Compromise of action —All parties concerned informed of terms—Terms signed by all parties cited except one — Refusal by that party cited to sign — Rights or claims however specifically waived—Power of court to order he be bound by terms—R.S.C., Ord.* 16, *r.* 9A.

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3. —— *Practice — Corporation — Grants to trust corporations and other corporate bodies —Grant to nominee of non-trust corporation—Non-contentious Probate Rules*, 1954 (*S.I.* 1954, *No.* 796 (*L.* 6), *r.* 34 (3).

* Practice Direction (Grant to Trust Corporation). Probate. 1 W.L.R. **127**

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3. —— *Negligence — Guard's duty — Person struck by door of guard's van—Door still open after train had travelled* 60 *yards—Rules for the working of the railway—Contributory negligence.*

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2. —— *Customs and excise—Valuation of goods — "Uplift" — Branded goods imported by sole concessionaire—Duty assessable on value—Statute requiring value to be based on price in open market — No open market — Advertising expenses borne by sole concessionaire in England — Cost of advertising properly added to invoice price of goods to arrive at value—Customs and Excise Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 44), *s.* 258, *Sch.* 6, *paras.* 1, 2.

* Rolex Watch Co. Ltd. *v.* H.M. Commissioners of Customs and Excise
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3. —— *Estate duty — Property chargeable — Property passing on death — Settlement —Settlement of freeholds, investments and assurance policy — During settlor's lifetime income to daughters while unmarried, subject to maximum amount — Surplus divisible equally between children—At settlor's death daughters' annuities charged on appropriated funds — No significant change in amount— Corpus divisible amongst surviving children —Whether beneficial interest arising or accruing on the death — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2 (1) (*d*)—*Finance Act*, 1934 (24 & 25 *Geo.* 5, *c.* 32), *s.* 28.

* *In re* Parkes' Settlement. Midland Bank Executor and Trustee Co. Ltd. *v.* Inland Revenue Commissioners
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4. —— *Income tax — Annual allowance — Abatement for machinery — Farm — Car used partly for business and partly for pleasure— Choice of car dictated by personal preference —Allowance reduced—Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 289.

* G. H. Chambers (Northiam Farms) Ltd. *v.* Watmough (Inspector of Taxes)
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5. —— *Income tax — Capital or income expenditure — Licence — Claim to deduct expenses incurred in application for extension of public carrier's licence—Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 123, *Sch. D, Case* 1.

* Pyrah (Inspector of Taxes) *v.* Annis & Co. Ltd. - Vaisey J. 1 W.L.R. **974**

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6. —— *Income tax — Capital or income receipt — Sale of "know-how" by manufacturing chemists to Burmese Government—To aid establishment of pharmaceutical industry in Burma—Not a trade receipt—Receipt from sale of capital asset—Depreciation of capital asset — Meaning of "know-how" — Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 123 (*Sched. D, Case* I).

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* Vernon *v.* Inland Revenue Commissioners - Upjohn J. 1 W.L.R. **1169**

8. —— *Income tax — Covenant — Construction — Deed of covenant, dated May* 5, 1953, *by taxpayer in favour of son—Covenant to pay "annual sum"—First payment due forthwith—Subsequent payments on "first day of May in each year" during period not exceeding eight years—Whether covenantor bound to pay annual sum on May* 1, 1954.

* Inland Revenue Commissioners *v.* Hobhouse - Danckwerts J. 1 W.L.R. **1393**

9. —— *Income tax—Double taxation relief —Rate of Exchange — Profits made in the United States—Tax over-paid in the United States — Repayment of tax — Alteration in exchange rate between payment and repayment—Crown not entitled to take alteration into account in computation of tax relief— Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 347, *Sched.* 16—*Double Taxation Relief* (*Taxes on Income*) (*U.S.A.*) *Order*, 1946 (*S.R. & O.*, 1946, *No.* 1327), *Sched., Pt. I, art. XIII* (2).

* Greig (Inspector of Taxes) *v.* Ashton
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10. —— *Income tax — Expenses — Travel expenses—Husband and wife company—Company dealing in refrigeration—Visit to Australia to study refrigeration methods—"Personal" equipment"—Husband's travel expenses allowable—No evidence wife's visit for purposes of company's business—Wife's expenses not allowable—Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), 9*th Sched., para.* 7.

* Maclean (Inspector of Taxes) *v.* Trembath - - Roxburgh J. 1 W.L.R. **437**

11. —— *Income tax — New source of income—"Source"—Deposit account at bank —Interest payable on sums deposited — Whether new contract between customer and bank arises every time a fresh sum deposited —"New source, or addition to source of income"—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Case III—Finance Act*, 1951 (14 & 15 *Geo.* 6, *c.* 43), *s.* 21.

* Hart (Inspector of Taxes) *v.* Sangster
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12. —— *Income tax — Non-resident — Trade within United Kingdom — Contracts made in United Kingdom for sale of goods manufactured there — United Kingdom company assessed as agent of foreign company—Whether authorized regular agent of foreign company carrying on trade or business within the United Kingdom—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, para.* 1 (*a*) (iii) *—All Schedules Rules, rr.* 5, 10.

*Firestone Tyre and Rubber Co. Ltd. *v.* Lewellin (Inspector of Taxes)
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13. —— *Income tax — Profits of profession—Doctor—Insurance policies taken out by voluntary hospital for medical staff—National Health Service inaugurated—Policies assigned to doctor — Surrender value taxable — Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D.*

* Temperley (Inspector of Taxes) *v.* Smith - - Vaisey J. 1 W.L.R. **931**

14. —— *Income tax — Profits of trade — Company — Resignations from agency and secretaryship to another company—Payment by third party of sum in consideration of resignation — Whether taxable as trading receipt—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 4), *Sched. D.*

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15. —— *Income tax — Profits of trade — Damages—Proceedings by agent for breach of contract terminating agency agreement—Compromise of proceedings on payment of agreed damages — Compensation received by agent for loss of agency—Taxable as profits of trade.*

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16. —— *Income tax—Schedule A—Assessment on landlord or tenant—Flats forming part of single house or building—Method of assessment—Whether assessment on tenant or landlord—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. A, No. VII, rr.* 8 (*c*), 12.

* Gatehouse *v.* Vise (Inspector of Taxes)
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17. —— *Income tax — Schedule A—Deductions—"Maintenance, repairs, insurance and "management"—Relief claimed by owner of adjoining land in respect of sum paid for road works carried out by local authority—Private Street Works Act*, 1892 (55 *&* 56 *Vict. c.* 57)—*Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 94, 101 (1) (2).

* Davidson *v.* Deeks (Inspector of Taxes)
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18. —— *Income tax — War damage — Value payments — Property dealing company —Whether profits or gains for income tax purposes—Benefits to taxpayer, not as trader, but as owner of land—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I—War Damage Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 36, 66, 79 — *War Damage (Public Utility Undertakings, etc.) Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 36), *s.* 28 (1) (4).

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* London Investment and Mortgage Co. Ltd. *v.* Inland Revenue Commissioners
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19. —— *Practice — Appeal from Commissioners — Dismissal by consent — Practice in Chancery Division.*

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20. —— *Profits tax—"Distribution"—Winding up distribution—Surplus assets distributed in liquidation—Whether a return of capital—Whether "gross relevant distribution" for purposes of profits tax — Finance Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 35 (1), 36 (1)—*Finance Act*, 1951 (14 *&* 15 *Geo.* 6, *c.* 43), *s.* 31 (1) (5).

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THE
WEEKLY LAW REPORTS
Volume I

Containing those cases of value to practitioners which are not intended to be included in The Law Reports and also practice notes and directions.

[CHANCERY DIVISION.]

* *In re* VITAMINS LTD.'S APPLICATION.

1955
Nov. 23, 24.

Lloyd-Jacob J.

Trade Mark—Registration—Foreign trade mark—Merchandise Marks Act—Forgery of trade mark with intent to deceive—Intention must be deliberate—"Makes"—"Trade mark"—"Protected by law in "foreign state"—Priority provisions not made use of—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 91—*Trade Marks Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *s.* 11—*Merchandise Marks Act,* 1887 (50 *&* 51 *Vict. c.* 28), *ss.* 2, 3.

Judicial Precedent—Privy Council decision—How far binding—Argument not presented to Board.

Application for the registration of the trade mark "Pabalate" in respect of pharmaceutical substances was made by an American company on January 24, 1952. That application was opposed by an English company, and on November 26, 1952, the application was withdrawn. On December 9, 1952, the English company applied for registration of the mark "Pabalate" in respect of pharmaceutical substances, and their application was opposed by the American one, who contended that registration should not be allowed on the ground that it would be contrary to section 11 of the Trade Marks Act, 1938, having regard to their wide user of the mark in the United States and Canada and the extensive advertising in medical journals and trade papers in connexion with that use, one of which had reached this country. They had registered the mark in Canada. The registrar allowed the application and the opponents appealed to the court. At the hearing of the appeal the further question was argued whether the registration would be disentitled to protection in a court of justice under section 11, because it would offend section 2 of the Merchandise Marks Act, 1887, under which a person is penalized who "forges any trade "mark . . . unless he proves that he acted without intent to "defraud":—

Held, (1) that the "intent to defraud" in section 2 is negatived by the deliberate commission of the act suggested as the forgery.

Slatcher v. *Mence Smith (George) Ld.* [1951] 2 K.B. 631; [1951] 2 T.L.R. 272; [1951] 2 All E.R. 388 applied.

1955

VITAMINS LD.'S APPLICATION, *In re.*

(2) That the words "makes that trade mark" in section 4 (*a*) of the Act of 1887 imported into the Act an association of a mark with a course of trade in goods; and that, accordingly, to establish that a trade mark has been forged within section 2 (*a*), it must be established that it has been associated on or in relation to goods in respect of which the mark has been associated in relation to trade as a trade mark.

(3) That the definition of "trade mark" in section 3 (1) of the Act of 1887 does not include a mark where a foreign user of it fails to avail himself of the priority provisions of section 91 of the Patents and Designs Act, 1907; the mark is not then "protected "by law in any . . . foreign state" within the meaning of the definition, even though it is registered in one. Accordingly, the objection to registration by the English company based on the Act of 1887 failed.

Imperial Tobacco Company (Newfoundland) Ld. v. *Duffy* (1917) 35 R.P.C. 12 not followed.

(4) That in the discretion of the court registration should be refused, and the appeal should be allowed.

MOTION.

By an application dated January 24, 1952, A. H. Robins Company Inc., a firm of manufacturing chemists incorporated in and carrying on business in the United States of America, applied for the registration of the mark "Pabalate" (standing alone) in respect of pharmaceutical substances. That application was opposed by Vitamins Ld., the registered proprietors of the trade mark "Pabavel." On November 26, 1952, that application was withdrawn.

On December 9, 1952, Vitamins Ld. (hereafter called the applicants) applied to register the word "Pabalate" as a trade mark in respect of pharmaceutical substances. That application was opposed by A. H. Robins Company Inc. (hereafter referred to as the opponents). The grounds of that opposition were that the opponents had registered the word "Pabalate" as their trade mark in relation to certain pharmaceutical substances in the United States and Canada, and that their user had been widely advertised in medical journals or trade papers published in the United States and Canada, which had circulated in the United Kingdom, and that registration of the word "Pabalate" by the applicants would therefore be contrary to section 11 of the Trade Marks Act, 1938.[1] By his decision dated May 31, 1954, the assistant-comptroller (acting for the registrar, the comptroller-general) allowed the application to proceed to registration. The opponents appealed from that decision.

At the hearing of the appeal the further question was argued as to whether the registration of this mark by the applicants would be disentitled to protection in a court of justice under

[1] Trade Marks Act, 1938, s. 11: "It shall not be lawful to register as "a trade mark or part of a trade "mark any matter the use of which "would, by reason of its being likely "to deceive or cause confusion or "otherwise, be disentitled to protec-"tion in a court of justice. . . ."

section 11 of the Act of 1938 because it would offend section 2 of the Merchandise Marks Act, 1887.[2]

R. G. Lloyd and *F. G. Guttmann* for the opponents.
G. D. Everington for the applicants.
P. J. Stuart Bevan for the Comptroller-General.

Cases cited in argument not referred to in the judgment: *Kat* v. *Diment*[3]; *Allard* v. *Selfridge & Co. Ld.*[4]

LLOYD-JACOB J., having stated the issues, continued: In addition to the main ground of opposition under section 11 of the Trade Marks Act, 1938, counsel for the opponents urged that the mark "Pabalate" would not justify registration according to section 9 of the Act. It is unnecessary to consider those submissions in detail, as I am satisfied that there was no foundation whatever for any objection to this application based on section 9.

Before the assistant-comptroller the opponents relied on their proprietary rights in this mark by reason of their use of the mark in the United States of America in connexion with a specific said to be of value in the treatment of arthritic complaints, and of the advertisements in relation to that business which they contended had reached this country; and, in addition, of any flowing from the application they had made in this country for registration of the same mark in respect of a pharmaceutical preparation.

The evidence filed on behalf of the opponents was found, on examination, merely to justify the finding of fact in the decision that one copy only of a periodical primarily circulating in the United States of America had, before the date of the present application, reached this country and was filed at the offices of the British Medical Association in Tavistock Square in London, and had thus been available for members of that association since September 26, 1951.

In the light of that evidence the assistant-comptroller held that the opponents had failed to establish such a reputation in the United Kingdom in respect of the mark "Pabalate" as would

[2] Merchandise Marks Act, 1887, s. 2: "Every person who—(*a*) forges "any trade mark . . . shall, subject "to the provisions of this Act, and "unless he proves that he acted with- "out intent to defraud, be guilty of "an offence against this Act."

S. 3: "(1) For the purposes of this "Act—The expression 'trade mark' "means a trade mark registered in "the register of trade marks kept "under the Patents, Designs, and "Trade Marks Act, 1883, and includes "any trade mark which, either with "or without registration, is protected "by law in any British possession "or foreign state to which the pro- "visions of section 103 of the Patents, "Designs, and Trade Marks Act, "1883,* are, under Order in Council, "for the time being applicable:"

S. 4: "A person shall be deemed "to forge a trade mark who either "—(*a*) without the assent of the pro- "prietor of the trade mark makes "that trade mark or a mark so nearly "resembling that trade mark as to "be calculated to deceive; or (*b*) "falsifies any genuine trade mark."

* Now replaced by s. 91 of the Patents and Designs Act, 1907, as amended.

[3] [1951] 1 K.B. 34; 66 T.L.R. (Pt. 2) 474; [1950] 2 All E.R. 657.

[4] [1925] 1 K.B. 129; 41 T.L.R. 97.

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justify a conclusion that confusion or deception would occur on that account should registration be permitted. I am unable to find any ground on which I can come to the conclusion that that finding was incorrect, and I have no alternative, accordingly, but to adopt it.

In addition to the objection under section 11 to which the decision of the assistant-comptroller was directed, namely, whether or not the use of the mark by the applicants would be likely to deceive or cause confusion, it was further submitted that the use of the mark by them would otherwise be disentitled to protection in a court of justice having regard to section 2 of the Merchandise Marks Act, 1887. It was mainly in respect of that submission that I felt that the assistance of the comptroller was desirable.

The point can be shortly stated as follows: By section 2 of the Act of 1887 it is provided that every person who forges a trade mark shall, subject to the provisions of the Act and unless he proves that he acted without intent to defraud, be guilty of an offence, which is in the nature of a criminal offence, this being a penal statute.

An initial matter which calls for determination is with regard to the possible defence under this section embraced by the words "unless he proves that he acted without intent to defraud." It has been laid down in a long line of decisions that the intention to defraud referred to in section 2 must be found in the deliberate commission of the act which comprises the forging of the trade mark. If any support for that proposition be required, it will be found in the recent decision of Lord Goddard C.J. in *Slatcher* v. *Mence Smith (George) Ld.*[1] In the passage of the judgment which summarizes the conclusion of the court Lord Goddard, after reciting a number of previous authorities in which the same principle had been expressed, stated[2]: "In this state of the "authorities it seems to us that we must construe the words "'that otherwise he had acted innocently'"—for this purpose those words can be considered as equivalent to the words "without intent to deceive"—"as meaning that he had acted "inadvertently or under some mistake of fact. The fact that "he had acted in good faith and had taken all precautions against "committing an offence against the Act will not amount to proof "that the defendant had otherwise acted innocently."

It has been submitted that in the particular circumstances of the prosecutions under this Act which arise in connexion with trade marks of a foreign origin, some additional scope will be found for the phrase "without intent to defraud" so as to protect the person who, although in good faith, deliberately applies to his goods a mark which is in fact the property of a foreign owner, so that such a person can avoid conviction under this Act on the

[1] [1951] 2 K.B. 631; [1951] 2 T.L.R. 272; [1951] 2 All E.R. 388.

[2] [1951] 2 K.B. 631, 638.

ground that the absence of any reputation in this country by the foreign owner effectively prevents any conceivable fraud on the public. In my judgment the true construction of the expression in section 2 of the Act cannot depend on the particular facts of the case under consideration. I can find no justification for supposing that the meaning attached to this phrase in the long course of authorities to which I have referred can now be accepted as erroneous. I would adopt the decisions of the various Divisional Courts that have considered this matter as my own.

It therefore becomes necessary to consider what is comprised within the phrase "forges any trade mark." [His Lordship read section 4 (*a*) and (*b*) and continued:] I need not trouble with the alternative in paragraph (*b*); I have only to consider the consequences of the first in paragraph (*a*).

The construction of that section presents some difficulty by the use of the phrase "makes that trade mark." That necessarily conveys to the mind more than a delineation of the word or device which comprises the mark. The words "the trade "mark" import into the Act an association of the word or device with a course of trade in goods so as to constitute that which is done, an act relating to goods in the course of trade. It would be most extravagant to suppose that the legislature were constituting an offence if a person used, for example, a word on and in relation to one type of goods merely because there was an existing trade mark consisting of the same word but used in relation to totally different goods, in respect of which the person using it was in no sense in competition. Accordingly, for the purpose of establishing that a trade mark has been forged, I think that it is necessary that the prosecution should, first of all, establish that no assent by the proprietor has been forthcoming and, secondly, that the act committed has been the association of the mark in question by the accused on or in relation to goods in respect of which the word or device has been associated in relation to trade as a trade mark.

There only remains to be considered what is the scope of the expression "trade mark." Although the Act contains in section 3 a definition clause, I am saying nothing original in drawing attention to the fact that the definition of the expression "trade "mark" is far from clear and indeed introduces a very considerable measure of difficulty. Substantially similar words were, it is to be observed, to be found in a Newfoundland statute which fell for the consideration of the Judicial Committee of the Privy Council in 1918 in *Imperial Tobacco Company (Newfoundland) Ld.* v. *Duffy*,[3] where Lord Wrenbury delivered the opinion of the Board, which consisted of Lord Parker and Lord Sumner in addition to Lord Wrenbury.

The particular trade mark statute then under consideration was chapter 112 of the Newfoundland Statutes, section 2 of

[3] (1917) 35 R.P.C. 12.

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which contained a definition of trade mark in words which are identical with the definition in section 3 of the Merchandise Marks Act. Their Lordships expressed the view that the Newfoundland statute was undoubtedly ill expressed, but they gave some guidance on the construction of certain portions of the definition. Before I consider that, it is perhaps desirable that I should say that in the result the Board stated that a person successfully securing registration under the Newfoundland statute could no longer be said, when he applied it to goods, to forge that trade mark, nor could it be said that he was falsely applying to goods any trade mark so as to be calculated to deceive.

Although a decision of the Privy Council is not binding on me, I would none the less, for the reasons advanced in the judgment, arrive at precisely the same conclusion; which in the present case, if this application should be successful, would provide a complete answer to proceedings under the Merchandise Marks Act, 1887.

The Board, having considered that definition, indicated certain aspects of its construction and arrived at this conclusion[4]: "It "results that, for the present purpose, section 2 of chapter 112 "may be read as providing that the expression 'trade mark' in "chapter 112 includes any trade mark which, either with or "without registration, is protected by law in America."

I have carefully read the report and the arguments of counsel, and it clearly emerges that the Board were not presented with certain of the arguments which have been put before me.

The definition clause in the Merchandise Marks Act, 1887, is in these terms: [His Lordship read section 3 (1) of the Act of 1887 and continued:] It is unnecessary for me to refer in detail to section 103 of that Act or indeed to the comparable provision in section 91 of the Patents Act, 1907, which, by amendment of the law, now obtains; suffice it to say that that is the statutory provision which provides for reciprocity as between the Convention countries so as to secure certain priority in this country for applicants for trade marks in a Convention country.

It is perhaps unnecessary to point out all the difficulties presented by the language of that definition section, but it is essential that I should note that in form it, first of all, defines trade mark by reference to a register in this country and continues "and includes," which prima facie was intended to indicate that the Register of Trade Marks would be a complete form of reference for the purpose of ascertaining whether or not a trade mark within the meaning of the Merchandise Marks Act was in existence. When the definition relates to marks which are protected abroad, whether in a British possession or a foreign State, it is to be observed that it is deliberately expressed to cover marks which secure their protection either with or without registration. If that expression be accepted at its face value, it would indicate that the marks within the definition, so far as they originated

[4] 35 R.P.C. 19.

abroad, were as to part in a different category from those within the definition which originated in this country. It would appear prima facie to be most unreasonable that in the creation of a criminal offence the marks in relation to which it could be committed were to be of a strictly limited character so far as nationals of this country were concerned and of a much wider category so far as foreigners were concerned, and more particularly when the statutory provisions in respect of registration in this country are of substantial importance.

The reference to " either with or without registration " is, in my judgment, intended to indicate the manner in which protection by law in the country of origin is required in order to enable a trade mark of foreign origin to fall within this definition. It is intended to cover the cases where protection of a trade mark under foreign law is secured either under a domestic system requiring registration or under one which does not require registration.

That leaves to be considered the scope of the phrase " protected by law." As Mr. Stuart Bevan, for the comptroller, pointed out, if the ordinary meaning is given to that expression, it must plainly include any brand name which, according to the domestic law of the country of origin, is maintained as a proprietary right in the person who has created or adopted it, and applied it in the course of trade, and that that would be so whether the business with which it is concerned is limited to a particular foreign territory or whether it has extended into the sphere of international trade. He has found no difficulty in illustrating how these words, given their widest signification, might bring within the purview of the Merchandise Marks Act a mark which has been used in a small territory of no international trading significance in circumstances such that it is not only unlikely but practically impossible that any knowledge of the user could have reached this country. He argued that that is the fair and reasonable interpretation of the definition section, and that any extravagant results which might flow from its application in practice might conceivably be guarded against by an interpretation of section 2 other than that which I have to put on it.

It is clear that a statute must be interpreted according to the ordinary meaning of the words used therein, subject of course to any words or phrases of technical import being given their true technical meaning. That applies where the language does not permit any other meaning to be adopted. If on one reading a construction would involve absurdity or inconsistency, the court is bound to consider the possibility of an alternative construction equally consistent with the technical meaning of the words which will avoid such absurdity or inconsistency.

It seems to me that there is an alternative construction of this definition, namely, that the phrase " protected by law " is directed to that which will permit a trade mark originating

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in any British possession or foreign State to become included in those registered in the register of trade marks. The reference to section 103 of the Patents, Designs and Trade Marks Act, 1883, is a reference to a specific statutory provision conferring priority in respect of British applications on persons who have made application for protection in their own country. In my reading of this definition, the protection by law there referred to is the protection which is afforded in foreign countries to applicants for priority rights in respect of trade marks, whether secured by application for registration or not, for the purpose and to the extent that that is required to make the right effective in this country. Some possibility of difficulty is left in the way of British nationals in that, to the marks entered on the register to which there is direct reference, there is notionally added for a period of six months from the date of the foreign application the possibility of inclusion of the foreign trade mark with a priority date antecedent to that of the actual application in this country; but since the definition plainly conveys the intention of the legislature to secure such protection for overseas proprietors of trade marks, that is a difficulty which it was bound to envisage.

In my judgment the definition of " trade mark " in section 3 of this Act extends initially to trade marks entered on the register, and notionally adds to them trade marks which according to the priority given to them by section 103 of the Patents, Designs, and Trade Marks Act, 1883, can be entered upon the register in consequence. If, therefore, a foreign applicant fails to avail himself of those priority provisions by allowing the period to elapse from the date of his acquisition of a right in his own country, then his mark is not within the expression " trade mark . . . protected by law " in this definition. In the present case, therefore, although there is evidence that the opponents' mark is in fact registered, inter alia, in the Dominion of Canada, there is no material before me which enables me to come to the conclusion that at the date of the present application the priority period of six months in which the opponents could apply under the Convention provisions had not expired, and accordingly, on the construction which I feel bound to give to section 3 of the Merchandise Marks Act, there is no justification for the submission that by reason of the opponents' registration abroad the applicants' use of this mark would be disentitled to protection in a court of justice.

Accordingly, I must hold that the objection to registration based on the Merchandise Marks Act has no substance and cannot prevail.

In his decision the assistant-comptroller indicated that there appeared to be no ground in the case for the exercise of his discretion adversely to the applicants, and indeed it appears that nothing was brought to his attention which would require him to exercise his discretion. It was urged before me on behalf

of the applicants that the true inference from that passage in the decision is that the assistant-comptroller had exercised his discretion in their favour. I cannot so read it. It is a fair and clear indication that in the circumstances, so far as they appeared to him, there was no reason in the present case which required him to exercise his discretion adversely to the applicants.

When the matter was further developed before me, two points emerged which call for consideration. The discretion vested in the registrar is, by section 52 of the Trade Marks Act, 1938, vested in the court and the court is directed to exercise the same discretionary powers as are conferred on the registrar in relation to hearings before him.

There are two matters which I have felt it right to consider on this aspect of the case. The first is the propriety or otherwise of the action of the applicants in making this application for registration. By the rules, which have the force of statute, it is provided that applications of this character shall be made upon Form T.M. No. 2, which requires that an application for registration should assert, in the case of a mark which has not yet been used in the trade, that the applicant proposes to use the mark and that he claims to be the proprietor of the mark.

The circumstances of the present case are these, that apart from some early application by some third party, about which little information is available, the present opponents themselves applied on January 24, 1952, for registration of precisely the same word as in this application in Class 5, in respect of pharmaceutical goods. As a result of the investigation of that application in the trade marks registry, they were directed to communicate with the present applicants, who were entered upon the register as the proprietors of a trade mark "Pabavel." On receiving the communication, the applicants refused to consent to the application proceeding and on November 26, 1952, that application was withdrawn and within about a fortnight of that period, on December 9, 1952, the present application was made.

A communication which the applicants had received from the opponents after the withdrawal of their application is set out in the comptroller's decision; that communication contained a quotation of this extract from a letter from certain associate agents in the United States of America: "In view of "the controversy over our 'Pabalate' mark in Great Britain "and the distinct possibility that we may never go into England "with 'Pabalate,' we believe it would be best and avoid further "expense to withdraw from the proceedings."

That was construed by the applicants as an indication that the American corporation were relinquishing all claims to the mark in this country. The communication may have been a little ambiguous, but I am not satisfied that it could fairly be construed as indicating an intention to surrender all rights in the mark. Indeed, the letter expresses a proprietary right by using the phrase "our Pabalate mark." Although I accept

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that the respondents understood the letter as a surrender of any proprietary rights, I am not satisfied that it was in fact communicating an abandonment. The expression in the application form that the applicant claims to be the proprietor, indicates an assertion of a present proprietary right. The applicants argue that it is merely only an assertion of the claim to become the proprietor or to assume proprietary rights as and when the application is granted, but I do not think that that can be the true interpretation of a form intended to be completed before application can be made for registration. A proprietary right in a mark sought to be registered can be obtained in a number of ways. The mark can be originated by a person or can be acquired, but it is necessary that the person putting forward the application should be in possession of some proprietary right which, if questioned, can be substantiated. Where, as here, another party in respect of precisely the same field of activity in commerce or industry had already put forward, by an application to the trade marks registry, a claim to be the proprietor of the identical trade mark and had withdrawn the application because of a desire to avoid controversy over their mark, it would be a straining of language to suggest that the party who had by opposition secured that result had, as the result of the withdrawal, acquired proprietary rights.

The position appears to have been this: the applicants by their possession and user of the mark "Pabavel" thought —which they may well have been entitled to do—that the reputation acquired for it was such that the use of the mark "Pabalate" by any other body would be an infringement of their rights, and that, as the result of the development of their business, they desired to introduce other marks into commerce beginning with the same first two syllables, so that they decided to make this application. No explanation has been given, and none has been asked for by anybody, why in the selection of other "Paba" marks they particularly condescended on the one which the opponents had claimed to be their property.

The mere fact that the evidence available may not have been sufficient to establish the right of that party to be entered upon the register does not of itself negative the proprietary right which he had asserted in his application, nor was that right denied by the withdrawal of the application. In my judgment something more must be established than a mere desire to secure registration of a mark which it is thought will be of advantage in one's business. Accordingly I must consider whether or not, in the exercise of my discretion, the applicants claiming to be the proprietors of this mark were in fact making a proper representation to the trade marks registry.

There is a second factor which I should have in mind when exercising a discretionary jurisdiction; and that is that the evidence discloses that the mark has been used by the opponents on and in relation to a remedy or an alleged remedy for

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arthritic conditions in human beings. The fact that the application was made in respect of pharmaceutical substances indicates that it is in a similar field that the applicants' user is contemplated. Since the evidence discloses a genuine business on the part of the opponents in their country of origin, and that the advertisements made in respect of that business might reach this country and appear in libraries or places of reference frequented by medical men, I think that I am bound to envisage that, with the passage of time, some conflict may occur in the minds of the trade between the use of the mark by the applicants and the advertisement and user of the mark overseas by the opponents. Having regard to the international character which medicine and the allied sciences have increasingly assumed over the last two decades, the court must be careful to see that in exercising its discretion under the Act the public interest is not in any way imperilled. I am not satisfied that the public interest will best be served by permitting the registration by manufacturers in this country as a brand name for a pharmaceutical substance a word in fact used by an American corporation in respect of the same material, and which is advertised in journals, which on the evidence are received and referred to in this country. Accordingly, on both those grounds it is my duty to hold that the application should not be permitted to proceed. In arriving at that conclusion I have done so upon materials which were not available to the assistant-comptroller.

Appeal allowed.

Solicitors: *W. B. Blackwell & Co.; Faithfull, Owen & Fraser; The Solicitor, The Board of Trade.*

I. G. R. M.

[PRIVY COUNCIL.]

* AUSTRALIAN WOOLLEN MILLS LTD. . APPELLANT;

AND

COMMONWEALTH OF AUSTRALIA . . RESPONDENT.

J. C.†

1955

Nov. 23.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia — Subsidy — Wool — Manufactured woollen goods for home market — Controlled prices — Subsidy scheme — Basis of scheme administrative not contractual—Provisions for refund of subsidy —Construction.

Contract—Formation—Offer and acceptance—Crown. Crown—Contract.

The respondent, the Commonwealth of Australia, which during the war years had bought all the Australian wool clip, ceased to do

† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD REID, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW.

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so as from June, 1946, and sales by auction were then reintroduced. The price of woollen goods in Australia remained controlled, however, as it had been during the war, and since in those circumstances auction prices might be uneconomic for local manufacturers of woollen goods a scheme of subsidies was introduced, the object being to enable the manufacturers to sell in the home market at the controlled prices. The basis of the scheme appeared from some 36 letters, covering the period from 1946 to 1948, written on behalf of the respondent to manufacturers, of whom the appellant company was one, and which, inter alia, made provision for the proposed subsidy and the method of its calculation, and stated that the scheme would be vested in and under the control of the Australian Wool Realization Commission. Correspondence subsequent to June, 1948, stated, in effect, that, subsidy was returnable or not claimable on stocks in hand at Christmas, 1948.

The appellant company contended that the letters of 1946 to 1948 constituted a series of contracts—offers which were accepted by a purchase of wool—under which they were entitled to subsidy on all purchases between June, 1946, and June, 1948, and under that head they claimed a sum of £108,871; they also claimed a sum of £67,282 which they had been called upon to refund to the respondent on the termination of the scheme and which they had paid under protest, making a total claim of £176,153. Before the Commission the appellant had also claimed a sum of £92,002 in respect of unsubsidized wool bought and used between June and Christmas, 1948, but that claim had been refused by the Commission on the ground that there was no authority to subsidize wool purchased after July 31, 1948, when the scheme came to an end, and that claim did not form part of the present action.

The respondent pleaded that there were no contracts, that the basis of the scheme was not contractual but administrative, and that the letters contained statements of policy and not contractual offers. There was in fact no contract form signed by each party. The respondent also alleged that the £67,282 was properly repaid in accordance with the scheme:—

Held, (1) that the letters of 1946 to 1948, which were to be read as a whole, could not be read as an offer or offers to contract. They contained a statement of policy. The "scheme" was to be administered by the Commission which was itself to determine the amount of the subsidy. If the intention had been to provide for a series of contracts one would, as between the parties, have expected a form containing the provisions which, if disputes arose, would be construed and applied by the courts. The number of uncertain factors made it natural that the basis should be administrative. Accordingly, there was no contractual right to a subsidy and the appellants' claim under that head failed.

(2) It was within the discretion of the Commission in computing refund not to have regard to the usage of unsubsidized wool bought and used between June and Christmas, 1948, and the respondent was therefore entitled to demand the £67,282 without regard to that user.

Judgment of the High Court of Australia affirmed.

Appeal (No. 23 of 1955), by special leave, by the Australian Woollen Mills Ltd. from a judgment of the High Court of Australia (Dixon C.J., Williams, Webb, Fullagar and Kitto JJ.) (May 4, 1954) given in its original jurisdiction in favour of the respondent, the Commonwealth of Australia, in an action brought against it by the appellant for the sum of £176,153 8s. 10d.

The action first came on for hearing before Kitto J. who, after taking evidence both oral and documentary, directed pursuant to section 18 of the Judiciary Act, 1903–1950, that the case should be argued before the Full Court.

The facts appear from the judgment of the Judicial Committee.

1955. Oct. 18, 19, 20, 25, 26 and 27. *Sir Garfield Barwick Q.C.*, *J. Leaver* (both of the Australian Bar), and *Ian Baillieu* for the appellant.

W. J. V. Windeyer Q.C. and *G. H. Lush* (both of the Australian Bar) for the respondent.

Nov. 23. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW. This is an appeal, by special leave, from an order of the High Court entering judgment for the repondent with costs.

The appellant manufactures woollen and worsted goods for the Australian market. During the war years the respondent bought all the Australian wool clip. The sale of that wool to the United Kingdom excluded wool required for local manufacture. There was control by the respondent of prices for woollen and worsted goods. The sales by the respondent to the appellant and other manufacturers were at a price fixed with reference to the controlled prices of the manufactured articles. This is described by the High Court as "in effect" a subsidy. There is a small item of claim in this case, £2,121, which relates to wool purchased by the appellant in the period 1942–1946 when the position was as above. For reasons which will appear the decision in this case does not require an investigation of the provisions of that procedure. This appeal arises out of and depends on the arrangements made for 1946–1947 and 1947–1948.

The respondent ceased as from June, 1946, the beginning of the season, to buy all the wool clip and auctions were then reintroduced. The prices of woollen and worsted goods were still controlled. It was realized that the auction prices which local manufacturers with others would have to pay might be such that the manufacturers could not manufacture to sell at the controlled prices unless they got financial assistance. There was therefore a scheme of subsidies in respect of purchases of wool to be manufactured into articles for the home market.

The appellant claims that under this scheme the subsidy payments became due to it under a series of contracts. There was no contract form signed by each party. The appellant contends that the letters to which reference will be made later constituted offers, the terms of which were varied from time to time, to be accepted by a purchase by a manufacturer, and further contends that under these contracts it is entitled to subsidy on all purchases between June, 1946, and June, 1948. The actual way

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in which the sums claimed are arrived at depends on later complications, which will emerge in due course.

The first answer of the respondent to this claim is that there were no contracts; that the basis of the scheme was not contractual but administrative, and that the letters contained statements of policy and not contractual offers. In the alternative, the respondent submits that if there were contracts nothing is due under them. This is based on a contention that the respondent was entitled to refuse to pay subsidy on stocks over a certain amount held at the end of the scheme and to reclaim subsidy on such stocks if already paid. The respondent maintains that if there were contracts they contained a term to that effect.

There are other issues which it is desirable to indicate in outline. The subsidy was discontinued as from July 31, 1948. Price control of woollen goods by the respondent came to an end in September, 1948. It passed to the States. There is no evidence as to what was the exact position after that date.

Under the scheme the subsidy had been paid shortly after the purchases of wool. The object of the subsidy was to enable manufacturers to sell in the home market at the controlled prices, and if the products made with the wool were exported it is not disputed that the subsidy had to be repaid, whatever the legal position. The respondent also claimed that reasonable stocks only were eligible for subsidy. If and when the scheme came to an end subsidy had been paid on stocks purchased in excess of a reasonable quantity it had to be repaid. A fortiori, no subsidy was claimable on such stocks if there had been no payment. Reference has already been made to the respondent's contention that if there were contracts this was a term of them.

Correspondence passed between the parties in the period following June, 1948. The respondent claimed that the appellant had to repay £67,282 on the grounds hereinbefore set out. The appellant paid this sum on May 9, 1949, at the same time putting forward a claim to £92,000 the basis of which will be explained later.

The appellant's main claim includes this £67,282 which, apart from the small item of £2,121, represents subsidy on wool bought in the period June, 1946, to July, 1948. It submits in the first instance that the repayment should be disregarded or treated as provisional. It has, however, an alternative claim for this sum as money had and received to its use, it having been paid, as it is alleged, under protest and without prejudice. This claim is maintained, though it be held that there were no contracts, on the following ground. Although a scheme of this kind be administrative and not contractual in that the party subsidized could not sue at law, still the respondent, it is said, could not recover back money that had once been paid. In the present case the respondent did not suggest that if wool had in fact been turned into goods which had been marketed in the home market, there could be a claim for repayment of subsidy already

paid. The respondent does, however, submit that having regard to the general and special provisions of this scheme it was entitled to demand the repayment of the sums which made up the £67,282.

This alternative claim of the appellant raises two issues. First, was the respondent entitled under the scheme to demand the repayment of the money? Secondly, if it was not so entitled, was the "protest" of such a nature as to entitle the appellant to sue for the recovery of money paid?

These in outline are the issues.

The first, contract or no contract, turns on the construction of the letters. The appellant submitted that in construing them the Board should have regard to the fact that the respondent had substantial stocks of wool of which it would be anxious to dispose. Their Lordships get no assistance from this fact. There is no ground for suggesting that this "interest" of the respondent in any way entered into this scheme.

The appellant further submitted that the respondent wanted the manufacturers to purchase so that there could be woollen goods on the home market. There was therefore an implied request to do so. Let this be admitted. It does not appear to their Lordships to advance the argument. There may be cases where the absence of a request negatives the existence of a contract. The presence of a request does not, however, in itself establish a contract. Manufacturers may be requested to come into and work a non-contractual scheme. On this aspect of the argument their Lordships think, with all respect, there was force in the criticism of that passage in the judgment of the High Court in which it is said that there was nothing in the nature of a request or invitation.

The terms of the contract are said to be contained in some 36 letters covering the period from 1946 to 1948. In considering whether a series of contracts were made the first two or three letters setting out the lines of the scheme are decisive. If these letters constituted a contractual offer the later letters could be read as varying its items; if they do not constitute a contractual offer there is nothing in the later letters which does so. The first letter is from the Commonwealth Prices Branch to the Associated Woollen and Worsted Textile Manufacturers, of which the appellant is a member. The second letter is from the Wool Realization Commission to the appellant. It is desirable to set out these two letters in full.

"Commonwealth Prices Branch to Associated Woollen and "Worsted Textile Manufacturers. June 20, 1946. Dear Sir, I "refer to recent discussions between the Wool Advisory Com- "mittee and the Associated Woollen and Worsted Textile "Manufacturers of Australia, the Chairman and the Executive "Member of the Australian Wool Realization Commission and "the representatives of the Commonwealth Prices Commissioner,

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" relating to the subsidization of raw wool purchased by Australian Manufacturers for domestic consumption under auction conditions which will operate after June 30, 1946.

" The Commonwealth Government has decided that subsidy will be paid to maintain the price of wool purchased for domestic use by Australian manufacturers when auctions recommence after June 30, 1946.

" The subsidy will be calculated as the difference between the present basic price of wool for domestic consumption and the average market price for each auction series. Manufacturers will be required to carry any excess cost by puchasing above average market level, but under certain specified conditions, will be allowed the benefit of keen buying at lower than average market level. The amount of subsidy payable will be as determined by the Australian Wool Realization Commission.

" The administration of the scheme will be vested in the Australian Wool Realization Commission and complete details of procedure will be made available to your members as soon as possible.

" A copy of a press statement issued by the Minister for Trade and Customs is attached. Yours faithfully, (Sgd.) P. D. KEWISH, Secretary. The Secretary, Associated Woollen and Worsted Textile Manufacturers of Australia, Flinders Street, Melbourne, Vic. The Secretary, National Council of Wool Selling Brokers of Australia, 120, King Street, Melbourne, Vic."

" PRESS STATEMENT of Minister for Trade and Customs.

" The Minister for Trade and Customs (Senator J. M. Fraser) announced today that subsidy would be paid to maintain existing prices of wool to Australian manufacturers for utilization in goods for domestic consumption, when auction sales recommence after June 30, 1946.

" The purpose of the subsidy is to enable Australian manufacturers to compete with overseas buyers in a manner that will avoid interference with normal auction purchases.

" Senator Fraser stated that subsidies would be paid to manufacturers to reimburse any excess paid in purchasing at prices for domestic consumption but not in excess of the average market level for individual wool types at a series of auction sales. This ensures that manufacturers will not bid extravagantly on the assumption that the Commonwealth Government will meet deficiencies resulting from unlimited bidding.

" ' The aim of the proposal,' said Senator Fraser, ' is to place ' ' Australian manufacturers as near as possible in the same ' ' bidding position as if they were buying in a competitive ' ' market prior to the war. As an inducement to efficient ' ' buying manufacturers will obtain benefits from purchases ' ' made below average market level. The scheme will be so ' ' designed as to ensure rapid payment of subsidy and will be

" ' administered by the Australian Wool Realization Commission " ' on behalf of the Commonwealth Government and the amount " ' of subsidy payable to manufacturers will be as determined " ' by the Commission.' Canberra. A.C.T. June, 1946."

" Australian Wool Realization Commission to Australian " Woollen Mills Pty. Limited. Head Office: Pitman House, " 540–542, Little Collins Street, Melbourne. C.I. August 7, " 1946. Dear Sir, The Commonwealth Government proposes to " grant a subsidy on wool purchased at auction by Australian " manufacturers in the 1946/47 season, and this Commission has " been charged with the calculation and payment of the subsidy.

" The Commission realizes the necessity for as prompt pay- " ment of the subsidy as possible to manufacturers, and full " details of subsidy procedure will be made available to all " manufacturers at an early date. However, the following " interim information is advised to you in respect of the pro- " cedure to operate *for subsidy on wools purchased for Australian " Manufacturers at auction*:—(A) In general, subsidy on wool " purchased at auction will be paid by this Commission in full " immediately the amounts have been computed for each series. " (B) It is anticipated that payments will be completed within " 28 days from the close of each series. (C) *Payment will be " automatically made from the Commission's records of auction " results* and no claim will be required from the manufacturer. " (D) With each payment, there will be forwarded a statement " showing in respect of each lot purchased—(i) The basic cost " assessed, i.e., at present, appraisement plus 10 per cent. for " fleece wools and appraisement plus 5 per cent. for skin wools. " (ii) The average greasy market price established. (iii) The " subsidy as calculated by the Commission.

" In discussions between the Commission and the Advisory " Committee of Woollen and Worsted Manufacturers on March " 19 and 20, 1946, manufacturers were advised of the Commis- " sion's responsibilities as to ensuring that the reserve prices for " Australian-grown wool, provided for under the United Kingdom- " Dominions Wool Disposals Plan, are made effective; and it was " understood at that meeting that members of your association " would be willing to purchase all wool required by your " members at auction with the following exceptions:—(A) Wool " produced by the manufacturer himself and used by him in his " own factory. (B) Wool purchased by a country manufacturer " on a normal quantitative basis according to his normal policy " from producers in his district. (C) Wool the product of fell- " mongering the skins owned by the manufacturer and used by " him in a continuous process of manufacture.

" You should note that auction purchases of raw wool will pro- " vide the basis of subsidy to manufacturers in so far as such wool " is used in the manufacture of goods sold for Australian " domestic consumption, and therefore any manufacturer who " does not buy his wool at auction will have to submit to the

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" Commission an application for subsidy, and in each case he will " need to supply:—(A) The names of the persons from whom " he has bought wool. (B) The quantities purchased from each " of these persons, and full details of the description and prices " of such purchases.

" As stated previously, when a manufacturer purchases wool " at auction, it will not be necessary for him to submit an " application to the Commission for subsidy because the Commis- " sion will have available to it from its records of auction results " all the necessary information for calculation of the subsidy and " automatic payment to the manufacturer.

" It should also be noted that a manufacturer purchasing " wool other than at auction will not receive subsidy up to " average market level when the price paid by him for such " wool is below average auction level. The subsidy, in this case, " will be the difference between basic cost and the actual price " paid by the manufacturer for the wool in question, whereas in " the case of wool purchased through auction the subsidy will " be the difference between the basic price and the average " auction market level, irrespective of the auction price paid for " the wool.

" The attention of manufacturers is also drawn particularly to " section 17 of the Wool (Contributory Charge) Assessment Act, " 1945, which reads:—' Except in pursuance of an arrangement " ' with the Commissioner, *a person shall not subject any wool*, " ' other than wool purchased by him, *to any process or treat-* " ' *ment of manufacture*, or export any wool, unless—(a) The " ' wool has first been submitted at an appraisement place or, " ' with the approval of the Commission, at any other place, for " ' appraisement by or on behalf of the Commission, and has " ' been so appraised; or (b) He is in possession of a certificate " ' issued in respect of the wool under section fifteen of this " ' Act. Penalty: Two hundred pounds.'

" In submitting wool purchased by a manufacturer, otherwise " than at auction, for appraisement for purposes of the Con- " tributory Charge Assessment Act, the prescribed form must be " completed and forwarded to the Commission.

" To enable the wool to be properly examined and appraised it " will be necessary for such wool to be displayed in accordance " with instructions from the Commission and on premises " approved by the Commission as suitable for the appraisement " of wool. If the premises of the manufacturer are unsuitable for " this purpose, the Commission may order the wool elsewhere for " appraisement.

" The Commission is endeavouring to communicate with all " Woollen and Worsted Textile Manufacturers understood not to " be members of the Association, and to advise them of the " above arrangement which, of course, must apply on the same " basis to all manufacturers of goods made from wool.

" The Commission is charged by the Government with the

" responsibility of doing all things necessary to ensure that the " United Kingdom-Dominion Wool Disposals Plan is successful, " particularly in regard to making effective the reserve prices " provided for under the plan, and the Commission feels sure " that you will co-operate in every way possible. Yours faith- " fully, (Sgd.) H. B. LEIGH, Secretary. The Manager, Australian " Woollen Mills Pty. Limited, 46, Martin Place, Sydney, " N.S.W."

Their Lordships are of opinion that these letters cannot be read as an offer or offers to contract. They contain a statement of policy. The " scheme " is to be administered by the Commission which is itself to determine the amount of the subsidy. No single phrase or provision may be decisive. The letters must be read as a whole. If the intention had been to provide for a series of contracts one would as between these parties have expected a form containing the provisions which, if disputes arose, would be construed and applied by the courts. The number of uncertain factors make it natural that the basis should be administrative. Nor is there anything remarkable in the fact that the manufacturers should be content to act on the respondent's statement of policy. A further letter of August 20 elaborating the procedure emphasizes the control which the respondent through the Commission was keeping on the scheme.

The later letters contain no sentences which support the appellant's contention and many which illustrate the administrative nature of the scheme. Some of these are cited below in dealing with the later points.

It is unnecessary, therefore, to consider the respondent's alternative claim that if there were contracts the terms have been fulfilled, but it is necessary to consider on the appellant's alternative claim whether the respondent under the scheme was entitled to demand the repayment of the £67,282.

It was not disputed that the subsidy could be demanded back if goods made with the wool " subsidized " were exported. This was referred to in a letter from the Commission of August 20, 1946. As and from March 20, 1947, the appellant, with other manufacturers, was required to sign a declaration to be forwarded with its subsidy statements. It contained the following provisions—" (a) that the wool shown in this statement will be used " by the said manufacturer for purposes of manufacture of goods " within the Commonwealth (excluding goods which are notified " to me as being ineligible for such subsidy); (b) that the above- " mentioned wool or no part of that wool will be resold without " prior notification being given to the Australian Wool Realization " Commission (for these purposes ' resold ' is deemed to include " any transfer of title in wool oddments or offsorts for a considera- " tion or as remuneration or part-remuneration to any person " processing such wool on behalf of a manufacturer); (c) that if " all or any of the wool is not for any reason used for manufac- " ture of goods eligible for subsidy, the subsidy paid will be

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"refunded to the Australian Wool Realization Commission as "agent for the Commonwealth; (d) that the above information is "a true and correct statement of wool for manufacture of sub- "sidized goods within the Commonwealth purchased by the said "manufacturer at the auction series for which this statement is "submitted."

As the High Court point out, the subsidy is regarded as on the manufactured goods rather than on the wool, though paid conditionally on the purchases of the wool.

The question of excess stocks is dealt with in a circular letter from the Commission of April 21, 1947:—"Pitman House, 540– "542, Little Collins St., Melbourne, C.1. April 21, 1947. "Dear Sir, The purpose of this letter is to inform you of an "instruction received by the Commission from the Common- "wealth Prices Commissioner, relating to a condition governing "the payment of subsidy on raw wool purchased during the "remainder of the 1946/47 season.

"The Commonwealth Prices Commissioner has ruled that "subsidization of wool purchased by manufacturers during the "1946/47 season is proposed only on the quantity of wool neces- "sary for the manufacturer to carry on his normal manufacturing "activities to June 30, 1947, and for such period after that date "during which he is unable to obtain supplies of wool from the "market.

"If any manufacturer is found to have purchased wool in "excess of these requirements, payment of subsidy on such "excess will be withheld by the Commission. Yours faithfully, "(Sgd.) J. H. WILLIS, for Secretary."

The point was further emphasized on January 30, 1948.

At some date during that year the question of the respon- dent's ceasing to control the prices came under consideration and there was clearly no question of the respondent continuing the subsidy after that. As the whole purpose of the scheme was to enable manufacturers to keep in business at the controlled price it would be contrary to the scheme if there was a subsidizing to any substantial extent of goods to be sold after control had ceased.

The last paragraph of a letter of February 20, 1948, is relevant: "*It is important to note that there is no guarantee* "*that stocks held at June* 30, 1948, *will remain subsidized to the* "*present basis. All or portion of the subsidy on stocks held at* "*that date may be adjusted by the Commonwealth Government* "*if it deems such action necessary.* This should be borne in "mind in the formulation of purchasing programmes as well as "the fact that subsidy may be withheld forthwith on purchases "which are deemed *excessive or inappropriate to a mill's* "*functions.*"

Early in June, 1948, there was an announcement that the subsidy would be discontinued as from July 31. In a letter of June 18 the Commission reminded manufacturers of the previous ruling as to reasonable stocks and invited discussions as to what

would be reasonable stocks at June 30. The first results of these discussions was a decision by the Commission that 5½ months' stocks would be reasonable. Control ceased in September. There was a complication as to equalizing stocks among manufacturers which does not help in the present issue. On August 30, 1948, the Commission wrote a letter from which the following is an extract:—

"Adjustment of subsidy on stocks in excess of 5½ months' "requirements as from June 30, 1948.

"The Commonwealth Prices Commissioner has now declared "that goods manufactured from wool stocks in excess of 5½ "months' normal requirements from June 30, 1948, are ineligible "for wool subsidy. Therefore, in accordance with sub-paragraph "(c) of the conditions under which subsidy has been claimed on "wool (see Declaration by Manufacturer on reverse of subsidy "claim form) the subsidy on wool stocks in excess of this period "will be either withheld in cases where payment has not yet "been made or must be refunded to the Commission as agent "for the Commonwealth Government if payment of subsidy has "already been made.

"In making these adjustments the Commission will adopt "the following procedure:—(A) Advise the manufacturer of the "amount by which his stocks held, in the opinion of the Com-"mission, exceed 5½ months' requirements from June 30, 1948. "(B) Invite him to give a considered estimate of what groups and "styles of wool will be in stock at the Christmas 1948 closedown. "(C) In formulating the basis for refund or adjustment regard will "be had initially for the level of wool values ruling over the last "six months of the 1947/48 wool season and not necessarily "to the level established on the last purchases made. (D) An "interim determination as to withholding or refund will be given "by the Commission as soon as practicable in the case of each "mill to give each a basis of adjustment. The interim deter-"mination may be reviewed by the Commission or the Common-"wealth Prices Commissioner. Payments will be made on "outstanding claims forthwith within the framework of the "procedure outlined."

Their Lordships are of opinion that those adjustments were plainly in accordance with the scheme. If a manufacturer had had subsidy on more than the 5½ months' stock it could have been reclaimed. There was, however, a modification and a special circumstance affecting the appellant which must now be considered.

In September the appellant suggested that it would be fairer to take the actual figures of stocks used over 5½ months from June 30 rather than an estimate. The Commission accepted this in principle and in a long letter of December 15 set out their final basis for winding up the scheme. In effect, subsidy was returnable or not claimable on stocks in hand at Christmas, 1948. This was to adopt the actual user test if over that period only

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wool bought in the subsidy period had been used. Wool bought before the 1946/47 season was, if still on hand, to be treated as "subsidized" having received an indirect subsidy as set out above. That explains how the item of £2,121 relating to wool bought before the scheme comes into the appellant's claim for the return of £67,282. It may be asked how the Commission was justified in going back to pre-1946 purchases or perhaps to purchases before March, 1947. No objection on this ground was taken by the appellant. These parcels had not in fact been used for goods for the home market though on hand for more than 21 months. It might also be said that these parcels should, as it were, be set against later purchases in fact used on which subsidy would be retained. This is speculation, no objection having been taken on these lines. Their Lordships are satisfied that the basis was in accordance with the general principles of the scheme as applicable to the situation which had arisen.

There remains the last paragraph of the letter which was as follows: "*Usage of unsubsidized wool before the Christmas* 1948 "*closedown.* 9. If any manufacturer has used unsubsidized wool "in manufacture prior to the Christmas 1948 closedown, the "Commonwealth Prices Commissioner may have regard to such "usage in computing any refund in respect of subsidized stocks "in excess of the prescribed maxima. It is necessary for such "consideration that the following conditions are observed:— "(a) That the wool was purchased at auction. (b) That no relief "has been obtained by means of price increase. (c) That sub-"sidized goods have not been withheld from the consumer. "(d) That the manufacturer has kept satisfactory records and "otherwise complied with the requirements of the National "Security (Prices) Regulations."

In a letter of January 12, 1949, the appellant stated that it had used unsubsidized wool and that the conditions of paragraph 9 had been complied with.

On February 25, 1949, the Commission set out their claim against the appellant. The appellant had substantial stocks at Christmas, 1948, on which it had received subsidy. It had claims in respect of wool used before Christmas on which subsidy had not been paid. On balance and subject to final audit the amount refundable and claimed was £67,282 4s. 9d.

On April 13 there was a further demand and a statement that if no reply was received within 10 days the matter would be referred to the Crown Law Authorities.

On May 9 the appellant wrote two letters. In one it enclosed a cheque for £67,282 4s. 9d. In the other it elaborated its claim in respect of the "unsubsidized" wool bought and used between June and Christmas, 1948. This was stated to be 2,115 bales and the claim in respect of it was said to be £92,000. Although paragraph 9 of the letter of December 15 was referred to, the words used can be read as claiming subsidy on these bales which were bought after the scheme had come to an end. The claim

was so treated by the Commission and the Commonwealth Prices branch by letters dated May 19 and July 19 and refused. In answer to this there was a solicitor's letter and these proceedings were started, in which no claim based on these bales, or on any adjustment consequent on their purchase, was made. It is one of the curious features of this case that the appellant did not state clearly its present submission that the claim as then made was not for subsidy on the 2,115 bales as such but that the Commission should have regard to the usage of unsubsidized wool as suggested in paragraph 9 of the letter of December 15. If this had been done there might have been some light on the Commission's reasons for not operating paragraph 9. In their Lordships' opinion it was within the discretion of the respondent not to have regard to the user referred to in paragraph 9. The respondent was therefore entitled to demand the £67,282 without regard to that user.

Their Lordships have thought it right to consider this issue on its merits rather than by approaching first the question whether circumstances which entitle a plaintiff to recover back money paid, which it was not liable to pay, were present in this case. Although the appellant clearly preserved its right to proceed with the counterclaim, as it was called, based on the 2,115 bales, that is not what it is now seeking to do. It is unnecessary to decide the point, but the appellant might well have failed to surmount the obstacles which the law places in the path of those who seek to recover back money paid.

In the result, their Lordships agree with the decision of the High Court. They will humbly advise Her Majesty that the appeal should be dismissed. The appellant will pay the costs of the appeal.

Solicitors: *Galbraith & Best; Coward, Chance & Co.*

C. C.

[COURT OF APPEAL.]

* *In re* POWELL-COTTON'S RESETTLEMENT. HENNIKER-MAJOR AND OTHERS *v.* POWELL-COTTON AND OTHERS.

[1954 P. No. 3162.]

Trust and Trustee — Variation of trusts — Jurisdiction of Chancery Division — Compromise — Jurisdiction to sanction — Investment clause of an uncertain meaning — Proposal to substitute modern investment clause — Proposed new investment clause approved by beneficiaries—Whether a compromise of beneficial rights.

Under a resettlement certain freehold properties and capital moneys were settled on the first defendant for life, with remainder to his issue, with remainders over. The resettlement contained a

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lengthy investment clause of a complicated character and doubts had arisen as to its scope. The trustees of the settlement applied by summons to have the effect of the investment clause decided. The defendants to the summons were the tenant for life and four infants who had contingent reversionary interests in the settled property. Immediately after the issue of the summons, the parties applied for leave to compromise the proceedings upon the terms that a new and modern investment clause be substituted for the old investment clause. Danckwerts J. refused to sanction the proposed compromise on the ground that the jurisdiction of the Chancery Division did not extend to sanctioning a transaction of this character and, in any event, the transaction was not one which the court ought to sanction:—

Held, that if there were here a compromise the Court of Appeal would not be justified in interfering with Danckwerts J.'s refusal to approve it.

Quaere whether, having regard to the language of Lord Simonds and of Lord Morton in *Chapman* v. *Chapman* [1954] A.C. 429, 445, 461; [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798, 802, 814, the proposed transaction was a compromise of disputed rights which the court had jurisdiction to sanction.

Decision of Danckwerts J. affirmed.

APPEAL from Danckwerts J.

By a resettlement dated January 31, 1940, made between Percy Horace Gordon Powell-Cotton of the first part the first defendant Christopher Powell-Cotton of the second part and trustees of the third part, certain freehold properties and capital moneys were, in the events which had happened, held on trust for the first defendant for his life, and after his death for his issue in tail (at the date of the summons he had no issue), with remainder to the second defendant Michael Cotton-Garratt for life, with divers remainders to take effect on his death. Clause 12 of the settlement contained a long and complicated investment clause which, inter alia, authorized the investment of capital moneys "in preferred stock or shares" and in "ordinary pre-"ferred stock or shares." The facts are more fully stated in the judgment of Evershed M.R.

The trustees, being uncertain about the exact scope of the investment clause, took out an originating summons raising certain questions of construction as to its meaning. The defendants to the summons were the first defendant, the tenant for life in possession, the second defendant, who was entitled to a contingent reversionary life interest, and three defendants, who had contingent reversionary interests in the settled property. The last four defendants were infants.

When the summons came before the master the parties applied for leave to compromise the questions raised by the summons on the terms that a new and modern investment clause should be substituted for that contained in clause 12 of the resettlement.

Danckwerts J. refused to sanction the proposed compromise and gave to the parties leave to appeal.

The first and fifth defendants appealed.

G. A. Rink for the appellants.

Peter W. E. Taylor for the plaintiffs, respondents.

Michael Browne for the respondents the second, third and fourth defendants.

The following cases, which were not referred to in the judgments, were cited in argument: *In re Hylton's Settlement* [1]; *Brooke* v. *Lord Mostyn* [2]; *Huddersfield Banking Co. Ltd.* v. *Henry Lister & Son Ltd.* [3]; *Sneath* v. *Valley Gold Ltd.* [4]

EVERSHED M.R. Danckwerts J. gave leave for this case to be considered by the Court of Appeal, the question being whether the court could or should sanction, by way of what was called a compromise, the substitution for an old-fashioned investment clause in a strict settlement of realty and personalty of a modern investment power which would give to the trustees, particularly, a power to invest capital moneys in what are commonly called "equities." I cannot do better, I think, than cite the language of the counsel who has advised the infants: "The existing narrower investment clause," he said, "may "therefore actually have a detrimental effect on security of "investment by making the trustees select the best of a rather "restricted category instead of the best available, and a well-"drawn modern investment clause would therefore be for the "benefit of the infants." The proposal is that the court should sanction the substitution for the narrower old-fashioned clause of "a well-drawn modern investment clause."

It is, of course, plain enough that the court has not the power, and never has assumed that it had the power, to improve upon the performance of the settlor by substituting for some provision which he inserted restricting the power of trustees to make investments a much better more modern clause—on the ground that so to do would be for the benefit of all persons existing and to come into existence under the settlement. But the case for the appellants (the adult beneficiary, supported by the infant beneficiaries) is that a doubt or difficulty of construction—I avoid the word "dispute" for there never really was any dispute—has arisen as to the meaning of the clause which the settlor selected. The clause was very long and in some measure undoubtedly repetitive. Having mentioned Government securities, freehold mortgages and the like, the settlor proceeded to empower his trustees to invest "in or upon the debenture stock or rentcharge "guaranteed or preferred stock or shares of any company incor-"porated by special Act or by or under any public general Act "or Acts of the Imperial Parliament or the legislature of any "colony or Royal Charter or in or upon the ordinary stock or "shares of any such company a fixed or minimum rate of interest

[1] [1954] 1 W.L.R. 1055; [1954] 2 All E.R. 647.
[2] (1864) 2 De G.J. & Sm. 373.
[3] [1895] 2 Ch. 273.
[4] [1893] 1 Ch. 477; 9 T.L.R. 137.

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" or dividend on which is guaranteed by the Government of the " United Kingdom or India or any colony or any foreign govern- " ment or state or in or upon ordinary preferred stock or shares " but not on deferred stock or shares of any such company." Then the mind of the settlor passed to municipal authorities.

The question, said to be one of doubt, which has arisen is this: The phrase " ordinary preferred stock " (though I assume that it came from the precedent book) is unusual, and has, I think, next to no actual application today. An affidavit of an experienced stockbroker was filed in which he said that the phrase was a term of art, which in a sense surprised me. He said: " I have come across the term ' ordinary preferred shares ' " in an investment clause. . . . My recollection is that such " clauses are used in old trusts established many years ago. I " am not aware of any company having shares so described in its " articles." Transposing the language, the term " preferred " ordinary " is, of course, much more common; but the suggestion is that there has been a slip—that perhaps the word " or " or the word " and " was missed from between the words " ordinary " and " preferred," so that the clause would run " or in " or upon ordinary or preferred stock but not on deferred stock."

That view of construction (upon which, of course, I do not pronounce) would, if accepted, lead to the result that it rendered quite nugatory and futile the very special provisions which immediately precede it to the effect that investment in ordinary stock or shares can be made only where a minimum rate of dividend is guaranteed by Government authority. However, I will proceed upon the view that here there is a doubt—a question of the meaning and intention of this somewhat old-fashioned clause.

That being so, it is contended that it is permissible (and within the jurisdiction of the court) to accede to the request that the compromise of that question by the substitution of an entirely new investment clause should be sanctioned by the court on behalf of the beneficiaries now infants or not yet in being; and the case is put on the broad proposition that the word " compromise " covers any resolution not merely of a dispute or actual controversy, but also of any question of doubt or difficulty.

Danckwerts J. rejected that application and although we have no note of his judgment, I gather that he did so on two grounds: He said that the " dressing up " of this case as one of a compromise of a dispute was really quite false—I am not using these words in any offensive sense—that it did not in the least degree really represent the true situation. " I do not think," I understood him to have said, " that in such a case as this the jurisdic- " tion of the Chancery court extends to granting the request put " to it, and I also do not think in the exercise of my discretion " that this is the sort of thing which in any case the court in its " discretion (if it has any) ought to do."

It has been said many times how useful is the jurisdiction in chambers of the Chancery judges to entertain all manner of problems that arise in the execution of trusts, and particularly to look after the interests of infants; and I always feel most unwilling in the Court of Appeal to lay down principles and rules which may fetter undesirably that very useful jurisdiction. Bearing that in mind, I for my part prefer to base my own conclusion, in rejecting this appeal, upon the second ground; namely, that, if it could be said here that there was a question being compromised, nevertheless I would feel quite unjustified in interfering with the view which the judge took in his discretion that to substitute an entirely new modern investment clause for that which was found in the settlement was not the right way of treating the matter. In a sense, that is really all that need be said.

But the other broader question of jurisdiction was argued, and perhaps I should say just a word about it, although I want to avoid laying down any hard and fast rule, or indeed expressing any final definite conclusion upon it. We were referred to the language used particularly by Lord Simonds and Lord Morton of Henryton in the recent case of *Chapman* v. *Chapman*.[1] It had there been argued that the jurisdiction of the Chancery court was of the widest and most unrestricted character possible; that the court could sanction anything to which the label of "arrangement" could be attached, by way of variation of the terms of existing settlements, so long only as the adult beneficiaries agreed, and that it was for the benefit of beneficiaries who were infants or not yet in being.

The door to that spacious jurisdiction was, I think, firmly closed by the House of Lords, and I am by no means sure that, if Mr. Rink's argument and Mr. Browne's argument in its full effect were accepted, the result would not be to reopen that door. I would like to cite one or two passages from the speeches in the *Chapman* case. Thus, Lord Simonds said[2]: "So, too, the "court had power in the administration of trust property to "direct that by way of salvage some transaction unauthorized "by the trust instrument should be carried out. Nothing is "more significant than the repeated assertions by the court that "mere expediency was not enough to found the jurisdiction. "Lastly, and I can find no other than these four categories, the "court had power to sanction a compromise by an infant in a "suit to which that infant was a party by next friend or guardian "ad litem. This jurisdiction, it may be noted, is exercisable "alike in the Queen's Bench Division and the Chancery Division "and whether or not the court is in course of executing a trust. "This brings me to the question which alone presents any difficulty in this case. It is whether this fourth category, which I "may call the compromise category, should be extended to cover

[1] [1954] A.C. 429; [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798.

[2] [1954] A.C. 429, 445.

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" cases in which there is no real dispute as to rights and, there-
" fore, no compromise, but it is sought by way of bargain between
" the beneficiaries to rearrange the beneficial interests under the
" trust instrument."

Then Lord Morton, upon the same point, said [3]: " There are,
" of course, many cases to be found in the reports in which the
" Court of Chancery, and its successor the Chancery Division,
" have approved compromises of disputed rights on behalf of
" infants interested under a will or settlement and on behalf also
" of possible after-born beneficiaries. . . . Where rights are in
" dispute, and the court approves a compromise, it is not altering
" the trusts, for the trusts are, ex hypothesi, still in doubt and
" unascertained."

That proposition and those views were later expanded. I need not read the whole of the passage to which our attention has already been directed. I refer to the paragraph beginning [4]: " This argument brings one face to face with the vitally important " question—is it possible to draw a line at some point between " the court's undoubted jurisdiction to sanction a compromise of " disputed rights, and the alleged unlimited jurisdiction to alter " beneficial interests to any extent. . . ." It will be noticed that in all those passages, the subject-matter of the alleged compromise must be (and I cite again the last passage I have quoted) " a compromise of disputed rights."

We are here concerned with a discretionary power given to trustees as regards investment. It is said, and I will again assume, that the precise scope of that power is not clear, and is open to real and substantial argument. Still, it seems to me very doubtful, to say the least, whether it could be said that as between the beneficiaries in this case there is any dispute as to their rights. That has been made manifest by the circumstance that, as Mr. Browne freely confessed, the advantage which he sought for his infants lay not in any give and take with somebody who had other rights, but in the mere circumstance that, if a much more modern investment clause was substituted, the trustees (if they exercised their powers sensibly) would benefit everybody all round.

Without, therefore, saying more for reasons which I have already indicated, I am bound to say that, as at present advised, I am not satisfied that this court can now, in loyalty to the principles laid down in *Chapman's* case,[5] accept the wide significance which, for purposes of jurisdiction, Mr. Rink and Mr. Browne would assign to the word " compromise." It may well be that powers which are expressed with uncertainty may give rise to questions of dispute as to rights. But in this case I think (as I have earlier said) that the judge rightly thought that the simple question, and the compromise of that question sought to be achieved, was really " dressed up " in the sense that in truth

[3] Ibid. 457.
[4] Ibid. 461.
[5] [1954] A.C. 429.

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here the advisers of the persons concerned—no doubt acting in the very best interests of those they represent—have sought and hoped, by fastening upon an ambiguity in a power of investment, to say that that gives them the opportunity of substituting an entirely new investment clause; and, if the matter were complex enough, and the interests sufficiently elaborate, they might go further and say that, without other counter-availing alterations, even that substitution would not suffice; so that, under the pretext of the difficulty of construction in a power, you might in the end almost achieve what, no doubt for many purposes, would be an admirable result, namely, redrafting the settlement from beginning to end. But I base my decision in this case primarily upon the view that, in all the circumstances, I do not think it would be right (or could be suggested to be right) that this court should interfere with the view expressed by Danckwerts J. when he said: "I do not think I ought to make the order which I have "been asked to make."

I think, therefore, that the appeal should be dismissed.

BIRKETT L.J. I am entirely of the same opinion.

Appeal dismissed.

Solicitors: *A. F. & R. W. Tweedie.*

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[COURT OF APPEAL.]

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Nov. 25, 28, 29.
Denning, Hodson and Morris L.JJ.

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[1953 L. 155.]

Estoppel — Conduct, by — Patent — Agreement between applicant for letters patent and manufacturer—Sole and exclusive licences to be granted when letters patent sealed — Provision for payment of royalties—Liberty to use inventions pending grant of letters patent — Royalties paid over period — Repudiation of liability to pay royalties — Action for recovery of royalties — Whether defendants estopped from denying liability to pay.

Patent.

On December 24, 1952, an agreement was entered into between the plaintiff, who had lodged at the Patent Office three applications for letters patent and certain foreign applications in connexion with gas-filled lighters and refills, and the defendants, who were then manufacturing and selling such goods. The agreement provided, inter alia; (a) that the plaintiff should himself discontinue the selling of lighters; (b) that when the patents should be granted, the plaintiff should grant to the defendants sole and exclusive licences under such patents (with power to grant sub-licences) for the full term thereof; (c) that pending the grant of such licences

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the defendants should be entitled to use and exercise the plaintiff's inventions as if licences under the patents had in fact been granted; (d) that during the continuance of the agreement the plaintiff should not himself use or exercise his inventions; (e) that during the continuance of the agreement the defendants should pay to the plaintiff specified royalties on goods sold which embodied the inventions or any of them so long as the inventions embodied should be protected by valid letters patent in the United Kingdom; (f) that the defendants should periodically render accounts and pay royalties to the plaintiff, and (g) that if the royalties should not amount to £2,000 in any one year (and in certain other events) the plaintiff could terminate the licences.

In accordance with the agreement, the plaintiff discontinued the sale of lighters and refills, and from time to time the defendants rendered accounts and paid what were called "royalties" in respect of sales made by them. The plaintiff's complete specifications were accepted and published, but no patents had ever been granted. In December, 1954, the defendants sent a statement to the plaintiff showing that the sum of £7,123 was due for royalties, but shortly afterwards repudiated this liability, and asserted that no royalties were, or ever had been payable, as under the agreement royalties were not payable until British letters patent were granted; and as their lighters and refills did not, on the true construction of the complete specifications as published, embody the plaintiff's inventions. In an action brought to recover the £7,123 stated to be due, Lloyd-Jacob J. gave judgment for the plaintiff. On appeal by the defendants:—

Held, (1) that on the true construction of the agreement the defendants were liable to pay the stipulated royalties during its existence, whether or not British letters patent had been granted; (2) that the conduct of the defendants in paying royalties over a period, thereby inducing the plaintiff to adhere to the agreement in the belief that they admitted that their goods embodied his inventions, constituted an estoppel preventing them from contending otherwise, notwithstanding that the representations arising from such conduct might involve representations of law regarding the true construction of the specifications, and representations as to the defendants' future conduct.

Per Denning L.J. This assurance was binding, no matter whether it is regarded as a representation of law or fact or a mixture of both, and no matter whether it concerns the present or the future. It may not be such as to give rise to an estoppel at common law, strictly so called, for that was confined to representations of existing fact; but we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations.

Per Hodson L.J. The estoppel set up by the plaintiff was of the kind well recognized at common law. The representations by conduct which the defendants made were perfectly clear and unambiguous, namely, that the articles which they made embodied the inventions which covered the subject-matter of the agreement. That, to my mind, is a representation of fact. It matters not that questions of law may be involved and that it may be necessary to construe the agreement in order to find out whether there is an embodiment. That there may be a mixed question of law and fact does not destroy the estoppel. Nor does it matter that questions of patent law may be involved in considering whether or not there is an invention that is covered by a patent.

Per Morris L.J. It was really a question of fact.

Decision of Lloyd-Jacob J. (1955) 72 R.P.C. 307 affirmed.

APPEAL from Lloyd-Jacob J.

In 1952 the plaintiff was marketing a lighter under the name of the " Bedford " lighter, which was operated by the vaporization of liquid gas contained in the body of the lighter. He had lodged at the Patent Office three applications for letters patent in connexion with such lighters and their refills, and had applied also for foreign patents. At the same time the defendants were marketing lighters and refills of a similar type which, in the plaintiff's view, would infringe the claims of his patents when granted. He informed the defendants of this, and, after negotiations the parties agreed that the plaintiff should discontinue the manufacture of the " Bedford " lighter, and should grant to the defendants full and exclusive licences to exploit his inventions, subject to the payment of royalties.

The arrangement made between the parties was embodied in a formal agreement dated December 24, 1952, which contained the following provisions. " 4 (a). Forthwith upon the grant of " letters patent upon each of the said applications the patentee " shall grant to the licensee a sole and exclusive licence with " power to grant sub-licences under such letters patent for the " full term therefore and prolongation or extension thereof in " the terms set forth in the second schedule hereto. . . . (b) Pend- " ing the grant of such licences the licensee shall be entitled to " use and exercise the said inventions and to make and sell gas " lighters and gas refills in such manner and on such terms as " are hereinafter provided as if such licences had in fact been " granted. (c) The patentee shall not during the continuance " of this agreement except as in clause 8 hereof provided either " by himself or by any agent or licensee (other than the licensee " and its sub-licensees) use or exercise the said inventions or any " of them or manufacture or sell or offer for sale any gas-filled " lighters or any gas refills. . . . 6 (a) The licensee shall during " the continuance of this agreement and subject to the provisions " of clause 8 (c) hereof pay to the patentee the following royalties " upon all articles sold by the licensee or its sub-licensees which " embody the said inventions or any of them whether or not such " sales were within a country in which the said inventions or any " of them are protected by letters patent or like protection so " long as such inventions as may be embodied shall be protected " by currently valid letters patent in the United Kingdom. " (i) The sum of 6d. upon any complete gas lighter embodying " the said inventions or any of them; (ii) the sum of 2d. upon " any gas refill embodying the said inventions or any of " them. . . ." By sub-clause (b) the defendants were required to account for and to pay royalties every two months. By clause 7, they were required to keep books of account, which were to be open to inspection by the plaintiff. By clause 8, the plaintiff was entitled to terminate the licence if in any year the royalties fell below £2,000, and also in certain other circumstances. By

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clause 15 (b): "If this agreement or any such licence as aforesaid "is terminated by the licensee pursuant to this clause, all "royalties payable hereunder shall be computed and discharged "up to and including the date of such determination."

In accordance with the terms of the agreement the plaintiff discontinued the sale of his lighters and refills and the defendants from time to time accounted for and paid to the plaintiff sums which they described as "royalties," such sums amounting to more than the minimum annual sum of £2,000 mentioned in the agreement. The plaintiff's three complete specifications were accepted by the Patent Office and published, but (for reasons which were not stated) no British or other letters patent had been granted, even at the date of the hearing of the appeal. On December 23, 1954, the defendants' solicitors wrote to the plaintiff's solicitors stating: "We now have pleasure in enclosing "detailed statement in respect of the royalties paid and payable "to Mr. Meller up to November 30, 1954," followed by a statement showing the number of lighters and refills sold, the royalties paid, and indicating that there was due to the plaintiff the sum of £7,123, subject to tax in respect of sales made after March. The defendants did not pay that sum, and soon afterwards repudiated their liability to do so, and asserted that no royalties were or ever had been payable under the agreement.

In an action in which the plaintiff claimed payment of the sum of £7,123, the defendants pleaded (i) that, on the true construction of the agreement, no royalties were payable until valid British letters patent were granted, and (ii) that they were not liable to pay royalties, as the lighters and refills sold by them did not fall within any claim of the complete specifications as published. The plaintiff, in reply, pleaded that by reason of the conduct of the defendants in paying royalties in respect of sales over the period up to March, 1954, they induced him to believe that they admitted that the lighters and refills sold by them embodied the inventions, the subject of the agreement, or some of them, and that they would continue to pay royalties; and that, acting on such belief, the plaintiff did not determine the agreement or grant licences to other manufacturers as otherwise he would have done; and that in the premises the defendants were estopped from denying that their lighters and refills embodied the inventions in question, and/or that royalties were payable thereon.

Lloyd-Jacob J. held that, on its true construction, the agreement required the defendants to pay royalties although no British patents had been granted; he also held that the defendants were estopped by their conduct from denying that their lighters and refills embodied the plaintiff's inventions, and gave judgment for the plaintiff. The defendants appealed.

Sir Lionel Heald Q.C. and *Guy Aldous* for the defendants.
Viscount Hailsham Q.C. and *P. Stuart Bevan* for the plaintiff.

Cases cited in argument not referred to in the judgments: *London County Territorial and Auxiliary Forces Association* v. *Nichols* [1]; *Combe* v. *Combe* [2]; *Beattie* v. *Lord Ebury* [3]; *In re Hooley Hill Rubber & Chemical Co. and Royal Insurance Co.* [4]; *Rickards* v. *Oppenheim* [5]; *Perrott (J. F.) & Co. Ltd.* v. *Cohen* [6]; *Curtis* v. *Chemical Cleaning & Dyeing Co.* [7]

DENNING L.J. In 1952 Mr. Lyle-Meller invented a new kind of lighter and refill. Instead of the well-known lighter with a wick and petrol, he invented one which was gas-filled, and he made applications for patents in this country and in countries overseas. He was associated with a company which was making them under the name of the Bedford lighter, but he soon found out that A. Lewis and Co. (Westminster) Ltd. were also making gas-filled lighters and were putting them on the market under the name Silver Match lighter. Thereupon Mr. Lyle-Meller said that their lighters would infringe his patent if and when he got it. He pointed out to them that, if he got a patent on his applications, they would have to pay back royalties in respect of infringements from the beginning. After some negotiations an agreement was reached between them on December 24, 1952, as a result of which Mr. Meller's company gave up making the Bedford lighter and he promised to make available to Messrs. Lewis all his information about the invention and not to give any information to anyone else. Messrs. Lewis agreed to pay Mr. Meller a royalty of 6d. upon every complete gas lighter "embody-" ing his inventions," or any of them, and 2d. upon any gas refill which "embodied his inventions" but Mr. Meller had a right, if the royalties did not come to £2,000 a year, to determine the agreement and exploit his inventions elsewhere.

During the next two years Messrs. Lewis made lighters and they paid royalties to Mr. Meller which exceeded £2,000 a year. They rendered statements of account to him, and in a letter on December 23, 1954, their solicitors wrote saying: "We now have "pleasure in enclosing detailed statement in respect of the "royalties paid and payable to Mr. Meller up to November 30, "1954." The detailed statement showed the exact number of lighters which they had made and the royalties which they had paid. It showed that there was still payable in respect of lighters and refills £7,123 4s. 4d., subject, of course, to tax. Within a few weeks, however, Messrs. Lewis repudiated their liability. They have never paid the £7,123 4s. 4d. and Mr. Lyle-Meller has brought this action to recover it. Messrs. Lewis say that

[1] [1949] 1 K.B. 35; 64 T.L.R. 438; [1948] 2 All E.R. 432.
[2] [1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767.
[3] (1872) L.R. 7 Ch. 777.
[4] [1920] 1 K.B. 257; sub nom. *Hooley Hill Rubber & Chemical Co.* v. *Royal Insurance Co.*, 36 T.L.R. 81.
[5] [1950] 1 K.B. 616; 66 T.L.R. (Pt. 1) 435; [1950] 1 All E.R. 420.
[6] [1951] 1 K.B. 705; [1950] 2 All E.R. 939.
[7] [1951] 1 K.B. 805; [1951] 1 T.L.R. 452; [1951] 1 All E.R. 631.

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the £7,123 4s. 4d. is not payable at all and indeed that they made a mistake in paying the earlier royalties. They say that none were ever payable. They take two entirely new points which they had never thought of in the first two years. Their first point is that no royalties were payable until the patent was actually granted in England and sealed. Their second point is this: "The lighters which we have made and the refills do not "embody your invention, so we are not liable at all."

The first point arises because of a phrase at the end of clause 6 (a), which seems to say that the royalties are only payable "so long as such inventions as may be embodied shall "be protected by currently valid Letters Patent in the United Kingdom." That is the phrase on which the defendants pin their faith. They pick out that one phrase in this agreement and say that it means that no royalties are payable until valid letters patent are issued in the United Kingdom and sealed. I cannot agree with that construction for the simple reason that it flouts nearly every other clause in this agreement. It is in flagrant defiance of the whole tenor of this agreement. If you read through this agreement clause by clause, it is as plain as plain can be that during the currency of this agreement they were to keep accounts of all the lighters that they made; every two months they were to account, and thereupon they were to pay the royalties. I do not think it necessary to travel through this agreement clause by clause except to say that, having regard to clause 4 (b), clause 6 (b) and clause 15 (b), I am of opinion that royalties were payable during this agreement just as if a patent had been granted and as if licences had been granted under it, and that the one phrase which the defendants rely upon does not carry them home. The explanation of this one phrase at the end of 6 (a) was, I think, well given by the judge himself and I adopt what he says about it.

Now for the second point. The defendants say that these lighters which they have made, and the refills also, do not embody the inventions, and they wish the court to embark on a grand inquiry upon that matter. They wish to take the applications for patents and the claims therein, and to go through them and compare the lighters with them to see whether the lighters which they have made would infringe those claims when they are properly construed. The judge has held that it is far too late for them to take that point, seeing that for two years they have paid royalties and accounted on the basis that these lighters did embody the inventions. It was proved to the satisfaction of the judge that if Mr. Meller had had any idea that they would repudiate their liability he would at once have determined the agreement and exploited his inventions elsewhere. This agreement says that if £2,000 was not paid in any year by way of royalties he could determine it, and he said that so he would have done. I have no doubt he would, and the judge has found that he would have done.

Here then is a course of conduct by the defendants, a course of conduct which, in my opinion, amounts to the plainest possible assurance to Mr. Meller in these terms: "We acknowledge that "the lighters and refills which we are making embody your "inventions and that we are liable to pay you royalties thereon." Mr. Meller acted on that assurance and altered his position in this way, that if it had not been given he would undoubtedly have sought to exploit his inventions elsewhere. As it was, he refrained from so doing. The question is whether in the circumstances the assurance is binding on these manufacturers.

Sir Lionel Heald urged us that this course of conduct amounted only to a representation of law and that such a representation does not give rise to an estoppel. He said that Mr. Lyle-Meller knew all the facts quite well. He knew the nature of the Silver Match lighter, he knew how it was made and the mechanism of it. If the defendants made any representation to the effect that it "embodied his inventions" that was a representation as to the true interpretation of the contract, and of the patent applications, which was a matter of law and gave rise to no estoppel.

I do not think it necessary to go into these refinements about law and fact. I am clearly of opinion that this assurance was binding, no matter whether it is regarded as a representation of law or of facts or a mixture of both, and no matter whether it concerns the present or the future. It may not be such as to give rise to an estoppel at common law, strictly so called, for that was confined to representations of existing fact: but we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations.

This new estoppel applies to representations as to the future. Take the kind of assurance which was held binding in *Central London Property Trust* v. *High Trees House Ltd.*[1] and in *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* in the Court of Appeal (first action),[2] and in the House of Lords (second action).[3] In each of those cases a creditor during the war gave a promise or assurance to the other party that he would for the time being forgo sums which were thereafter to become due to him. In the *High Trees* [1] case it was rent. In the *Tungsten* case [3] it was sums payable by way of compensation. The assurance was not a contract binding in law, but it was an assurance as to the future, it was intended to be acted upon, it was acted upon, and it was held binding on the party who gave it. This appears distinctly from the speech of Lord Cohen.[4] The creditor was not allowed to resume his right to the periodic payments until he made it clear (as he did after the war) that he wanted them again, and then he only regained his right to them for the future, not for the past. He had forgone the past sums beyond recall.

[1] [1947] K.B. 130; 62 T.L.R. 559.
[2] 69 R.P.C. 108.
[3] [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657.
[4] [1955] 1 W.L.R. 761, 799.

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This new estoppel also applies to representations about legal relations. Take the kind of assertion or assurance which was held binding in *Robertson* v. *Minister of Pensions*,[5] and in the decision of the Privy Council in *Harnham Singh* v. *Jamal Pirbhai*[6] to which Lord Hailsham drew our attention this morning. In each of those cases one party had made to the other a clear and explicit assertion of the legal relationship existing between them. In the *Robertson* case[5] it was a statement by the Crown to an Army officer: "Your disability has been accepted as attributable "to military service." In the *Harnham* case[6] it was an unequivocal statement by a tenant that he "will remain in occupation "as a statutory tenant." The statement was not in either case a contract, and not regarded as such, but it was an assurance as to the legal position—as to the legal consequences of the facts known to both—which was intended to be acted upon, it was acted upon, and it was held to be binding. It did not give rise to a cause of action in itself, but it did prevent the party making it from setting up a defence which would otherwise be open to him. In that sense it gave rise to an estoppel, but it was not the old kind of estoppel, which was only a rule of evidence. It was the new kind of estoppel which affects legal relations.

I am unwilling to regard the present case as an old common law estoppel, for the simple reason that I doubt whether there was an estoppel as to the precise number of lighters made. If the defendants, after rendering their accounts, found out that they had made an arithmetical mistake and had stated the figure at 100 lighters too many, I should have though they should be allowed to correct the mistake. But no such mistake is suggested: and figures apart, I think the whole course of conduct by them amounted to a clear assurance that the lighters and refills which they were making did, within the meaning of the agreement, "embody the inventions" and that they were liable to pay royalties thereon. Mr. Lyle-Meller acted on that assurance, he altered his position on the faith of it, and it is binding on the manufacturers. They cannot now be allowed to go back on it, at any rate not in respect of past lighters and refills on which they have acknowledged the royalties are payable, and that is all we are concerned with here.

I think that the judge was right on both points and would dismiss the appeal.

HODSON L.J. In my opinion the judge was right on both points in this appeal, that is to say, on the construction of the agreement of December 24, 1952, and on the estoppel point, to which I shall refer.

The claim was for royalties upon articles sold by the defendants, and was based on an agreement whereby the plaintiff had

[5] [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2 All E.R. 767.

[6] [1951] A.C. 688.

agreed to grant the defendants the right to exploit certain of his inventions. The defendants had contended that, on the true construction of the agreement, no royalties were payable at all, and that none will be payable until the plaintiff has actually been granted letters patent in respect of his inventions. They have also contended that no royalties are payable because the articles they have sold do not fall within the claims of any of the applications put forward by the plaintiff, and so are outside the scope of the agreement because they do not embody the inventions, the subject of the agreement. To this the plaintiff has replied (and I shall have to refer to the pleading later for the way in which the matter is put) that the defendants are estopped from giving evidence to prove that the articles did not embody the inventions by reason of their conduct.

As to the construction of the agreement, it was drawn by skilled hands, and no doubt care was taken that it should carry out the intention of the parties. But in one respect at any rate —that is to say, in respect of clause 6 (a)—scope for argument has been left as to what the particular clause means. The judge has come to a conclusion as to the true effect of that particular clause, and that contention has been supported in this court by the respondent. For my part I am not prepared to accept the construction which the judge has placed upon that clause in full, although I do see the force of the argument that is put forward. The last phrase in the clause reads "so long as "such inventions as may be embodied shall be protected by "currently valid letters patent in the United Kingdom." Those words attach themselves more readily to the preceding phrase than the terms contained at the beginning of the clause: "The "licensee shall during the continuance of this agreement . . . "pay to the patentee the following royalties"—that is to say, I think that the phrase beginning "so long as," although awkwardly placed in any event, may more conveniently and sensibly attach to the protection provisions than to the payment provisions of that clause. I merely enter a caveat because I am not sure that, even when the words attach themselves to the protection part of the clause, they have the meaning which the judge thought that they had.

The appellants have contended that the words "so long as "such inventions as may be embodied shall be protected by "currently valid letters patent in the United Kingdom," attaching themselves to the words dealing with the payment of royalties, enable them to say that no royalties are payable until there are patents. This is flying in the face of the whole tenor of the document, an agreement which contains eighteen clauses, most of which are, in my judgment, specifically dealing with the interim period before letters patent had been granted. The phrase "during the continuance of this agreement" appears frequently from time to time throughout the document; and

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when one follows up the words of each clause one finds that the parties are dealing with what is to be done during the continuance of this agreement—that is to say, from the date thereof—notwithstanding the fact that at the date thereof no letters patent had been granted although it was contemplated that letters patent would be granted, and applications had been put in containing specifications of the articles concerned.

On this question of construction, I am content to base my judgment on the overriding words of clause 4 (b) of the agreement. In order to understand clause 4 (b) I think it is necessary to read 4 (a), which is in these terms: "Forthwith upon the "grant of letters patent upon each of the said applications the "patentee shall grant to the licensee and the licensee shall "accept a sole and exclusive licence with power to grant sub-"licences under such letters patent for the full term thereof "and any prolongation or extension thereof in the terms set forth "in the second schedule hereto or as nearly conforming thereto "as the circumstances and the laws and practice of the respec-"tive countries in which such letters patent have been granted "will permit." Then follows 4 (b), which is the vital subparagraph: "Pending the grant of such licences the licensee "shall be entitled to use and exercise the said inventions and to "make and sell gas lighters and gas refills in such manner and "on such terms as are hereinafter provided as if such licences "had in fact been granted." The subparagraph which I have just read can to my mind mean one thing, and one thing only; the words "on such terms as hereinafter provided" refer forward to clause 6 (a) so as to bring in the liability to pay the royalties as if the licences had in fact been granted. The words used are not apt, in my judgment, to cover the contention of the appellants, which is that all that is intended by this clause was to deal with back royalties; that is to say, they admit that when the letters patent have been granted, the back royalties (or provisions for back payments by way of royalties) would be due to the plaintiff under this clause. But the sensible reading of this subclause seems to me that which the judge accepted and which has been defended in this court; that pending the grant of licences which follow upon the grant of letters patent—which themselves follow and are assumed to be based upon the applications which are scheduled to the agreement—the licensee shall be entitled to use the inventions "on such terms as are herein-"after provided as if the licences had in fact been granted." When one looks at the terms of clause 6 (a) one finds that royalties were to be payable when the patent has been granted and when the licence has been issued, and all that one has to do is to return to 4 (b) and read 4 (b) and to see what payments are to be made by taking the figures from clause 6 (a).

That is indeed what the defendants did. They did not read the words "as if such licences had in fact been granted" as equivalent to "not until they have been granted." Throughout

the period until December, 1954—a period of two years—they acted upon the basis that royalties were payable as if licences had been granted following letters patent; and it was only after that date that they changed their attitude towards the plaintiff, and these proceedings for payment of royalties followed.

I come now to the question of estoppel. That was raised only in reply, after the defendants had specifically pleaded by amendment that royalties were not payable by them in respect of lighters and refills sold by them which were not protected by the claims. It is pleaded in this way: "If the plaintiff should "contend (contrary to the defendants' submission) that royalties "are payable by the defendants in respect of lighters and refills "sold by them which were not protected by the claims of any "granted patent or patents but which embody the inventions of "the complete specifications"—of which the numbers are given —"as published, then the defendants will contend that no "royalties are payable by them because (i) they have not sold "any lighters or refills falling within any claim of any of the "said specifications as published on their true construction." In reply to the amended pleading of the defendants, the plaintiff by amendment pleaded inter alia as follows: "By reason of the "payment by the defendants to the plaintiff of all royalties "payable by the defendants under the said agreement during "the period from the commencement of the said agreement until "March 31, 1954, the defendants induced the plaintiff to believe "that they admitted that the lighters and refills manufactured "and sold by them embodied the inventions the subject of the "said agreement or some of them and that the defendants would "continue to pay royalties thereon. Acting on such belief the "plaintiff did not determine the said agreement, or, alternatively, "seek to grant licences to other manufacturers, on the ground "that the minimum royalties reserved by clause 8 (a) thereof "had not been paid, as he would otherwise have done, but "maintained the said agreement," and so on.

The position then was that the defendants were seeking to prove that the articles which they manufactured did not embody the inventions the subject of the agreement, and it was in connexion with that that the question of estoppel arose. The plaintiff objected to the calling of that evidence and said that the defendants were estopped from so doing by reason of the representations which they had made by their conduct throughout the currency of the agreement in paying the royalties on the footing that they were bound to do so. That, to my mind, as pleaded and as found by the judge, was an estoppel of the kind which is well recognized at common law. I think that as pleaded and as found the estoppel is perfectly sound.

Bowen L.J., in *Low* v. *Bouverie*,[7] said: "Estoppel is only "a rule of evidence; you cannot found an action upon estoppel.

[7] [1891] 3 Ch. 82, 105; 7 T.L.R. 582.

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"Estoppel is only important as being one step in the progress "towards relief on the hypothesis that the defendant is estopped "from denying the truth of something which he has said." Later he said[8]: "an estoppel, that is to say, the language "upon which the estoppel is founded, must be precise and "unambiguous. That does not necessarily mean that the "language must be such that it cannot possibly be open to "different constructions, but that it must be such as will be "reasonably understood in a particular sense by the person to "whom it is addressed."

It seems to me that in this case the representations by conduct, which the defendants made, were perfectly clear and unambiguous, and were representations of fact, namely, that the articles which they made embodied the inventions which covered the subject-matter of the agreement. That, to my mind, is a representation of fact. It matters not that questions of law may be involved and that it may be necessary to construe the agreement in order to find out whether there is an embodiment. That there may be a mixed question of law and fact does not destroy the estoppel. Nor does it matter that questions of patent law may be involved in considering whether or not there is an invention which is covered by a patent. But that there was fact in this case which was relevant appears perfectly clear from the course which the trial took when the estoppel point was taken, because the defendants were then seeking to call evidence to show that the article which they manufactured did not embody the plaintiff's inventions which were covered by the agreement. To my mind there was no question of having to carry the doctrine of estoppel beyond what I might perhaps describe as the ancient field which was being considered by Bowen L.J. in the case to which I have referred.

The only other case to which I need make passing reference is the decision of the House of Lords in *Greenwood* v. *Martin's Bank*,[9] where Lord Tomlin spoke on this subject in the passage which the judge cited. I will not repeat what he said, but I agree with the judge in taking the view that, following upon the instruction to be obtained from that speech, the plaintiff had satisfied all that it was necessary for him to do in the way of establishing an estoppel. There was a representation or conduct amounting to a representation which was intended to induce a course of conduct on the part of the person to whom the representation is made—those last words are a citation from Lord Tomlin's speech—and finally there was a detriment to such person as the consequence of the act. Here there is no doubt (and Sir Lionel Heald has not argued to the contrary) that if there was a representation creating an estoppel, the plaintiff did alter his position by holding to the agreement and by not looking round for fresh licensees.

The only question remaining on the estoppel point is whether

[8] [1891] 3 Ch. 82, 106.

[9] [1933] A.C. 51, 57; 48 T.L.R. 601.

the representation was simply a representation of law or one of fact, or mixed fact and law. If the representation had been a mere representation of law, I should find it difficult to get an estoppel out of it. There are, indeed, passages in various authorities to the effect that if you merely admit liability and say you are wrong in law, no estoppel arises. There may be an agreement for consideration which produces the same result, but in the absence of agreement the mere admission of liability standing by itself does not as a rule produce anything in the nature of an estoppel on the authorities because—as I think Lloyd-Jacob J. put it—it may be taken to be reasonable that each party is in as good a position as the other to satisfy himself on what the law is; and if one party admits he is wrong in law, he is not necessarily estopped from changing his mind hereafter.

Some support for what I have just been saying is to be found in the decision of this court in *Birch* v. *Pease and Partners Ltd.*[10] That was a case where there was an admission of liability, but the case was decided on an agreement; that appears I think quite clearly from the judgments of Scott and Goddard L.JJ. Goddard L.J. drew attention to the consideration for the agreement which existed in that case.[11]

Here I see no difficulty at all in supporting the judgment on this ground as on the other ground, and I would accordingly dismiss the appeal.

MORRIS L.J. The claim that was presented in this action was for a sum of money representing royalties which it was said were due under the terms of the agreement of December 24, 1952. The defendants previously admitted that they owed the sums claimed. With their letter of December 23, 1954, they sent a detailed statement which they said was in respect of royalties paid and payable up to November 30, 1954. They never paid, and so the action was brought.

By their defence as originally drafted the principal point that the defendants took was a point that they said arose by reason of clause 6 (a) of the agreement. The concluding words of clause 6 (a), to which I must later refer, are "so long as such "inventions as may be embodied shall be protected by currently "valid letters patent in the United Kingdom." The defendants, in reliance on those words, pleaded that there had at no time been any currently valid letters patent, or any letters patent at all, subsisting in the United Kingdom; and so they said, by paragraph 4 of their defence: "No royalties are or have ever "been payable by the defendants under the agreement." They also counterclaimed for a sum of nearly £7,000, that sum being the amount of royalties that they had paid to the plaintiff. At some stage, that counterclaim was abandoned.

[10] [1941] 1 K.B. 615; 57 T.L.R. 361; sub nom. *Pease and Partners* v. *Birch* [1941] 1 All E.R. 343.

[11] [1941] 1 K.B. 615, 636.

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The matter came before Lloyd-Jacob J., who gave a preliminary judgment dealing with the construction of the agreement. After that preliminary judgment there was a further hearing, and in the meantime the defence was amended. By the amended defence, the defendants said, in effect, that they had not sold any lighters or refills falling within any claim of any specification referred to in the agreement. They also pleaded certain points as to amount, about which we have heard nothing. The amended reply to that amended defence raised the question of estoppel.

It seems to me that it is logical to approach the matter by considering first of all certain questions on the construction of the agreement, and in particular to consider whether the point taken by the defendants is a valid point or not. Shortly stated, it is that nothing was payable under the agreement until there were inventions that were protected by currently valid letters patent in the United Kingdom.

It is necessary to refer to some of the clauses of the agreement in order to test and examine this main submission which the defendants advanced. The first recital to the agreement was that the patentee had made certain inventions. The defendants were, therefore, by that recital to their agreement, acknowledging that the plaintiff had made certain inventions, and it is only reasonable to suppose that the defendants knew what those inventions were. They certainly had every opportunity to know. The third recital shows that the right that was granted by the patentee, the plaintiff, was a right to exploit the inventions and that it was a right to exploit them throughout the world on the terms of the agreement.

It seems to me that there are many indications in the agreement which support the view that not only was the agreement at once operative—for I think that is abundantly clear—but that it was to be at once operative so far as the payment of royalties was concerned.

[His Lordship considered the construction of a number of clauses in the agreement, and continued:] The result was that the defendants were entitled to use and exercise the inventions, and were entitled to make and sell gas lighters and gas refills on the terms of the agreement, and as if licences had in fact been granted. That being so, it seems to me that the plaintiff was entitled to royalties if he proved the facts of his case.

The plaintiff accordingly had to prove his case and establish his facts. He had to show that articles had been sold which had embodied the invention. He would get 6d. for every gas lighter embodying his inventions, or any of them, and he would get 2d. for every gas refill embodying his inventions, or any of them. But the plaintiff might not in the ordinary course know how many lighters and refills had been sold. So the agreement provided for that matter. Under clause 6 (b) there was an obligation to send a full statement as to the manner in which the royalties were calculated. Such statement would include a

statement as to the number of the articles sold. Furthermore, there was the obligation in clause 7 of the agreement to keep proper books, which were to be subject to inspection.

The defendants in the first place made a very clear admission of the amount that was payable by them. They had in a letter of November 30 written as follows: "We are enclosing a state-"ment which we have today received showing the royalties due "for the six months ended September 30, 1954." With their December letter, they sent a statement showing what had happened in the past and the amount then payable. That statement showed that the defendants had recorded the numbers of lighters sold and the numbers of refills sold. The defendants had first paid the £1,000 on account for which the agreement provided: they had sent a cheque on June 23, 1953: another one on October 28, 1953: a further cheque on the same date: another cheque on June 11, 1954: and another cheque on that same date. The statement recorded the number of lighters and refills sold in the eight months to November 30. I do not gather that there is any withdrawal by the defendants in regard to the number of the articles they had sold.

It is at this stage that the plaintiff refers to what was done in the past. There was much discussion by counsel as to the results of conduct which induces a belief that rights will not be exercised. The position in such a case may be governed by the principle of equity expressed in *Hughes* v. *Metropolitan Railway Co.*[12] and described by Bowen L.J. in *Birmingham and District Land Co.* v. *London and North Western Railway Co.*[13] Bowen L.J. said: "if persons who have contractual rights against others "induce by their conduct those against whom they have such "rights to believe that such rights will either not be enforced "or will be kept in suspense or abeyance for some particular "time, those persons will not be allowed by a court of equity "to enforce the rights until such time has elapsed, without at "all events placing the parties in the same position as they were "before." But here we are not concerned with any situation where on equitable principles there is to be a disallowance of rights. It seems to me that here the plaintiff is enforcing his rights, and in doing so he is using the principle of estoppel to prove his case.

What was said in *Low* v. *Bouverie*[14] is of direct application to the facts of this case. Bowen L.J. said: "Estoppel is only "a rule of evidence; you cannot found an action upon estoppel. "Estoppel is only important as being one step in the progress "towards relief on the hypothesis that the defendant is estopped "from denying the truth of something which he has said."

Reference has been made to the words of Lord Tomlin in the *Greenwood* case.[15] In *Maclaine* v. *Gatty*,[16] Lord Birkenhead

[12] (1877) 2 App.Cas. 439.
[13] (1888) 40 Ch.D. 268, 286.
[14] [1891] 3 Ch. 82, 105.
[15] [1933] A.C. 51, 57.
[16] [1921] 1 A.C. 376; 37 T.L.R. 139.

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said [17]: "Where A has by his words or conduct justified B in "believing that a certain state of facts exists, and B has acted "upon such belief to his prejudice, A is not permitted to affirm "against B that a different state of facts existed at the same "time. Whether one reads the case of *Pickard* v. *Sears*,[18] or "the later classic authorities which have illustrated this topic, "one will not, I think, greatly vary or extend this simple "definition of the doctrine."

In my judgment, that applies to the facts of this case. The claim here is for money due down to November 30, 1954. The plaintiff says: "You have sold 116,000 lighters and 506,000 "refills which embody my inventions. You at all times down "to the end of 1954, either expressly or impliedly, stated that "you had used and were using my inventions. You told me the "numbers of the lighters and the refills which you had made "which embodied my inventions, and you paid me on that basis." I think, therefore, that the plaintiff can say that the defendants, by words and conduct, made the representation that their lighters and refills embodied his (the plaintiff's) inventions. Secondly, I think that he can say that it was made in such a way that he acted upon it. Thirdly, I think that the plaintiff can say that he acted on it to his detriment, because he refrained from seeking another licensee and he refrained from exploiting his invention.

The judge was satisfied in regard to the issues of fact. He said [19]: "I have heard Mr. Lyle-Meller in the witness box, and "he has told me that had he any reason to suppose that the "obligation of the defendants as a consequence of this licence "was to cause them to manufacture and distribute lighters and "refills upon which no royalty was payable, he would have "desired to exploit his inventions by seeking another licensee "or other licensees. Indeed, the agreement contains provision "whereby if the royalties payable under it do not reach the "specified amount he is to have freedom so to exploit his inven-"tion. I see no reason whatever to doubt the evidence he "gave, which I accept as evidence of truth, that having regard "to the payment of royalties by the defendants in respect of this "agreement he refrained from seeking alternative methods of "exploiting his invention and that, if it were now held that in "so doing he had rendered himself unable to procure any "remuneration from the exploitation of his invention, that would "plainly amount to a detriment to him." I think that the way in which the judge approached the matter as illustrated by that passage was entirely correct.

The plaintiff can, therefore, say that this rule of estoppel prevents the defendants from asserting that the articles which they sold did not embody the plaintiff's inventions. It seems to me that the defendants were themselves in the best position to know. It was really a question of fact. Had the case had to

[17] [1921] 1 A.C. 376, 386.
[18] (1837) 6 Ad. & El. 469.
[19] (1955) 72 R.P.C. 307, 317.

proceed further before the judge the admission of liability, though later retracted, might have had some evidential value. But it seems to me that in common fairness, which lies at the root of the application of the principle of estoppel, the defendants ought not in this case to be heard to say that the articles which they sold, the numbers of which they presumably still admit, did not embody the plaintiff's inventions. I would dismiss the appeal.

Appeal dismissed.
Leave to appeal refused.

Solicitors: *Lewis & Lewis and Gisborne & Co.; Herbert Baron & Co.*

F. R. D.

[MANCHESTER ASSIZES.]

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[1954 U. No. 6533.]

Landlord and Tenant—Repairs—Covenant—Breach—Notice—Covenant to keep structure in repair — Breach existing at date of lease — Implied condition of notice of want of repair.

Landlords covenanted to keep in good tenantable repair the roof, main structure and outside walls of a shop leased to the plaintiffs in February, 1953, for a term of five years. In June, 1953, the plaintiffs themselves carried out limited repairs to make safe the floorboards of a store room on the ground floor at the request of the local authority. On November 10, 1953, while the shop manager was standing on this floor it gave way and he was precipitated therefrom into the basement whereby he sustained serious injuries for which he was compensated by the plaintiffs. No notice of want of repair had been given to the landlords. In an action by the plaintiffs for breach of covenant in which they claimed an indemnity from the landlords to cover the compensation and the costs which they had paid to the shop manager:—

Held, that although the landlords' covenant to keep in repair included a duty to repair any defect that existed when the premises were let, such obligation did not arise until they had notice thereof; and that as the landlords had not been given notice of the defect and the plaintiffs had not proved that they had actual knowledge of it, they were not in breach of their covenant.

Dicta of Lord Buckmaster and Lord Sumner in *Murphy* v. *Hurly* [1922] 1 A.C. 369; 38 T.L.R. 386 applied.

Quaere whether the landlords would have been liable if they had had actual knowledge at the time of letting.

[Reported by JOHN WARD, Esq., Barrister-at-Law.]

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ACTION.

The following statement of facts is taken substantially from the judgment. By a lease dated February 5, 1953, the defendant company let to the plaintiff company a shop and premises at 244, Regent Road, Salford, for a term of five years. The lessor covenanted to keep the roof, main structure and outside walls of the demised premises, except the glass windows thereof but including boundary walls, in good and tenantable repair.

Before the lease was entered into there had been the usual negotiations between the parties, and the plaintiffs' representatives had inspected the premises to see if they would be suitable. A day or two after February 5 the plaintiffs entered into possession for the purpose of putting some fittings, including new shop windows, into the premises. When the fittings had been arranged to their satisfaction they took in their stock-in-trade, and on March 29 opened their business.

On the ground floor towards the back of the shop there was a small room, described as a store room, in the centre of which there was on the floor a metal plate which had apparently been put there by way of repairing some damage or defect in the floorboards. An inspector of the local authority had advised or required that this plate should be removed and the floorboards properly repaired, and in June the plaintiffs—although they might have called upon the defendants, their lessors under the lease to do so—employed a builder to take up the metal plate and insert portions of new floorboards to repair the hole. This was done and business continued.

On November 10, 1953, Mr. Morehen, the manager of the shop on behalf of the plaintiffs, stood on the floor of the little store room which collapsed under him, causing him to fall and suffer injuries. The cause of the floor's collapse was discovered by an architect and surveyor who examined the fall of the floor a week or two after the accident. He discovered that the joists of the floor were all very badly affected by dry rot at the point where they entered the walls, and he was surprised, having regard to the advanced state of decay of the joists at those points, that the floor had stayed up as long as it had. He observed that, while there was no sign that anything had ever been done to support the floor of this small store room, in other parts of the basement props had been placed under the ground floor with what were called padstones—that is to say, pads of timber—between the top of the posts and the bottom of the joists. These props had obviously been in position for a long time, because many of the pads of timber at the top of the posts were themselves in a rotten state.

The plaintiffs were advised that there was a legal liability upon them to compensate Mr. Morehen for his injuries, and his claim was compromised by a payment of £2,000 and 50 guineas costs, amounting to £2,052 10s. in all.

The plaintiffs alleged that the defendants, as lessors, were in

breach of their covenant to keep the main structure of the premises in good and tenantable repair, and that by reason of their failure to do so the plaintiffs had been called upon to pay damages and costs to their manager; and they sought to recover from the defendants the amount of such damages and costs.

Fenton Atkinson Q.C. and *W. D. Hodgson* for the plaintiff company.

N. J. Laski Q.C. and *Joseph Zigmond* for the defendant company.

The following cases were cited in the argument: *Luxmore* v. *Robson and Another* [1]; *Vyse* v. *Wakefield* [2]; *Hart* v. *Windsor* [3]; *Payne* v. *Haine* [4]; *London and South Western Railway Co.* v. *Cyril Flower and Others* [5]; *Manchester Bonded Warehouse Co.* v. *Carr* [6]; *Hugall* v. *M'Lean* [7]; *Walker* v. *Hobbs & Co.* [8]; *Torrens* v. *Walker* [9]; *Melles & Co.* v. *Holme* [10]; *Griffin* v. *Pillet* [11]; *Morgan* v. *Liverpool Corporation* [12]; *Bottomley* v. *Bannister* [13]; *Summers* v. *Salford Corporation* [14]; *McCarrick* v. *Liverpool Corporation* [15]; *Edler* v. *Auerbach.* [16]

GLYN-JONES J. I am grateful to counsel for the help they have given me in this case, which raises a point in the law of landlord and tenant upon which there appears to be no precise and binding authority. [His Lordship stated the facts, and continued:] The plaintiff company say that the defendant company, as lessors, are in breach of the obligation put upon the company by the covenant in the lease to keep the main structure in good and tenantable repair. Unquestionably, the joists of the floor are part of the main structure and the covenant applies to them. Looking at the language of the covenant and no further for the moment, Mr. Atkinson, for the plaintiffs, says that the lessors had covenanted to keep these joists and the floor which rested upon them in good and tenantable repair, that they were not in good and tenantable repair and that that is why the accident happened and why the plaintiffs have been called upon to pay out this sum in damages, and that the plaintiffs should recover from the lessors the amount of damages and costs which have been paid to Mr. Morehen.

A number of issues are raised in the pleadings, but only one, or perhaps two, are before me. It was very rightly conceded

[1] (1818) 1 B. & Ald. 584.
[2] (1840) 6 M. & W. 442.
[3] (1844) 12 M. & W. 68.
[4] (1847) 16 M. & W. 541.
[5] (1875) 1 C.P.D. 77.
[6] (1880) 5 C.P.D. 507.
[7] (1885) 1 T.L.R. 445.
[8] (1889) 23 Q.B.D. 458; 5 T.L.R. 640.
[9] [1906] 2 Ch. 166.
[10] [1918] 2 K.B. 100.
[11] [1926] 1 K.B. 17.
[12] [1927] 2 K.B. 131; 43 T.L.R. 146; 91 J.P. 2; 71 S.J. 35; 25 L.G.R. 79.
[13] [1932] 1 K.B. 458; 48 T.L.R. 39.
[14] [1943] A.C. 283; 59 T.L.R. 78; [1943] 1 All E.R. 68.
[15] [1947] A.C. 219; 62 T.L.R. 730; [1946] 2 All E.R. 646.
[16] [1950] 1 K.B. 359; 65 T.L.R. 645; [1949] 2 All E.R. 692.

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by Mr. Laski, for the lessors, that the plaintiffs were under a legal liability to compensate Mr. Morehen, that the compensation paid was reasonable and that the loss suffered by the plaintiffs in having to pay that compensation is a consequence of the breach by the lessors of this covenant, assuming that there has been any breach. There was at one time a suggestion that this floor fell because it was overloaded by the plaintiffs, but that suggestion was withdrawn before the hearing began.

The question for me, then, is whether or not the lessors are in breach of the covenant. As I have said, Mr. Atkinson's argument is that on the face of the covenant it is quite obvious that the lessors covenanted to keep the floor in good and tenantable repair, that it was not in good and tenantable repair and that therefore there is a breach. Now to that Mr. Laski replies that for a very long time—certainly since *Makin* v. *Watkinson* [1]—there has had to be read into a covenant by a lessor to keep premises in repair an implied condition that the lessor shall have notice of the want of repair before he can be called upon, under the covenant, to make it good.

Mr. Laski, I think, goes so far as to argue that every covenant by a landlord to keep the demised premises in repair must be read as if there were imported into it in unqualified terms an absolute provision that the landlord's obligation is not to have effect unless and until notice has been given to him by the tenant of the defect. This, I think, goes too far.

I bear in mind what was said in the speeches in the House of Lords in *Murphy* v. *Hurly* [2] to this effect: that the reason for the condition that the landlord must not be held liable unless he has had notice is that, since he is out of possession of the premises and the tenant is in possession of them, it would be wholly unreasonable, and indeed unrealistic, to hold the landlord liable for not having effected repairs if he did not know and could not know that the repairs needed doing. Certainly Lord Buckmaster and Lord Sumner, in their speeches in *Murphy* v. *Hurly*,[2] indicate that the principle laid down in *Makin* v. *Watkinson* [3] is not an absolute and unvarying rule such that every covenant by a landlord must be qualified by a proviso that he is not obliged to repair unless and until he has had notice from the tenant of the want of repair.

Lord Buckmaster, for instance said [4]: "The principle upon "which notice is required to be given to a lessor requiring him "to repair demised premises in accordance with his covenant "before proceedings are taken to obtain damages for the breach "is not inherent in the relationship between landlord and tenant. "The doctrine depends upon the actual facts existing in each "case and upon the consideration whether the circumstances "are such that knowledge of what may be required to be done

[1] (1870) L.R. 6 Ex.Ch. 25.
[2] [1922] 1 A.C. 369; 38 T.L.R. 386.
[3] L.R. 6 Ex.Ch. 25.
[4] Ibid. 375.

" to comply with the covenant cannot reasonably be supposed to " be possessed by one party while it is by the other." Lord Sumner said [5]: " The rule requiring a notice of want of repair " by the tenant to the landlord, in the case of an ordinary land- " lord's repairing covenant for dwelling-houses, warehouses and " similar structures, is well settled, and no-one proposes to alter " or restrict it. The nature and conditions of this rule are, how- " ever, equally well settled. As a rule of construction it reads " into the covenant words—namely, ' upon notice '—which are " not there, its application naturally depends on the existence of " those strong circumstances, of necessity, which alone justify the " implication of a condition upon an obligation, which is itself " expressed unconditionally."

What Mr. Atkinson says to me on that is that, in respect of defects which existed at the time when the term began, the facts which, as a general rule, render necessary the implication into the landlord's covenant of a provision that notice of the defect must be given to him do not exist, because the landlord was in a perfectly good position to know what the state of the premises was at the time when the letting took place and if, being in a position to know, he chooses to covenant that he will keep the place in repair, he is bound by his covenant and there need not be imported into the covenant any condition requiring notice to be given to him if the defect is one which was in existence when the lease began. I suppose, although Mr. Atkinson did not put it exactly in this way, that he would argue that since the landlord at the time of letting is in a position to know, if he chooses to make the necessary inquiry, what defects are present, then, if he wants to exclude liability in respect of them there would be nothing to prevent his framing his covenant so as to exclude his liability to repair such defects either without notice or at all. That, I think, is the way in which Mr. Atkinson puts his argument.

I have, perhaps, begged the question whether or not a landlord is liable to put right, under a covenant to keep in repair, defects which existed at the time of the letting, which is sometimes expressed as being an obligation not only to keep in repair but also to put into repair. It is, of course, well settled, as is shown by the many cases which have been cited to me, that where a landlord undertakes to keep premises in repair he may not, when a notice is given to him of a defect, say: " That defect " existed at the time when I let the premises. If you make me " repair that, you will, in effect, be making me put the premises " into repair and I have not covenanted to do so." If he has covenanted to keep premises in repair and notice is given to him of a defect, he is bound as a rule to repair that defect, whether it existed at the time of the original demise or has come since into existence.

[5] Ibid. 387.

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That, in my opinion, is the sense in which a covenant by a landlord to keep in repair may be said to be a covenant to put into repair, and I reject Mr. Atkinson's argument that, merely because a covenant to keep in repair has been construed as requiring the landlord to put the premises into repair, in the sense that he is as well liable to repair defects which existed at the beginning of the lease as defects which have subsequently come into existence, the obligation to put the premises into repair by curing any defect existing at the start of the term rests upon the landlord at the moment the term begins to run, whether he has notice of the existence of the defect or not and even whether the defect is apparent or concealed. This means, I think, that Mr. Atkinson fails in his main contention. I am of opinion that, whether the defect existed at the beginning of the tenancy or not, the obligation of the lessors to repair it did not come into existence until they had notice, and it is conceded that no express notice of this defect was ever given to the lessors.

A second issue arose in the present case, namely, whether or not the lessors actually knew of this defect at the time of the letting. When first the suggestion was made by Mr. Atkinson that I ought to find that the lessors know of the defect, Mr. Laski objected—rightly, in my view—that there was no plea, of actual knowledge of the defect by the lessors, on the pleadings. I therefore gave Mr. Atkinson leave to deliver a reply, in which he answered the lessors' defence that they had had no notice by alleging, in effect, that they had actual knowledge. Mr. Atkinson—again, as I think, quite rightly—conceded that it was not enough for him to show, for this purpose, that the landlord had the means of knowledge, but that nothing short of actual knowledge would take the place of notice. I do not think that anything short of proof by the tenant of actual knowledge by the landlord can relieve him of the necessity of proving that he gave notice to the landlord before he can hold the landlord liable for breach of the covenant to repair. Having allowed witnesses for the plaintiffs to be recalled and cross-examined by Mr. Laski, and having heard Mr. Rose, a witness called by Mr. Laski, I have no hesitation in coming to the conclusion that Mr. Atkinson has failed to establish actual knowledge by the lessors of the state of these joists.

Whether or not, in an action for negligence brought by some person who had been injured as a result of the collapse of this floor, either against the lessors at the time when they occupied, or against the lessees at the time when the lessees occupied, the plaintiff would have succeeded in proving that the state of the floors ought to have been known to the occupier is another matter. If I had had that question to decide, I might have had no difficulty in deciding it, but, as between lessors and lessees, I can see no reason why I should assume that the lessors let this building with knowledge of the defect, any more than I should assume that the lessees took it with knowledge of the defect. Neither of them,

in my view, took the slightest trouble to find out whether or not the floor of this comparatively old building was in such a state that it was safe to store furniture on it. However, to say that both of them failed to make the inquiry which, perhaps, they should have made, is not to say that either of them had actual knowledge of the defect, which any sort of proper examination would have revealed.

[His Lordship referred to the evidence, and continued:] Since I am not satisfied that Mr. Atkinson has proved actual knowledge, it becomes unnecessary for me to consider what my decision in this case would have been had actual knowledge been established.

Judgment for the defendants.

Solicitors: *James Chapman & Co.; Laurence Marks.*

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UNIPRODUCTS (MANCHESTER) LTD. *v.* ROSE FURNISHERS LTD.

Glyn-Jones J.

[COURT OF APPEAL.]

* WALDON *v.* WAR OFFICE.

[1954 W. No. 4188.]

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1955 *Dec.* 1.

Singleton, Jenkins and Parker L.JJ.

Judicial Precedent—Damages—Guidance from awards in previous cases—Personal injuries—Whether counsel should cite amounts awarded in other cases where similar injuries sustained—Judges' discretion.

The plaintiff sustained a serious accident which resulted in the lower half of his body becoming paralysed. At the hearing of his claim for damages for personal injuries his counsel proposed to refer to previous decided cases to show the amounts which had been awarded by other judges in similar cases. Counsel for the defendants objected:—

Held, that, although a judge is not bound to hear reference to such cases, he may do so. He has a discretion to decide whether in his view the reference to such other cases would or would not assist him.

Per Parker L.J. I think that counsel can be trusted only to refer to other cases very sparingly, bearing in mind that each case depends upon its own facts and only rarely can another case be of real assistance to the judge.

Rushton v. *National Coal Board* [1953] 1 Q.B. 495; [1953] 1 W.L.R. 292; [1953] 1 All E.R. 314 applied.

APPEAL from Lloyd-Jacob J.

On August 18, 1954, a lorry and trailer belonging to the defendants and driven by their agent or servant, collided with and overturned a motor-car in which the plaintiff was travelling as a passenger. The plaintiff sustained severe injuries resulting in the complete paralysis of the lower half of his body. The defendants

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

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admitted liability for the accident, but contested the amount of damages. Counsel for the plaintiff asked that he might be allowed to refer the judge to decisions of other judges and of the Court of Appeal in cases of a like nature, but Lloyd-Jacob J. treated the request as a preliminary issue, and held that it would not be right for him to permit any reference to the quantum of damages awarded in similar cases. He awarded the plaintiff £12,875 damages, which included £60 agreed special damages. The plaintiff appealed.

Gerald Gardiner Q.C. and *J. L. Elson Rees* for the plaintiff.
Rodger Winn for the respondents.

The following cases were cited in argument: *Rushton* v. *National Coal Board* [1]; *Roe* v. *Ministry of Health* [2]; *Davies* v. *Fraser and Chalmers Engineering Works* [3]; *Smith* v. *Alexander Findlay & Co.* [4]; *Benham* v. *Gambling* [5]; *Bird* v. *Cocking & Sons* [6]; *Bailey* v. *Howard.* [7]

SINGLETON L.J. This is an appeal by the plaintiff, Peter Leslie Waldon, who was very badly injured on August 18, 1954. He was a passenger in a motor-car; a War Office lorry and trailer sought to pass the car in which he was and an accident took place. The plaintiff brought this action against the War Office, who accepted responsibility for the accident, and the only question which had to be determined was the amount of damages to which the plaintiff was entitled.

That is often an extraordinarily difficult question. The desire of the judge of first instance is to do what is right and fair between the parties so that a person who is injured may have the right sum of damages, in so far as damages can compensate for an accident of a serious character.

At the time of the accident the plaintiff was 28 years old. He had been apprenticed in his youth to a firm of engineers with whom he had remained until he was 17 years old. Thereafter he spent four years in the Navy. He returned from the Navy and worked again as an engineer repairing, mostly, Government instruments. He was with the firm for about five years and then he obtained employment with R. Hoe & Crabtree, Ltd., engineers, and at the time of the accident he was earning £9 15s. a week. He had very bright prospects. A director of the company described him as "one of the bright young men employed "by the company" he said that he had a very considerable chance of a rise very shortly to 10 guineas a week. Indeed, he

[1] [1953] 1 Q.B. 495; [1953] 1 W.L.R. 292; [1953] 1 All E.R. 314.
[2] [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131.
[3] The Times, February 8, 1955.
[4] C.A., 1954, No. 147.
[5] [1941] A.C. 157, 160, 161, 163; 57 T.L.R. 177; [1941] 1 All E.R. 7.
[6] [1951] 2 T.L.R. 1260.
[7] [1939] 1 K.B. 453; 55 T.L.R. 249; [1938] 4 All E.R. 827.

had even better prospects than that, for it was pointed out that in that company the directors had all started in the same sort of way that the plaintiff had done, and although it was not said that he would become a director, there were possibilities in his employment to which any young man might look forward. A director is paid a considerable sum of money. Apart from that, I should judge that there was every prospect of considerable increase in the plaintiff's earnings in years to come.

He met with this accident which resulted in paralysis of the lower half of his body. There was an injury to the spine. A description of the injuries contained in the statement of claim is amply borne out by the evidence. "Fracture (dislocation) of the "12th dorsal vertebra resulting in a total transverse spinal syn-"drome below the 8th thoracic segment. Total paralysis of both "lower limbs. Total paralysis of lower abdominal muscles. Total "loss of sensation below the 8th thoracic segment. Total "paralysis of bladder and bowels."

The result is that the plaintiff is unable to walk; he has to be helped by his wife in almost everything except that he has the use of his hands and arms. Over and above that, he has suffered great pain, and it appears from the evidence given that the pain will persist. He and his wife have one son who is quite young. They were looking forward to at least one more child. That has become impossible by reason of the condition of the plaintiff, and indeed the whole life of the plaintiff is changed. He will never be able to work again. He is trying to do something with his hands in the way of clock repairing. Whether he will earn anything by that I should think it doubtful, but I will assume that he may earn something. He had a serious chest affection for some time, but that improved under treatment. None the less, he is just a wreck who can do nothing for himself.

It is impossible in such a case for anyone to say what is the right sum to award as damages. But the effort has to be made. The case came before Lloyd-Jacob J. on July 25, 1955, and the judge awarded the plaintiff the sum of £12,875. The appeal of the plaintiff is directed to showing that, on the facts, the amount is too small, and this court is asked to allow the appeal and to increase the amount of damages payable to the plaintiff.

The court does not readily allow an appeal from a judge of first instance on a question of damages for reasons which are well known; but if it be shown that the judge has made some mistake as to the position in law, or if he has made a wholly erroneous estimate of damages, the court can interfere.

One point of law is raised. Mr. Gerald Gardiner, appearing for the plaintiff before Lloyd-Jacob J., raised a question of some interest. He asked that he might be allowed to refer the judge to decisions of other judges and of this court in cases of a like nature in order to give some guidance as to the amount of damages which should be awarded. Mr. Rodger Winn, appearing for the defendants, objected to any such material being placed

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before the judge, and the judge, who dealt with the question as a preliminary issue, gave judgment upon that question. He said that Mr. Gardiner had referred him to the decision of this court in *Rushton* v. *National Coal Board*,[1] and in particular to certain words of Birkett L.J. Lloyd-Jacob J. said: "As I understand "the language, it is in main directed to a consideration of those "cases in the Court of Appeal, and, indeed, the language of "Birkett L.J., in which he says 'when, therefore, a particular "'matter comes for review one of the questions is, how does this "'accord with the general run of assessments made over the "'years in comparable cases?', is to my mind apt to indicate "the practice in the Court of Appeal itself. I am disinclined to "accept the view that the Court of Appeal would impose upon "judges of first instance an additional burden to that which they "must necessarily bear in assessing compensation in this type of "case by requiring them to do other than considering such cases "as containing the principles upon which the assessments are "based." The judge's decision is in these words: "I do decide "that in the circumstances it would not be right for me to permit "Mr. Gardiner to refer to the quantum of damages awarded in "similar cases. If I am wrong about that, he will be able to get "the matter put right hereafter."

I am sure the judge appreciates that this court is always most anxious not to put any additional burden upon judges of first instance. They have quite enough to do. The decision of the Court of Appeal to which reference was made drew attention to the desirability of approaching, as far as possible, something in the nature of a standard in certain classes of injury so as to help judges of first instance as much as possible. No one knows what is the right sum of damages in any particular case, and no two cases are alike.

One of the cases to which Mr. Gardiner desired to direct the attention of the judge was a decision of Barry J. in a case of the same kind as this, a case of paraplegia, in which Barry J. had given £18,675 damages to a man 35 years old, and who was earning £12 10s. a week. There was an appeal in that case, and the Court of Appeal expressed the view that the damages were on the high side, but that the assessment did not err to such an extent that it was the duty of this court to interfere, and the appeal was dismissed. I think that reference to that case would have been of help to the judge. The circumstances were similar to those in this case, though they were not quite the same. There were two or three other cases to which Mr. Gardiner would have referred the judge if he had been allowed, but as objection was taken and the judge ruled against the plaintiff's submission, he had not the benefit of hearing any of those cases. I do not consider that a judge is bound to hear such evidence. If counsel on one side or the other tenders such

[1] [1953] 1 Q.B. 495; [1953] 1 W.L.R. 292; [1953] 1 All E.R. 314.

evidence or such material, it is for the judge to say whether, in his discretion, he thinks it will be of help to him or not. He may know all the recent cases upon the subject, or most of them. He may not desire to complicate the issue, for it does mean some complication if that material is received. On the other hand, he may think that it would be of help to him.

The danger of such material is that it is apt to take the mind of the tribunal from the particular facts of the case on which it is to give a decision. It would not be right that a claim for damages for personal injuries should open by counsel for the plaintiff saying: "My Lord, I have here 15 decisions of "judges in the last five years upon an injury like this one," say, the loss of a leg; and for counsel on the other side to say: "I have 25 similar decisions," the one quoting the high ones and the other quoting the low ones. That would not be of help to any judge. But in this case there was an injury of a kind which is not common. There have been decisions upon it and one of them reached the Court of Appeal, and there is a judgment given by the Court of Appeal upon it. I am inclined to the view that it would have been of help to the judge, and if counsel on the one side desired the judge to look at the judgment he might well have done so. A judge in assessing damages draws upon his own experience. Where does he get that experience? From knowledge of other judges' decisions as to amount; from knowledge of what is said in this court and in the House of Lords; and from his ordinary experience in life. It would not be wrong for counsel appearing in such a case to say to a judge: "I have here the report of a decision in the Court of Appeal on "an appeal on damages in a case very like this one; and I have "another case, a decision of Mr. Justice 'X,' a case again "very like this one. Would your Lordship like to have them?" The judge could not be wrong if he said: "Yes, I should like that "information. I should like to know what the Court of Appeal "said and I should like to know how Mr. Justice 'X' dealt "with this subject, for it is one of which no one has great "experience."

The receiving of material of this kind by a judge ought to happen seldom. The question is one for the discretion of the judge, to be exercised sparingly, as I think. I would add this. All that I have said upon this subject is directed to the case of a judge sitting alone. It may be said: "Why should a judge "have something before him which a jury would not have?" And I am not sure that there is any good reason, except, perhaps, this. If jurors, new to the task, are called upon to assess damages in a case such as this, the more one can keep their minds directed to the actual issues the better. If numbers of other cases are mentioned in which damages have been given, the danger is confusion or complication, and I would not encourage that—and there is a danger of it—in a jury case. The judge realizes that his task is to assess damages in the particular case

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before him, and upon the evidence before him and upon nothing else. If he can get help from decisions of other judges, or from this court, I am inclined to think that in his discretion he might well accept it. It is for him to judge.

It was with that in view that the remarks of Birkett L.J. in *Bird* v. *Cocking & Sons Ltd.*,[2] which was cited in *Rushton* v. *National Coal Board*,[3] were used, and with the desire which everyone has had for years to get as near as one can towards some form of scale or regularity in assessing damages.

As to the facts of this case. There are three main points to be considered in the assessment of damages. One is the loss of earnings. The plaintiff was 28 years old when the accident happened and was earning just under £10 a week; his prospects of increased earnings were good, and he might have risen to a very much better position as time went on. He appeared to have a long working life before him until he was injured. The loss of earnings is cause for a considerable sum by way of damages.

The next, and a most important one, is the suffering which the plaintiff has undergone, and which he will undergo; and the loss of the "amenities of life." He cannot enjoy himself as he did before. He can do nothing. For a man of 28 to suffer that is indeed grievous.

Again, he has to have someone to look after him, and will so require all his days and all his nights, to tend to him and to do things he cannot do for himself. That is done by his wife now. She is young. He is not under the necessity of paying someone a large amount each week which would have to be paid if his wife did not do it. It ought not to be forgotten that his wife is doing it. She does not ask for payment, but her hands are tied when she is doing it, though I do not suggest that there should be a sum awarded which would cover the cost. I feel that one has to bear in mind that his wife is helping now and that, if by chance for one reason or another she ceased to help him, if she died or if she was ill through doing too much or from some other cause, he would need help. That is the third point which should be taken into consideration.

Apart entirely from the question of law which was raised, it appears to me that the court is confronted with this fact, that the damages awarded by the judge are too low for the injuries suffered. In my judgment, they are so much too low that it is the duty of this court to interfere, though nothing can compensate a man for injuries such as these. I would allow the appeal and increase the amount of damages to the sum of £17,000 in all.

JENKINS L.J. I agree, and although we are differing from the judge I find nothing that I can usefully add to what my Lord has said.

[2] [1951] 2 T.L.R. 1260.

[3] [1953] 1 Q.B. 495.

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PARKER L.J. I also agree. In fitting the figure awarded by this court into any general pattern of awards in the case of paraplegia, I for my part would emphasize two ingredients in this case which may be absent in other cases. One is the age of this man. He was a very young man at the time, aged 28. The second is, that in the accident the injury to his spine was such as to result in a deformity which one does not always get in paraplegia cases, as a result of which the doctors agree he has suffered very considerable pain, and is likely to suffer from it in the future.

So far as the ruling of the judge is concerned, as to whether other cases should be looked at, I would only like to say this. In my view, it would be calamitous if anything that this court said should impose an additional burden on judges of first instance, and particularly on judges on assize. It has been suggested that counsel on either side will come armed in every case of personal injuries with reports or transcripts in regard to other cases. I, myself, do not think that there is any fear of that. I think that counsel can be trusted only to refer to other cases very sparingly, bearing in mind that each case depends upon its own facts, and only rarely can another case be of real assistance to the judge. And secondly, I think that the discretion must always be in the judge himself to decide whether in his view the reference to such other cases would or would not assist him. I agree with the proposed order.

Appeal allowed.

Solicitors: *Evill & Coleman; Treasury Solicitor.*

[COURT OF APPEAL.]

* *In re* B. KARSBERG LTD.

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Nov. 28, 29.
Birkett and Romer L.JJ.

[No. 00606, 1955.]

Company—Winding up—Voluntary liquidation—Petition for compulsory winding up—Opposition by majority of creditors—Whether special circumstances requiring compulsory winding up—Validity of petitioners' debt.

A petition for the compulsory winding up of a company in voluntary liquidation was opposed by a majority, both in value and numbers, of the creditors. The grounds of objection were (1) that the validity of the petitioners' debt was disputed, and (2) that it was desirable that the affairs of the company, which was one of several closely linked companies all of which were in voluntary liquidation, should continue in the hands of the liquidator acting in the voluntary liquidation, because he was acting as liquidator of all the other companies:—

Held, that irrespective of the question whether the petitioners' debt was valid or not, they had not shown any valid reason or

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special circumstances why effect should not be given to the wishes of the majority of the creditors that the voluntary liquidation should continue. It might be that the company's affairs required investigation by the court, but such an investigation could both conveniently and adequately be made in the course of the existing liquidation.

In re Home Remedies Ltd. [1943] Ch. 1; 59 T.L.R. 31; [1942] 2 All E.R. 552 and *In re Campbell Coverings (No. 2)* [1954] Ch. 225; [1954] 2 W.L.R. 204; [1954] 1 All E.R. 222 applied. *In re Northumberland and Durham District Banking Co.* (1858) 2 De G. & J. 357 distinguished.

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

The following statement of facts is taken substantially from the judgment of Romer L.J.

B. Karsberg Ltd. was incorporated in September, 1949, as a private company, with its registered office in London, and with a nominal and issued capital of £10,000. Its objects were to carry on business as manufacturers, importers and exporters, factors, and agents for the sale of and wholesale and retail dealers in carpets, rugs, linoleum, mats, and other floor coverings and other objects set forth in its memorandum of association. The company was one of a group of six associated and closely linked companies, all carrying on business of a similar nature in shops in North London. At the material times all these companies, including B. Karsberg Ltd., were controlled, directly or indirectly, by a Mr. and Mrs. Fredman. They were the directors of B. Karsberg Ltd. On July 12 Mr. Harry Lubbock, F.C.A., and Mr. Philip Fine, F.C.A., A.T.I.I., were appointed directors of this company, at the instance of certain creditors, in place of the Fredmans. On July 15 a debenture was issued to a certain creditor of the company (Messrs. Segal & Berman Ltd.) in order to secure a cash advance which that creditor had made for the purposes of the company. On July 19 Mr. Fine was appointed receiver under that debenture; and on the same day he sent out to the creditors of all the companies in the group a letter which, after referring to the appointment of Mr. Lubbock and Mr. Fine (both of whom are chartered accountants and are partners in a firm of chartered acountants) as the directors, and referring to the above-mentioned debenture, proceeded: "The object of this "letter is to invite you to submit to us immediately full and "detailed particulars of your trading and other transactions with "the above-named companies and any other undertaking with "which Mr. A. Fredman has been connected. We would "emphasize that the action recently taken by" (the company to which the debenture had been given) "has been directed solely "to conserve the assets of the various undertakings concerned "and to ensure that the position which is now under investiga-"tion by us shall not in any way be allowed to deteriorate. The "action has been taken solely for the purpose of protecting all "the creditors concerned, and it is to be hoped that we may

"rely on your full co-operation in the investigation which we "have to undertake and which, from present indications, will be "most complicated. It is proposed to take the necessary steps "for the purpose of putting the companies into liquidation at the "earliest moment and formal notices will reach you during the "course of the next few days."

On the following day, July 20, a petition for the winding up of the company was presented by one Moishe Rokach and one Norman Rokach, who claimed to be creditors of the company for a total sum of £5,350, and on the same day an application was made for the appointment of a provisional liquidator of the company. On July 21 Mr. Lubbock and Mr. Fine resigned from the board of the company and two new directors were appointed to act in their place. On July 25 the application for the appointment of a provisional liquidator came before the registrar, and he made no order on the application upon the receiver giving certain undertakings as to dealing with the company's assets, and so forth. On September 2 there was a meeting of the creditors of this company, duly convened, at which the creditors passed a resolution that the company should go into a creditors' voluntary liquidation (that resolution being passed pursuant to section 293 of the Companies Act, 1948), and Mr. Fine was appointed liquidator. Subsequently, all the creditors of the other companies in the group adopted the same course, and all six associated companies went into voluntary liquidation, Mr. Fine being the liquidator in all those liquidations.

On October 17, 1955, the petition relating to B. Karsberg Ltd. came before Vaisey J., and he made an order that that company should be compulsorily wound up. Fifty-one creditors, representing a total value of over £41,000, out of 56 creditors had opposed the petition. One or two creditors who had given notice to support the petition, including the Inland Revenue Commissioners and some insurance companies, when the petition came on for hearing, expressed their willingness to have a supervision order made under section 311 of the Companies Act. All of the 51 creditors appealed.

By paragraph 5 of the petition: "The company is indebted "to your petitioners in the aggregate in the sum of £5,350, being "as to a cheque drawn by the company in favour of your peti- "tioner Moishe Rokach on the National Bank Ltd. . . . for "£1,350, which cheque on presentation was dishonoured by being "referred to the drawer thereof, and a cheque drawn by the "company in favour of A. B. Kahan otherwise known as M. H. "Kahan on the National Bank Ltd. . . . for £1,350 which cheque "on presentation was dishonoured by being referred to the drawer "thereof, and the burden and benefit of such cheque having been "assigned by deed of assignment dated July 19, 1955, to your "petitioner Norman Rokach and further by an agreement dated "January 27, 1955, made between the company of the one part "and your petitioner Norman Rokach of the other part, the

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" company received from your petitioner Norman Rokach the " sum of £3,100 of which there remains due the sum of £2,650, " for which sum your petitioner Norman Rokach holds post-dated " cheques in respect of which Philip Fine, a director of the " company, has intimated the company's inability to pay these " cheques on their respective dates for maturity. 6. The com- " pany is insolvent and unable to pay its debts. 7. In the " circumstances, it is just and equitable that the company should " be wound up."

In addition to the usual statutory affidavit in support of the petition a further affidavit was sworn by the petitioners in support of their application for the appointment of a provisional liquidator. By paragraph 2 of that affidavit: " The business of the company " is an extensive business and one which would carry a consider- " able amount of stock and involve the turnover of large sums of " money. The goodwill of the company is of considerable value " and would be seriously damaged if not destroyed in the event " of the company's business being hampered, mismanaged or " closed down, or if the large amount of stock required to carry " on the business were depleted."

By paragraph 5 the petitioners said: " The company appears " to be the main company of a number of companies which are " all associated but which carry on different businesses, and we " verily believe that that business of the company is the most " substantial of all the companies and it is therefore essential " that the company's businesses and undertakings shall be pro- " tected. 6. We have caused certain inquiries to be made as a " result of which we find that two alleged substantial creditors of " the company appear to have forced the issue with the previous " directors of the company " (the Fredmans) " and apparently " in fact arranged for the appointment of two of their nominees," namely, Mr. Lubbock and Mr. Fine, as directors of the company.

By paragraph 9 they said: " From further inquiries we have " made we are informed by . . ." Mr. Fine " that there appear " to be no records, stock sheets or other usual company's books " and accounts of the company, and we are informed that it is " suspected that these books and papers were taken away by a " former director of the company, who since the appointment of " the two present directors has disappeared completely together " with his wife."

Mr. Philip Fine put in an affidavit, sworn on October 7, in answer to the petition. After stating that the company (with the other companies) went into a creditors' voluntary liquidation on September 2, 1955, he said: " Prior to the said winding up my " said firm conducted an investigation into the affairs of the " company on behalf of a creditor, and the facts and matters " hereinafter set forth or referred to are matters within my own " knowledge acquired both during the said investigation and as " liquidator as aforesaid. 4. I dispute the allegations set forth " in paragraph 5 of the said petition and deny that the company

" was or is indebted to the petitioners herein or either of them " in the sum of £5,350 in the said petition mentioned or any sum " at all. 5. At all material times the company was one of a " group of private companies . . . which were controlled either " directly or through nominees by " Mr. Fredman and his wife. " 6. The petitioners are unregistered moneylenders and neither of " them has been or is a trade creditor or loan creditor with respect " to the company, nor has either of them been in any way con- " nected with the company or the business thereof. 7. During " the course of many months prior to the said voluntary " liquidation of the company the petitioners (and others including " one M. H. Kahan in the said petition referred to) either jointly " or severally advanced moneys by way of loan to Mr. Fredman " in his personal capacity altogether unrelated to his activities as " a member or director of the company. The said loans were " advanced at unconscionable rates of interest and were utilized " by Mr. Fredman for his own personal use and benefit. 8. Not- " withstanding the fact that not one of the said loans was ever " made to, at the request or for the benefit of the company or is " recorded in any entry whatsoever in the company's books, Mr. " Fredman without any authority, right or power so to do repaid " the said loans and the said interest thereon out of banking " accounts standing in the names of the company, the said " associated companies, the directors thereof and their nominees. " The said accounts were very numerous and, as at present " ascertained, number over 70. The said accounts were brought " into being and operated by Mr. Fredman for his own private " purposes as aforesaid. It appears from the books of the " company that the repayments made to the petitioners by the " company as aforesaid with respect to the said loans are debited " to a loan account with the company in the name of Mr. " Fredman." He then said that the petitioners' alleged loan of £5,350 represented loan transactions of the sort that he had just been mentioning and continued: " neither of the petitioners nor " the said M. H. Kahan ever at any time had any connexion with " the company whether as a loan or trade creditor or howsoever " otherwise. (iii) There is no entry in the books of the company " recording the payment to the company of the said sum of " £5,350, or any part thereof or at all. (iv) That the company " has never been and is not now indebted to the petitioners or " either of them." He went on to say that the petitioners started bankruptcy proceedings against Mr. Fredman, and eventually they withdrew those because Mr. Fredman " consented to a " receiving order being made against him on a bankruptcy petition " brought by another of his creditors. Mr. Fredman was duly " adjudicated bankrupt on September 29, 1955 "; and he ended by repeating the contention that the company was not indebted to the petitioners in the sum which they claimed.

That affidavit elicited an affidavit in reply from the petitioners,

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sworn on October 14, which came to the hands of the company very shortly before the hearing and was not, for that reason (it was said), dealt with by an affidavit in rejoinder. Mr. Moishe Rokach said: "On May 2, 1955, I advanced the sum of £1,350 "as a loan to the above named company. Of the said sum of "£1,350, £1,250 was paid by cheque and the balance of £100 "was paid in cash. The said sums were paid to Mr. Alec Fred- "man and to his wife Mrs. Betty Fredman (formerly Mrs. Betty "Karsberg) who was then a director of the company and was paid "to them as a loan to the company." Then he referred to an agreement under which the company acknowledged that it had received that sum and undertook to repay it on June 6, 1955; and that agreement was signed on behalf of the company by Mrs. Fredman. "At the same time," he said, "she handed to me "a cheque dated June 6, 1955, and drawn on the company's "account with the National Bank Ltd. for the sum of £1,350. "The said cheque was duly presented for payment on June 6, "1955, and was dishonoured"; and he produced the agreement and the cheque. Then he said: "I do not now nor have I ever "carried on business as a moneylender."

Mr. Norman Rokach for himself said that on June 16, 1955, Mr. Moishe Kahan "advanced the sum of £1,350 as a loan to "the above named company. The said sum was paid in cash "and was paid to the said Mr. Alec Fredman and the said Mrs. "Betty Fredman, who was then a director of the company. "8. By an agreement in writing dated June 16, 1955, the above "named company acknowledged that it had received the sum of "£1,350 from Mr. Moishe Hersch Kahan (there described as "Mr. A. B. Kahan) and undertook to repay the same on July 14, "1955. The said agreement is agreed," "signed," presumably, was meant, "on behalf of the company by Mrs. Betty Fredman "under the name of 'B. Karsberg' at the same time handed to "me a cheque drawn on the company's account with the National "Bank Ltd. for the sum of £1,350. The said cheque was duly "presented on July 14, 1955, by the said A. B. Kahan and was "dishonoured." On July 19, 1955, Mr. Kahan assigned the debt of £1,350 to him; and he exhibited the agreement and the cheque, and the deed of assignment. By paragraph 11 he said: "By a "memorandum under seal dated January 27, 1955, the company "acknowledged that it had received from me sums totalling "£3,150 and the company undertook to repay the same to me "in the manner and on the dates therein referred to, and it was "further agreed by the company that if the company should "suffer any act of bankruptcy or insolvency the whole of the "said sum should become immediately repayable. 12. The said "memorandum under seal was signed by the said Mr. Alec Fred- "man and the said Betty Fredman on behalf of the company"; and Mr. Norman Rokach then produced the memorandum, and said, by paragraph 14: "I do not nor have I ever carried on "business as a moneylender."

By paragraph 16 Moishe Rokach and Norman Rokach jointly said: "By a letter dated August 29, 1955, the said Mr. Alec "Fredman informed us that all moneys advanced by us to Mr. "Alec Fredman and Mrs. Betty Fredman were borrowed on "behalf of the above named company and was used for the "benefit of the said company"; and they produced that letter. Paragraph 17 was about the change of directors. By paragraph 18: "On September 2, 1955, a meeting of its creditors was called "by the above named company pursuant to the provisions of "section 293 of the Companies Act, 1948, and at the said meeting "it was resolved that the said company be wound up voluntarily "and that the said Mr. Philip Fine be appointed liquidator of "the company. No notice of the said meeting was given to us "or to either one of us notwithstanding that the petition herein "had been filed."

G. Glynn Blackledge Q.C., *Lindsay Jopling* and *John Woodhouse* for the creditors opposing the petition.

John Vinelott for the petitioners.

In addition to the cases referred to in the judgment of Romer L.J., the following were cited in argument: *In re Rica Gold Washing Co.*[1]; *In re Wear Engine Works Co.*[2]

Birkett L.J. I will ask Romer L.J. to deliver the first judgment.

Romer L.J. This is an appeal from an order which Vaisey J. made on November 4, 1955, for the compulsory winding up of a company called B. Karsberg Ltd. The company opposed the petition, as did also the great majority of the creditors of the company. It is hardly necessary, perhaps, for me to say that it is always with hesitation and diffidence that I differ from the views which Vaisey J. takes, and especially perhaps on company matters, of which he has such great experience; but I have come to the conclusion in this case that the appeal should be allowed, for reasons that I will state.

Certain facts and dates are undisputed. [His Lordship referred to the facts as stated above and continued:] The affidavits and the exhibits (set out above) were the material which was before the judge when he dealt with the petition. We have no notes of any reasons which were expressed by the judge which led him to the conclusion that this company should be wound up, but we have been told that, while he realized the strength of the opposition of the creditors, he thought that the facts as disclosed by the evidence raised a proper case for investigation and a public examination, and he came to the conclusion that it was in the interests of the creditors that there should be a compulsory winding

[1] (1879) 11 Ch.D. 36. [2] (1875) 10 Ch.App. 188.

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up, in the course of which such an examination as he thought was desirable could most efficiently and thoroughly be carried out. But the creditors do not take before us the view, nor indeed did they take the view before the judge, that it was in their interests that a compulsory winding-up order should be made, and it is for that reason that they and the company have appealed.

Mr. Blackledge, for the appellants, put his case in various ways. In the first place, he said that the petitioners' debt is genuinely disputed, on the ground, first, that the petitioners are unregistered moneylenders, and that the loans on which the petition is founded were usurious in character; and, secondly, that in any event the loans, if made, were made to the Fredmans for their personal use and not for the use of the company. As to the first objection, it is, of course, clear that the court will not in general make a winding up order on a disputed debt and will not determine the validity of the debt itself, but will leave the alleged creditor to establish it by proper proceedings. But for my part I feel a difficulty in taking the view that the petition should have been dismissed on the first ground on which Mr. Blackledge relied, because there was a complete conflict of evidence on the affidavits as to whether the petitioners are moneylenders or not. The petitioners have sworn that they are not; and there was no cross-examination on the point.

As to the alleged usurious rate of interest, the matter is only one of speculation, based upon the form which the transactions took and the documents which were before the court. It is enough, I think, if I say that suspicion has arisen and has been expressed upon certain aspects of these loans, an example of which is sufficiently found in the petitioners' affidavit in reply, where, by paragraph 3, Moishe Rokach said that he advanced £1,350, of which £1,250 was paid by cheque and the balance of £100 was paid in cash. It is suggested that that would lead either to the inference that this gentleman was lending the company this considerable sum for no interest at all, or, as a matter of inference arising from the improbability of such a transaction, that in fact the £100 cash was either never paid at all or, having been paid, was immediately restored into the pockets of Moishe Rokach.

That is an example of the approach which the appellants make to these alleged loan transactions; but, as I say, on the evidence before us it is a matter merely of surmise, and inasmuch as the petitioners' debt will have to be dealt with, if and when it is submitted to proof, I propose to say no more about that approach to the matter.

As to the suggestion that in any event if the loans were made they were made to the Fredmans for their personal use and not for the use of the company, the cheques and various agreements and acknowledgments which were produced by the petitioners show on their face that the loans were in fact made to the company, that the company was liable to repay them, and that that

liability was merely coupled with a personal guarantee by the Fredmans which would be collateral to the liability of the company.

Accordingly, I think there is much to be said in favour of Mr. Vinelott's submission that the company has not shown, upon the material which is before us, that there are grounds upon which the debts can be said to be bona fide disputed. That is a matter, however, which will have to be dealt with hereafter.

But Mr. Blackledge's second point is the point upon which, in my opinion, this appeal must succeed. His point is that where (as is the case here) practically the whole of the company's creditors, both in value and in number, oppose a compulsory order, the court should regard their wishes in the matter and should not force an order upon them merely because the petitioners want it. Here there is no doubt whatever that the creditors as a whole are opposed to an order being made. They have faith in Mr. Fine, whom their committee appointed liquidator in this and in the other voluntary liquidations; and, as the group of companies is in their view so essentially interlocked, they want the affairs of all the companies to be in Mr. Fine's hands. It is, of course, true that notwithstanding a voluntary liquidation a creditor can petition for a compulsory order under section 310 of the Companies Act, 1948. But there can be no doubt that the general principle is, as Mr. Blackledge has submitted it to be, that the court will pay great regard to the wishes of the majority of the creditors; and the matter was clearly laid down Simonds J. in *In re Home Remedies Ltd.*,[1] the headnote of which is: "The rule still prevails that, "where a company is in voluntary liquidation and a petition is "presented for its compulsory winding up, the court is bound "to have regard, not only to the wishes of the petitioning "creditor, but also to those of all the creditors. The rule is not "affected by the provision in section 255 of the Companies Act, "1929"—that is now section 310 of the Act of 1948—"that "the voluntary winding-up of a company shall not bar the right "of any creditor to have it wound up by the court." Simonds J. said[2]: "No reason has been shown why a compulsory order is "necessary to protect the rights of the petitioning creditor or "any other creditor, but counsel for the petitioner claims that "the court is bound to make an order in his favour in spite of "the opposition. In *In re James Millward & Co. Ltd.*[3] it was "decided that, on the true construction of section 255 of the "Companies Act, 1929, a creditor of a company in voluntary "liquidation, on proving his judgment debt and that it has not "been satisfied, is, as between himself and the company, "entitled ex debito justitiae to an order for the compulsory "winding up of the company. That case, however, did not

[1] [1943] Ch. 1; 59 T.L.R. 31; [1942] 2 All E.R. 552.
[2] Ibid. 2.
[3] [1940] 2 Ch. 333; 56 T.L.R. 330; [1940] 1 All E.R. 347.

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"decide that the old rule of the court that, where a company "is in voluntary liquidation, the court, before making an order "for its winding-up, is bound to have regard not only to the "wishes of the petitioner but also to those of the other creditors, "has been abrogated. It is true that section 255 of the Companies Act, 1929, has made an alteration in the law so that "it is no longer necessary for a petitioning creditor to show that "he is prejudiced by a voluntary liquidation, but, as between "himself and the other creditors, the old rule remains, and the "court has to consider the wishes of all the creditors. If the "majority of the creditors wish to continue the voluntary "liquidation and no valid reason is shown why effect should not "be given to their wishes, the court will not make a winding-up "order. There is nothing in the decision in *In re James Millward & Co. Ltd.*[3] to the contrary. Here the great majority "of the creditors are in favour of a continuance of the voluntary "winding-up and no suggestion has been made that in such a "winding-up the interest of any creditor will be prejudiced"; and he dismissed the petition.

Roxburgh J., in *In re Ithaca Shipping Co. Ltd.*[4] (which was a petition for the winding up of a company which was opposed by creditors), said: "The petitioning creditor is a judgment "creditor for some £60, or thereabouts. He is supported by a "creditor for £133. As against the company, the petitioner and "his supporting creditor would be entitled to a winding-up order "ex debito justitiae. But it is said on behalf of Mr. Vlassopoulos, "whose position I will describe in a moment, that he is a "creditor for £3,000 and that he opposes the petition, and that, "in those circumstances, as it is opposed by a majority in value "of the creditors, an order ought not to be made." "As a "general proposition," the judge continued, "that is quite true, "but it is a proposition which is always subject to the proof "of special circumstances, and, in my judgment, those special "circumstances have in this case been clearly demonstrated."

In my judgment, it follows from the principles as stated in those cases (and, indeed, the principles are long and well established) that in the present case an order should not have been made unless a "valid reason" or "special circumstances" were shown by the petitioners why effect should not be given to the wishes of the majority of the creditors that the voluntary liquidation should continue. Mr. Vinelott relied on the desirability (in which indeed the opponents themselves concur) of having a thorough examination into the management (or mismanagement) of the company in the past. In compulsory liquidations facilities for that are afforded by the Companies Act, 1948, s. 270 (1), which provides: "Where an order has been "made in England for winding up a company by the court, and "the official receiver has made a further report under this Act

[3] [1940] 2 Ch. 333.

[4] (1950) 84 Ll.L.Rep. 507.

"stating that in his opinion a fraud has been committed by any "person in the promotion or formation of the company or by "any officer of the company in relation to the company since its "formation, the court may, after consideration of the report, "direct that that person or officer shall attend before the court "on a day appointed by the court for that purpose and be "publicly examined as to the promotion or formation or the "conduct of the business of the company or as to his conduct "and dealings as officer thereof." But under section 307 of the Act these facilities can be made available, and in fact are frequently extended, to a voluntary winding up on an application being made to the court by the liquidator or a contributory or a creditor in the voluntary winding up. Subsection (1) provides: "The liquidator or any contributory or creditor may apply to "the court to determine any question arising in the winding up "of a company, or to exercise, as respects the enforcing of calls "or any other matter, all or any of the powers which the court "might exercise if the company were being wound up by the "court." Subsection (2) says: "The court, if satisfied that "the determination of the question or the required exercise of "power will be just and beneficial, may accede wholly or "partially to the application on such terms and conditions as "it thinks fit or may make such other order on the application "as it thinks just."

Recently Wynn-Parry J. held in *In re Campbell Coverings Ltd. (No. 2)* [5] (and in so holding he was following an indication of an opinion which Evershed M.R. had expressed in an earlier case of the same name [6]) that under section 307 the court has jurisdiction to order the public examination of a director, pursuant to section 270 (1). So that by conjunction of sections 270 and 307 it will be open to the liquidator or a creditor in the existing voluntary winding up to apply to the court for directions and for a public examination of the past directors or other persons in the same way as could be done in a compulsory winding up. There is further provision which is to be found in section 334 of the Act, which is a section applicable both to compulsory and voluntary liquidations, whereby under subsection (2) it is provided that: "If it appears to the liquidator in the course of a "voluntary winding up that any past or present officer, or any "member, of the company has been guilty of any offence in "relation to the company for which he is criminally liable," he shall report the matter to the director of public prosecutions. Subsection (2) of that section applies to voluntary liquidations, and subsection (1) is the subsection which applies to compulsory liquidations.

Accordingly, it would appear to me that the objection founded on the ground that an investigation of the affairs of the company

[5] [1954] Ch. 225; [1954] 2 W.L.R. 204; [1954] 1 All E.R. 222.

[6] [1953] Ch. 488; [1953] 2 W.L.R. 1135; [1953] 2 All E.R. 74.

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is both desirable and should be carried out (and there is much to be said in favour of that view) is sufficiently met by the fact that such an investigation can both conveniently and adequately be made in the course of the existing voluntary liquidation. Of course, there are some cases which one can imagine where the court would make a compulsory order against the wishes of the majority of the creditors; and, indeed, Mr. Vinelott referred to one such, namely, *In re Northumberland and Durham District Banking Co.*[7] I do not think that any principle is to be extracted from that case. It was a very special case, and having regard to the very peculiar circumstances which were proved to exist in that case the court thought it right to make a compulsory order, in preference to allowing the voluntary liquidation to continue. But I am clearly of opinion that no such circumstances exist here. It appears to me that while it may truly be said, as Mr. Vinelott submitted, that the necessity of investigation may constitute in some cases a "special circumstance" within the language of Roxburgh J. in the case which I have just quoted, it ought not to have much weight in the present case, where both Mr. Fine and all the creditors who stand behind him in the matter, and who constitute practically the whole of the creditors of the company, will obviously take full advantage of the means for investigation and inquiry which are afforded in voluntary liquidations, as I have indicated.

There are many matters which will require thorough investigation in this case, as far as I can see, but it will be obviously in the interests of the creditors themselves (who include banks and other responsible bodies) to see that every possible investigation is made with stringency. For my part, I think that there are no circumstances shown here, such as were shown in *In re Northumberland and Durham District Banking Co.*,[7] which should disturb the view that the majority of the creditors should have their wishes fully regarded and given effect to.

Mr. Vinelott suggested that a reason personal to the petitioners why there should be a compulsory winding up is that Mr. Fine (who is the liquidator under the voluntary winding up) has, so it is said, shown prejudice against the petitioners—that, as appears from the evidence, the liquidator has said that the petitioners are moneylenders and usurious, and also that he ignored their position of petitioning creditors when he convened a meeting of the creditors. In my opinion that is no sufficient reason to force a compulsory order upon the majority of the creditors. I have no doubt that Mr. Fine, who is a responsible and reputable professional gentleman, will approach the petitioners' position and claims with impartiality, and if he is satisfied as to the bona fides of the debt he will treat the petitioners with complete fairness and justice. No other reason

[7] (1858) 2 De G. & J. 357.

was suggested apart from that why the petitioners would be prejudiced if the voluntary liquidation was allowed to continue, and it is indeed difficult to see why a course which is desired by practically the whole of the creditors of the company, and which in their view will be of the greatest advantage to them, should also not be of advantage to the petitioners themselves.

Finally, it was suggested that the judge had made an order partly on the ground (which is one of the statutory grounds for presenting a petition under section 222) that it is just and equitable that the company should be wound up. Mr. Blackledge said that an order could not be made on that ground because no circumstances were disclosed in the petition, other than insolvency itself, which brought the case within the "just and "equitable" provision and, indeed, that the petitioners only stated in their petition that it was just and equitable to wind up the company because of the alleged insolvency. [His Lordship, in stating the facts set out above, had observed that the statement that it was just and equitable that the company should be wound up, in paragraph 7 of the petition, was founded upon the circumstances of the petition, and that the only circumstance to which reference was made in the petition related to the alleged insolvency of the company.] I think that Mr. Blackledge was probably right in saying that if no case were made out in the petition for a "just and equitable" ground, then the court could not, if all the matters on which the petitioners relied failed, make an order on the ground that it was just and equitable.

For my part, I do not think that the judge made an order upon that ground at all; and, indeed, I understood Mr. Vinelott to say that his clients do not rely on the "just and equitable" provision as distinct from insolvency. But although, as I say, we unfortunately do not know very much of what happened before the judge, it appears to me as most probable that he decided this question as to the validity of the debt adversely to the company, and, accordingly, made the winding-up order on that ground, and simply resorted to the suggestions in the evidence as to irregularity in the conduct of the company as confirming his view that the petitioners were entitled to an order, and as justifying a departure from the usual rule that the interests of the majority of the creditors should be considered. But, as I have already said, having regard to the ample and powerful facilities which are open to a liquidator and creditors for investigation and inquiry in a voluntary winding up, I do not think that that is an objection to the voluntary liquidation being allowed to continue.

I, accordingly, would allow this appeal, on the ground which I have tried to make clear, that the overwhelming majority of the creditors of this company are against the making of a compulsory order, that they are content that the voluntary liquidation

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should continue, and that the petitioners have shown no ground of hardship or injustice upon which the court could base a departure from the ordinary principles to which I have referred.

BIRKETT L.J. I agree with the judgment which has just been delivered, and there is nothing that I can usefully add.

Appeal allowed.

Solicitors: *Alfred Bieber & Bieber; Harewood & Co.*

E. D.

[CARDIFF ASSIZES.]

*REGINA *v.* COTTRELL.

1955
Nov. 16.
McNair J.

Road Traffic—Disqualification—Power to vary—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 7 (3).

On an application under section 7 (3) of the Road Traffic Act, 1930, the court has power to remove the disqualification for holding a licence or to refuse the application, but it cannot vary the disqualification whether by limiting the class of vehicle to which it applies or otherwise.

APPLICATION.

On July 12, 1954, the applicant, Haydn Cottrell, pleaded Guilty at Swansea Assizes before Glyn-Jones J. to a charge of dangerous driving and was ordered to pay a fine of £50 and was disqualified from driving all motor-vehicles for five years. In announcing the disqualification, Glyn-Jones J. expressed the opinion that, if at the end of a year, the court was satisfied with the applicant's behaviour, he (his Lordship) would not think it out of keeping with the spirit of his sentence that the applicant should then have the disqualification varied so as to permit him to ride his motor bicycle.

The applicant was of good behaviour during the ensuing year and now applied under section 7 (3) of the Road Traffic Act, 1930,[1] for the variation of the disqualification, so as to permit him to drive a motor-cycle.

John C. Rutter for the applicant.
J. F. Coplestone-Boughey for the Crown.

[1] Road Traffic Act, 1930, s. 7 (3): "A person who by virtue of a conviction or order under this Part of this Act is disqualified for holding or obtaining a licence, may, at any time after the expiration of six months from the date of the conviction or order, and from time to time apply to the court before which he was convicted or by which the order was made to remove the disqualification, and on any such

[Reported by HYWEL AP ROBERT, Esq., Barrister-at-Law.]

No cases were cited in argument.

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McNAIR J. In this matter an application is made to me on behalf of Haydn Cottrell who pleaded guilty at these assizes in 1954 before Glyn-Jones J. to the offence of dangerous driving which involved the death of a bystander, and he was sentenced to a fine of £50 together with a disqualification from driving any class of motor-vehicle for a period of five years. In imposing that disqualification the judge said: "In addition, you will be "disqualified from driving all motor-vehicles for a period of five "years, but I do not want necessarily to bring it about that you "never drive even your motor bicycle during the whole of that "period, and I will say this, that you have your right to apply, "on the proper grounds, for the removal of that disqualification "after an appropriate interval and I will express the opinion "that, if at the end of one year from now the court is satisfied "with your behaviour and performance, I should not think it "out of keeping with the spirit of my sentence that you should "then have the disqualification varied so as to permit you to "ride your motor bicycle."

Since that sentence of disqualification was imposed the applicant has behaved in a perfectly proper manner, and in September, 1954, he volunteered and undertook a three years' engagement with the Royal Engineers and is at present stationed at Southampton, training as a crane operator in the port battalion there. His commanding officer says that since joining the Royal Engineers his character and behaviour have been of an irreproachable nature; he is a sober, good worker and always well-turned out in dress.

In those circumstances, if I felt I had power to accede to the application, which is an application, not for the removal of the whole disqualification, but for varying the disqualification so as to permit the applicant to ride a motor bicycle whilst maintaining the general disqualification, I should have been prepared to accede to it. [His Lordship read section 7 (3) of the Act of 1930, and continued:] It is to be noted that in that provision there appear to be only two powers given to the court: either a power of removing the disqualification, or a power to refuse the application, whereas under section 6 of the Act, under which the original disqualification was imposed, there was an express power in the court, if it thought fit, to limit the disqualification imposed to the driving of a motor-vehicle of the same class or description as the vehicle in relation to which the offence was committed.

Although I think the facts would justify the exercise of

"application the court may, as it "thinks proper, having regard to the "character of the person disqualified "and his conduct subsequent to the "conviction or order, the nature of "the offence, and any other circum- "stances of the case, either by order "remove the disqualification as from "such date as may be specified in the "order or refuse the application."

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discretion in favour of varying the disqualification in the way in which the application asks—at any rate, it would be in line with the views of the judge who imposed the disqualification—I do not feel that I have power to do anything other than remove the disqualification or to refuse the application. Seeing that I do not think the facts justify the removal of the disqualification in whole, I exercise the alternative power given under that section of refusing the application.

But, at the same time, I can see there may be cases where it might be convenient that the court was given a power to vary a disqualification. But, as at present advised, it is my opinion that this section, as enacted, does not give a power of variation. It is, however, clearly a question upon which other minds might reach a different conclusion.

Application refused.

Solicitors: *Edward Lewis, James & Possart, Cardiff; Director of Public Prosecutions.*

[PROBATE, ETC., DIVISION.]

1955
Dec 6, 7, 8, 9.

WILLMER J.

* PROSPECTOR (OWNERS) *v.* CHUSAN (OWNERS). THE CHUSAN.

Shipping—Collision—Fog—"Moderate" speed—Circumstances to be considered — Radar — Continuous radar watch not being kept — Regulations for Preventing Collisions at Sea, 1910, *art.* 16.

The plaintiffs' vessel, the *Prospector*, was in collision with the defendants' vessel, the *Chusan*, in the Straits of Dover. The weather was foggy with visibility two to three cables. The *Prospector* was proceeding at a speed of about eight knots, sounding regulation fog signals. Those on board the *Prospector* failed to stop their engines on hearing, forward of their beam, a fog signal from the *Chusan*, and altered course before the position and course of the *Chusan* were ascertained. The *Chusan*, a twin-screw turbine vessel, equipped with a radar set, was proceeding at a speed of about seven knots. On the bridge of the *Chusan* the master and chief officer periodically looked at the radar screen, but no continuous radar watch was being kept. The approach of the *Prospector* was not observed by radar, and a signal of one long blast was the first warning which those on board the *Chusan* received of the presence of the *Prospector*. In spite of the engines of each vessel being put astern, both vessels had some residual forward way at the moment of collision:—

Held, that it is part of a seaman's duty, in the exercise of reasonable care, to take full advantage of any equipment with which his vessel is supplied, and the fact that a continuous radar watch is not being kept on board a vessel supplied with a radar set, and which has an officer available to keep such a watch, is a circumstance to be taken into consideration in deciding whether the speed of the vessel is excessive; that in the circumstances the speeds of both vessels were excessive, but the *Prospector* was further

to blame in that those on board her failed to stop their engines in compliance with article 16 of the Regulations for Preventing Collisions at Sea, 1910, and prematurely altered their heading before the position and course of the *Chusan* had been ascertained; and that the vessels were to blame in the proportions of three-quarters to the *Prospector* and one-quarter to the *Chusan*.

Per curiam. I wish to make it abundantly clear that what I have said is not to be interpreted as meaning that a vessel which does maintain a continuous watch on her radar is thereby entitled to proceed at an excessive speed in fog.

ACTION.

On June 12, 1953, the plaintiffs' vessel, *Prospector*, was in collision with the defendants' vessel, *Chusan*, in the Straits of Dover, near the South Goodwin lightship. At the time of the collision, the *Prospector*, a vessel of 6,165 tons gross, fitted with reciprocating engines of 3,350 h.p.i., laden with a general cargo, was on a voyage from the West Indies to London. The *Chusan*, a twin-screw passenger vessel of 24,215 tons gross, fitted with steam turbine engines of 42,300 h.p.i., was in the course of a cruise from Tilbury to the Mediterranean.

Shortly before the collision the *Prospector* was proceeding on a course of 52° (True), an almost opposite course to that of the *Chusan*, with engines working at half-speed ahead, making a speed of about 8 knots, and sounding regulation fog signals. On a fog signal being heard twice from a vessel forward of the beam of the *Prospector*, the vessel's engines were put slow speed ahead, and were stopped on a third signal being heard. Shortly afterwards, on sighting a black form, which proved to be the black boot-topping of the *Chusan*, the helm of the *Prospector* was put hard-to-port, and a signal of two short blasts sounded. Thereafter, the engines of the *Prospector* were put full speed astern, and a signal of three short blasts sounded, which signal was repeated shortly afterwards. The port helm of the *Prospector* took effect before the collision occurred.

Shortly before the collision the *Chusan* was proceeding at a speed of about 7 knots, with engines working at slow speed ahead, on a course of 230° (True), sounding regulation fog signals. The radar set in the chartroom on the bridge of the *Chusan* was working, but the approach of the *Prospector* was not observed by radar. On hearing a fog signal from a vessel forward of their beam, the engines of the *Chusan* were stopped, and, shortly afterwards, when a subsequent fog signal was heard, the engines of the *Chusan* were put half-speed astern, a signal of three short blasts being sounded. A signal of two short blasts was heard from the *Prospector*, and when, what was thought to be a further signal of two short blasts was heard, the engines of the *Chusan* were put full speed astern. At about this moment the *Prospector* was sighted visually.

The stem of the *Chusan* and the starboard bow of the *Prospector* came into contact at an angle of 15° leading aft on

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the *Prospector*, and both vessels at the moment of collision had some residual forward way.

The plaintiffs claimed that the collision was solely caused by the improper and negligent navigation of those on board the *Chusan*. The defendants denied negligence and counterclaimed against the plaintiffs, alleging that the collision was solely caused by the improper and negligent navigation of those on board the *Prospector*.

R. F. Hayward Q.C. and *G. N. W. Boyes* for the plaintiffs.
J. V. Naisby Q.C. and *J. B. Hewson* for the defendants.
Two nautical assessors sat with the judge.

The following cases and authorities were cited in argument: Marsden's Collisions at Sea, 10th ed., p. 480; *The Marigola* *; *The Memnon* v. *The Paulsboro* †; *The Esso Plymouth*.‡

WILLMER J., after stating the facts and finding the *Prospector* to blame for breaches of article 16 of the Regulations for Preventing Collisions at Sea, 1910,[1] in that she proceeded at an excessive speed in fog and failed to stop her engines on hearing the fog signal of a vessel forward of her beam, and further, for prematurely altering course to port before the position and course of the *Chusan* were ascertained, continued: The *Chusan* was a high-powered vessel, a vessel with good pulling-up power. No doubt it can be said with force that for such a vessel a higher speed in knots can be justified than would be justified in the case of other vessels with less engine power and less pulling-up capacity. In judging the speed of the vessel one must also take into consideration the area in which she was navigating (that is to say, in this case, rounding the Goodwin Sands and passing through the Straits of Dover), and the extent of the visibility.

There is also another fact to which I must now refer for the first time, but which, I think, is material to be taken into consideration. The *Chusan* was fitted, as one would expect a large passenger ship to be fitted, with a radar set. It is the fact that no warning of the presence of the *Prospector* had been detected on the radar screen of the *Chusan*; but it is also the fact that, at the material time, there was no officer on continuous watch at the radar set. The radar screen is mounted inside the chartroom, and the evidence showed that both the master and the chief officer (who had been specially called to the

* (1929) 34 Ll.L.R. 217.
† (1920) 5 Ll.L.R. 250.
‡ [1955] 1 Lloyd's Rep. 429.

[1] Regulations for Preventing Collisions at Sea, 1910, art. 16: "Every vessel shall, in a fog . . . "go at a moderate speed, having "careful regard to the existing circumstances and conditions. A "steam vessel hearing, apparently "forward of her beam, the fog-"signal of a vessel the position of "which is not ascertained, shall, so "far as the circumstances of the case "admit, stop her engines, and then "navigate with caution until danger "of collision is over."

bridge because the weather was foggy) were going in and out spasmodically and looking at the radar screen; but it so happened that on none of the occasions when either of those officers looked at the radar screen was any trace of the *Prospector* found. The result was that the first which the *Chusan* knew of the presence of the *Prospector* was when she heard the whistle signal to which I have already referred. This is a matter which I have considered very carefully with the Elder Brethren. I think that all those circumstances must be taken into consideration in deciding whether in a particular case a vessel is proceeding at a proper speed or not.

I have already expressed the view that the *Chusan*, like the *Prospector*, had some residual forward way at the time of the collision. Again, I am not imputing any desire to tell an untruth to any of the witnesses who said that from their observation their vessel was stopped. I am advised by the Elder Brethren—and I readily accept their advice—that observing from the height of the bridge of the *Chusan* it would be practically impossible to judge within a knot or so whether the vessel was completely stopped or not. I am satisfied that the *Chusan* did carry some residual forward way; in other words, having got as long notice as it was reasonable to expect of the approaching *Prospector*, she had not, in fact, succeeded in taking off all her way. Against that it can be said, of course, that perhaps she would have done if the *Prospector* had not been proceeding so fast, and if the *Prospector* had got off more of her way. That, of course, is rather speculative.

I have come to the conclusion that for a vessel of this character navigating in this area, in these conditions of visibility, and in circumstances in which a continuous watch was not being kept on the radar, a speed of 7 knots was excessive. I find no other fault with the *Chusan*, but I do not see that I can avoid concluding that the excessive speed of the *Chusan* was a factor contributing to the collision.

Before I leave that point and consider the apportionment of blame as between the two vessels, I should like to add a footnote to what I have already said about the radar. If only to set at rest the fears expressed by Mr. Naisby in the course of argument, about the possible effect of any observations I may make about speed in relation to continuous observation on the radar—and if it is any comfort to Mr. Naisby, I would gladly add that my advisers also feel very concerned about the same subject—I wish to make it abundantly clear that what I have said is not to be interpreted as meaning that a vessel which does maintain a continuous watch on her radar is thereby entitled to proceed at an excessive speed in fog. I hope that nothing I have said in this case can be twisted round and used in future cases in such a way that it may seem to justify a speed which would otherwise be excessive, merely on the basis of a continuous watch being maintained on the radar set. I approach the matter in this way.

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It seems to me part of any seaman's duty, in the exercise of reasonable care, to take full advantage of any equipment with which his vessel is equipped. After all, a radar set is not the only kind of equipment with which one expects a modern steamship to be supplied. It is the fact that this equipment is supplied to be used, and used intelligently; but I am far from saying that the use of this equipment can be prayed in aid so as to justify navigation that would otherwise be reckless.

Having said that, it remains for me to consider the apportionment of blame as between these two particular vessels.

I entertain no doubt at all that there is a clear preponderance of blame in this case as against the plaintiffs' ship, the *Prospector*, and in favour of the defendants' ship, the *Chusan*. The plaintiffs' ship, in addition to the fault of excessive speed (which, on my findings, she shares with the *Chusan*), was also guilty of additional faults, to which I have already referred, in failing to stop her engines when she should have done under article 16, and in taking premature helm action. Moreover, in my judgment, the initial excessive speed of the *Prospector* was, as a matter of degree, more blameworthy than the initial excessive speed of the *Chusan*. It was not only a higher speed in knots, but the *Prospector* was a vessel that had far less engine power and, therefore, less capacity for stopping. In those circumstances there can be no doubt but that by far the greater proportion of blame should be attached to the plaintiffs' ship. Having considered what the fair apportionment should be in all the circumstances, I have come to the conclusion that the *Prospector* was to blame to the extent of three-quarters, and the *Chusan* one-quarter.

Solicitors: *Simpson, North Harley & Co.; Thomas Cooper & Co.*

A. S-R.

[COURT OF APPEAL.]

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Dec. 5.

* MEAD *v.* CLARKE CHAPMAN & CO. LTD.

[1952 B. No. 243.]

Singleton, Jenkins and Parker L.JJ.

Fatal Accidents Acts — Damages — Infant dependant — Remarriage of widow—Right of infant to damages after remarriage of widow—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93).

About nine months after the death of her husband in an accident for which the defendants, his employers, admitted liability, the widow remarried a good man of similar income to her late husband. In an action under the Fatal Accidents Act, 1846,

as administratrix of the estate of her deceased husband the widow claimed, inter alia, damages for her infant daughter, as a dependant of the deceased. The trial judge held that the child was entitled to damages only in respect of the weeks prior to the remarriage of the mother, and he awarded her £36:—

Held, that once it was shown that the child had suffered a loss of dependency under the Fatal Accidents Acts, the onus of proving that the dependency originally lost had ceased entirely on the remarriage of the mother shifted to the defendants, and they had failed to discharge it; and that although it would be wrong altogether to disregard the fact that the child had acquired a kind and generous stepfather, the court could not regard the moral obligation which he had undertaken as the financial equivalent of the legal obligation of a father, and the award to the child should be increased to £200.

Peacock v. *Amusement Equipment Co.* [1954] 2 Q.B. 347; [1954] 3 W.L.R. 288; [1954] 2 All E.R. 689; reversing [1954] 1 W.L.R. 803; [1954] 2 All E.R. 123 and dicta of Scrutton L.J. in *Baker* v. *Dalgleish S.S. Co.* [1922] 1 K.B. 361; 38 T.L.R. 245 applied.

APPEAL from Donovan J.

On January 15, 1951, Alexander Scott, a welder employed by the defendants, Clarke Chapman & Co. Ltd., engineers, fell from a height while working at a power station in course of construction at Naval Row, Poplar, and was killed. The defendants admitted liability for the accident. The widow brought an action on behalf of herself and her infant daughter, claiming damages under the Fatal Accidents Act, 1846, and also in respect of the loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934. She brought the action as Mrs. Anne Mead, administratrix of the estate of Alexander Scott, having married on September 27, 1951, a lorry driver named Mead. At the time of his death Scott was earning £8 10s. per week, and Mead's earnings were stated to be the same in amount.

At the trial of the action it was contended for the defendants that in the circumstances the dependency of the wife upon the husband who was killed ceased when she remarried. Donovan J. accepted that contention and, calculating the plaintiff's loss at £5 per week for the 36 weeks prior to her remarriage, he awarded £180 damages under the Fatal Accidents Act, apportioned as to £144 to the plaintiff and £36 to the infant. He also awarded the plaintiff £400 under the Law Reform (Miscellaneous Provisions) Act, and £35 in respect of funeral expenses.

This appeal was brought by the plaintiff in respect of the award to the infant, the judge having limited the child's right to damages to the 36 weeks before the mother remarried and the child acquired a step-father.

L. G. Scarman for the plaintiff.

John W. Russell for the defendants.

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Cases referred to by counsel: *Baker* v. *Dalgleish S.S. Co.*[1]; *Peacock* v. *Amusement Equipment Co.*[2]; *Liffen* v. *Watson*[3]; *Davies* v. *Powell Duffryn Associated Collieries*[4]; *Harrison* v. *L. & N. W. Railway Co.*[5]; *Barnett* v. *Cohen.*[6]

SINGLETON L.J. Mr. Alexander Scott was a welder employed by the defendants, Clarke Chapman & Co. Ltd., who are engineers. On January 15, 1951, he was working at a power station which was in the course of construction at Naval Row, Poplar. He fell from a height and was killed. The defendants recognize that his death was brought about through their negligence and that they are responsible in damages to his widow. This action is brought by the widow on her own behalf and on behalf of her small daughter, who was born on September 24, 1950; that is, about four months before her father was killed. On September 27, 1951, the widow married again. She married a man named Mead, and her action is brought in the name of Anne Mead. She claimed damages under the Fatal Accidents Act of 1846, an Act which provided that an action would lie in respect of the death of a person when the death was caused by the wrongful act, neglect or default of someone. Section 2 of the Act provides that "Every such action shall be for the "benefit of the wife, husband, parent, and child of the person "whose death shall have been so caused, and shall be brought "by and in the name of the executor or administrator of the "person deceased; and in every such action the jury may give "such damages as they may think proportioned to the injury "resulting from such death to the parties respectively for whom "and for whose benefit such action shall be brought." The action may now be brought in the name of the widow, if there is no executor or administrator; and, merely in order to show that I do not overlook it, there is a definition of the word "child" in section 5 of the Act.

It was claimed on behalf of the widow that she was entitled to damages under the Fatal Accidents Act and that her daughter was entitled to damages. There was also a claim for damages by the widow under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the loss of expectation of life of her husband. Donovan J., before whom the case came, awarded the plaintiff the sum of £400 under the Law Reform (Miscellaneous Provisions) Act, and a further sum of £35 in respect of funeral expenses.

The question of difficulty which arose was in regard to the

[1] [1922] 1 K.B. 361; 38 T.L.R. 245.

[2] [1954] 2 Q.B. 347; [1954] 3 W.L.R. 288; [1954] 2 All E.R. 689; reversing [1954] 1 W.L.R. 803; [1954] 2 All E.R. 123.

[3] [1940] 1 K.B. 556; 56 T.L.R. 442; [1940] 2 All E.R. 213.

[4] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.

[5] (1885) Cab. & El. 540; 1 T.L.R. 519.

[6] [1921] 2 K.B. 471; 37 T.L.R. 629.

damages to be awarded under the Fatal Accidents Act. Mr. Scott was 23 years old when he was killed. He was earning £8 10s. a week as a welder. No evidence was given about what he might have earned if he had lived a little longer, though most of us know that wages of workmen of that type have increased considerably. The second husband, Mr. Mead, is a lorry driver, and at the date of the trial he was earning £8 10s. a week. That is precisely the same sum as the first husband was earning—but there is 4½ years' difference in time. However, it was taken without objection that the earnings of the first husband were the same as the earnings of the second husband.

It was submitted to the judge on behalf of the defendants that dependency of the wife upon the husband who was killed ceased when she married a second time, and that no damages ought to be given to her in respect of any time after her second marriage, for it was said that there was no loss thereafter; she was as well off as she was before. That was accepted by the judge. He awarded damages to the plaintiff in respect of the 36 weeks' period between the death of her first husband and her marriage to Mr. Mead. She had said that her husband gave her £6 10s. a week, and the judge calculated that the loss to the family was £5 a week for 36 weeks, and thus he awarded £180 damages under the Fatal Accidents Act. He divided those in this way: "I apportion £36 to the infant and the balance of "£144 to the plaintiff." I have said already that he awarded damages to the plaintiff as the executrix or administratrix of her husband's estate, under the Law Reform Act. Strictly, the damages awarded under the one ought to be set off against the other, but that was not done and no question is raised upon it in this appeal.

The damages awarded to the child, who was four months old at the time of her father's death, are very small, £36, and they were given in respect of the period up to the second marriage of her mother. Before her first husband's death the plaintiff and her husband and her child were living in a room at her mother's house. She and her second husband and her child now have a room in another house, and she has a child of her second marriage. There was very little evidence, just a few answers by the plaintiff and about eight questions in cross-examination. Mr. Russell asked her: "Would it be right to say that really, so far as the way you live is concerned, you are living very much the same as when your husband was alive? (A.) Yes. (Q.) Is your present husband fond of Christine? (A.) Yes, very fond. (Q.) He looks after her nicely? (A.) Yes. (Q.) He is a lorry driver? (A.) Yes"; and that is the end of the evidence.

It is said on behalf of the defendants that the child's right to damages ceased to be effective when her mother married again, by reason of the fact that the second husband, her step-father, was kind to her and looked after her and treated her nicely. The judge yielded to that argument and gave no damages to the

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child in respect of any time after the second marriage of her mother. The plaintiff appeals, not against the award of damages to her, for in one sense she got more than she might have got, because of the point which might have been taken that the damages awarded under the Law Reform Act fell to be considered as against the amount awarded to the widow under the Fatal Accidents Act. Mr. Scarman, on behalf of the plaintiff, submitted that the judge should have paid no regard to the fact that the daughter had a step-father, as the benefit from that quarter did not accrue to the daughter as the result of the death. Secondly, and alternatively, he submitted that if he was wrong in his first submission, the judge was wrong in holding that the dependency wholly ceased when the daughter acquired a step-father.

The question of damages under the Fatal Accidents Act leads to questions of some nicety. It is clear that the damages to be awarded must be based on pecuniary loss or expectation of pecuniary loss. I do not propose to go through the authorities which have been cited to us, one of the most useful of which is *Baker* v. *Dalgleish Steam Shipping Co.*,[1] and in particular, the judgment of Scrutton L.J. I do not read it, for it is sufficient for my purpose to refer to a case in this court quite recently, *Peacock* v. *Amusement Equipment Co. Ltd.*,[2] where the question arose as to the measure of damages under the Fatal Accidents Act. There was a sum of money which had been paid by step-children to their step-father, which money they had received from their mother's estate. Their handing a portion of the money they had received to their step-father was a voluntary act; and it was held that the amount received by the step-father from his step-children ought not to be deducted from the amount awarded under the Fatal Accidents Act as damages in respect of the death of the plaintiff's wife.

Somervell L.J., in the course of his judgment, cited words of Scrutton L.J. in *Baker* v. *Dalgleish Steam Shipping Co.*[3] as follows[4]: " Scrutton L.J. also said: ' The same principle applies " ' to voluntary benefits conferred in consequence of the death. " ' Just as in assessing the loss by the death the probability of " ' voluntary contribution destroyed by the death of the contri- " ' butor may be included to swell the claim, so the probability " ' of voluntary contribution bestowed in consequence of the " ' death may be used to reduce the claim by showing what " ' loss the claimant has in fact sustained by the death.' I think " that is a useful sentence. . . . There is, I think, another aspect " of this matter which is very well stated in *Redpath* v. *Belfast* " *and County Down Railway*.[5] That was not a fatal accident " case, though one or two of the fatal accident decisions were " referred to. There had been a railway accident which was

[1] [1922] 1 K.B. 361, 371–373.
[2] [1954] 2 Q.B. 347, 353.
[3] [1922] 1 K.B. 361, 371–373.
[4] [1954] 2 Q.B. 347, 353.
[5] [1947] N.I. 167.

" caused by the negligence of the railway company's servant. " A number of people had been killed or injured, and the public " had subscribed to a fund which was used to help those who " had been injured as well as the dependants of those who had " had been killed. The defendants sought to interrogate the " plaintiff as to what payments, if any, he had received from the " fund. The Lord Chief Justice held that that was an irrelevant " matter and could not be brought into account. He said, after " referring to some of the fatal accident cases: ' In these circum- " ' stances common sense and natural justice appear to me to rise " ' in revolt against the proposition that the money so subscribed " ' should be diverted from the objects whom the subscribers " ' intended to benefit in order to be applied in reduction of the " ' damages properly payable by the wrongdoer as compensation " ' to the victims for their loss. Why, one may well ask, should " ' the defendants' burden be lightened by the generosity of the " ' public? ' " Somervell L.J. continued: " I think that one can " say in the same way in this case: why should the burden on the " defendants be lightened by the generosity of the step-children? " I realize, of course, that a defendant may find his or her burden " lightened, for instance, by the fact that the deceased, usually " a husband, has saved money which goes to his wife as a result " of the death."

In the present case it is submitted that the burden upon the defendants, the wrongdoers, should be lightened because the child has a good step-father. Up to a point, that may be right, but it cannot, as I think, be taken that, by reason of the fact that the child has, and for some few years has had, a good step-father, the burden put upon the defendants is removed altogether. They are responsible as tortfeasors, and " in every such action the " jury may give such damages as they may think proportioned " to the injury resulting from such death to the parties respec- " tively for whom and for whose benefit such action shall be " brought." We are concerned with an action brought for the benefit of a very young child. It is admitted that the child was entitled to damages from the defendants in respect of the period from the date of the death of her father up to the remarriage of her mother. The child is a person for whose benefit an action may be brought under section 2 of the Act.

It is submitted by Mr. Russell that no damages ought to be paid in respect of any period after the date of the second marriage. I do not think that it is right to say that no regard should be paid to the fact that the daughter has a step-father who is kind and good to her. It is the duty of the judge assessing damages to pay regard to all relevant facts and, as far as anyone can tell, the child did not suffer any damage between the time of the second marriage of her mother and the date of trial, but it should not be assumed that of necessity the position will remain the same. The defendants admitted that the child was a person entitled to benefit as a person under section 2 of the Act. The

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remarriage of her mother does not necessarily alter that for all time. In other words, if the defendants are to escape liability after that date, it appears to me that the onus is upon them of showing that in all reasonable probability the child could not suffer any pecuniary loss or damage in the future; in other words, that she is provided for for the rest of the time for which she might have been dependent upon her father.

I do not think that that was shown. One does not know what the future will bring. One hopes that the step-father will continue to be fond of his step-child and to treat her well, and that she will go short of nothing in so far as he can provide it; but there are many things to be considered, and it is not right, as I think, that a child of this age should be cut off from any possibility of damages against a wrongdoer because she has been treated well up to the date of trial. There might be a large family in years to come. The step-father might be pressed for money. He might not be able to look after this child as well as her own father could have done. Those are reasons why it seems to me it is not right to say that she is not entitled to damages after her mother married a second husband.

The judge pointed out that she had lost a father who would be legally bound to maintain her until such time as she could earn her own living. He referred to one or two of the authorities, and said: "There is no actual loss here due to the advent of a "step-father in place of a father. I am asked, however, to "compensate for a prospective loss, and on these grounds: Had "the child's father not been killed, and during some part of the "child's infancy had failed to maintain her, he could have been "made to do so; if the like situation should occur now, the step-"father could not be made to do so. . . . The child is being well "looked after by its step-father, who is very fond of it. The "child has now a half-brother born of the remarriage and the "two are growing up together. There is no evidence that the "step-child is being discriminated against in any way, nor is "there evidence of any prospect of it. The only difference in the "step-child's position is that it now has to rely on the good moral "sense of the step-father to maintain it without any legal sanction "in the background. The step-father has shown every sign of "fulfilling the moral obligation, and it would be wrong and unjust "(and perhaps unfortunate) to suggest that he might cease to do "so in the future."

I do not suggest that he will cease to do the right thing in the future, but there is a difference between a father and a step-father, in that the father can be forced to support his child if he fails to do so, while the step-father cannot. Over and above that, if there is a father as a standby, when the child is getting a little older, the father may well be willing to do something for his own child to help it forward in education or in some other way, a burden which a step-father might not be willing to undertake. I do not accept Mr. Scarman's first proposition. At the

same time, I do not consider it was right to say that no damages after the date of the second marriage should be given in respect of the child's claim. How much the damages ought to be is not a simple matter; but, taking all the factors into consideration, I feel that it is right that the claim in respect of the child should be allowed at the sum of £200, and I would allow the appeal accordingly.

JENKINS L.J. I am of the same opinion. In this case the court has to ask itself, and endeavour to answer as at the time of the trial, the question: how much worse off financially is the child Christine than she would have been if her father had not been killed? On making this comparison, one finds on the one hand that Christine lost from the time of her father's death the financial benefits in the form of maintenance, and so forth, which he used to provide for her, but, on the other hand, that Christine's mother had remarried, and that her second husband has so far proved himself to be an excellent step-father, who is maintaining and looking after Christine as though she was his own child.

In this state of affairs Mr. Scarman, for the plaintiff, invites us to hold that all we should have regard to is the loss which Christine has sustained by the death of her father, and not the compensating gain she had received in the shape of an affectionate step-father. Mr. Scarman arrives at that result in this way: He says that injuries on the one hand and benefits on the other are only to be regarded if they are the result of, or the consequence of, the death in question. Here, he says, the marriage, from the point of view of the child, has no causal connexion at all with the accident; that, from the child's point of view, the marriage is irrelevant; it does not give her any rights of maintenance against the step-father. Therefore, he says, to take into account what the child has gained in the form of the prospect of being maintained by the step-father would be doing what was held to be wrong in *Peacock* v. *Amusement Equipment Co. Ltd.*[6]; that is to say, lightening the burden of the wrongdoers (namely, the defendants), on the strength of the generosity of the step-father, as it is in this case, or the step-children, as it was in *Peacock's* case.[6]

In my view, that is not the right way of regarding Christine's acquisition of a step-father. Clearly, if the father had not died, the mother could not have remarried and the child could never have acquired a step-father. She could not have the advantage of being protected by two fathers at one and the same time; so that the financial advantage to her of the protection of the step-father was something that she could not have enjoyed but for the death of her father. In my view, there is a sufficient causal connexion here to make it proper to take into account the financial consequences to the child of the remarriage of her mother.

[6] [1954] 2 Q.B. 347.

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Mr. Russell, for the defendants, contended that once the remarriage was taken into account it put an end, a terminus, not only to the claim of the widow in respect of any period after the remarriage but also to the claim of the child Christine in respect of any period after the remarriage. He called our attention to the facts of the case and said that, on those facts, the child was, for all practical purposes, in just as good a financial position as she was before her father's death, owing to the closely comparable circumstances of the father and the step-father, and the step-father's very kind and generous treatment of the child. In my view, that is wrong. However good a step-father this man may be, I do not think it is possible to regard the moral obligation he has chosen to undertake as equivalent to the legal obligation of a father. In these cases one has to consider the financial aspect of the matter; and, so viewing it, I cannot see that the step-father's moral obligation is the financial equivalent of the father's legal obligation. In my view, therefore, the defendants have not shown that the child's injury is fully compensated in the circumstances by an award calculated only in respect of the period from her father's death down to the date of her mother's remarriage, or (to use an expression sometimes met with in these cases) that the child has ceased to be a dependant in consequence of her mother's remarriage. It follows, in my view, that since the contrary has not been proved, the child must be entitled to some further payment in addition to what was awarded to her by the judge, because she was admittedly and indisputably a person falling within section 2 of the Fatal Accidents Act, and it has not been shown that her mother's remarriage has provided a countervailing pecuniary advantage sufficient wholly to offset her loss in respect of any subsequent period.

In these cases it is always difficult to fix on a figure, but I agree with the figure of £200 which I understand my Lord to propose as the whole amount of the damages for the child, and would allow the appeal accordingly.

PARKER L.J. I agree with what my Lords have said and would only add this: The judge came to the conclusion that, on the facts of this case, no reasonable probability of future pecuniary loss had been shown. He said this: "In the present case I "have no evidence of such a prospective pecuniary loss as should "sound in damages for Christine." If, as the judge appears to have assumed, the onus was on the plaintiff, then I agree with his conclusion; but it seems to me that, once a person is shown to be a person for whose benefit an action can be brought under the Act, and is shown to be a person who has suffered a loss of dependency, then the onus shifts. It is then for the defendants to show, if they can, that on the facts of the case the dependency originally lost has been reduced or has ceased entirely. That, as it seems to me, is a heavy onus for the defendants to discharge, when they seek to say that the dependency has entirely

ceased. The evidence consisted entirely, on this point, of three or four answers in cross-examination of the widow, passages to which my Lord has referred. Though that is evidence which goes, I think, in reduction of the loss, I cannot think that it is sufficient to enable the defendants to discharge the onus upon them of showing that the loss has entirely ceased. In those circumstances, I agree with the proposed order.

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Appeal allowed.

Solicitors: *Ellis, Bickersteth & Co.; Carpenters.*

A. W. G.

[COURT OF APPEAL.]

* PERRY *v.* KENDRICKS TRANSPORT LTD.

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Rylands v. *Fletcher—Exception—Act of stranger—Dangerous thing—Empty petrol tank on coach—Escape of fumes—Explosion causing personal injuries—Escape and explosion caused by act of small boy—Act of stranger not of kind to be anticipated by owner of coach—No negligence—Rule in Rylands* v. *Fletcher not applicable—Whether rule applies to personal injuries.*

The plaintiff, a boy 10 years of age, was seriously injured by the explosion of petrol fumes from the tank of a disused coach parked near the southern edge of the defendants' parking ground. The petrol had been drained out and a cap screwed onto the entrance pipe. As the plaintiff approached the edge of the parking ground he saw two other small boys standing on the raised edge of the ground and when he was about level with the coach those boys jumped away and immediately the explosion occurred. It was found by the trial judge that the screw cap had been removed that day by someone unknown and that one of the two boys had thrown a lighted match into the tank. He held that there had been no negligence on the part of the defendants and dismissed the action brought by the plaintiff.

The plaintiff appealed, contending, inter alia, that the rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330 applied, the defendants having kept upon their land, at their peril, a dangerous object likely to do mischief if the fumes from it escaped:—

Held, assuming the rule to apply to personal injuries, that, it having been shown that the escape of the dangerous fumes and the explosion were caused by the acts of a stranger, albeit a child, the defendants came within the exception to the rule in *Rylands* v. *Fletcher*, unless the plaintiff could show that the act which caused the escape was of a kind which the defendants could reasonably anticipate and guard against: that this the plaintiff had failed to do, and the appeal failed.

Rickards v. *Lothian* [1913] A.C. 263; 29 T.L.R. 281 applied.

Rylands v. *Fletcher* (1868) L.R. 3 H.L. 330 distinguished.

Per Parker L.J. I do not think it open to the Court of Appeal to hold that the rule does not apply to personal injuries.

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Musgrove v. *Pandelis* [1919] 2 K.B. 43; 35 T.L.R. 299 and *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 157; 62 T.L.R. 646; [1946] 2 All E.R. 471 considered.

APPEAL from Lynskey J., sitting at Birmingham Assizes.

The plaintiff, a boy aged 10 years, suing by his father as next friend, brought an action claiming damages for personal injuries against the defendants, Kendricks Transport Ltd.

On October 29, 1952, the boy, Trevor Perry, of Jasmine Road, Dudley, was returning home from school by crossing some waste land and was approaching land used by the defendants as parking ground, when he saw two other small boys standing on a bank at the southern end of the defendants' ground and near the side of a Leyland coach. As Trevor approached them they jumped away and immediately afterwards there was an explosion in the petrol tank of the coach and he was very badly burned and injured.

The defendants, before placing the coach on the parking ground, had emptied the tank of petrol and had screwed a cap on the entrance pipe. According to their evidence there had been a careful and regular inspection of the coaches in the parking ground. There was also evidence that children were accustomed to playing on the coaches, but were chased away by the defendants' employees whenever seen.

Lynskey J., who heard the action on July 26, 1955, found that the cap had been removed by some unknown person and that a lighted match had been thrown into the tank by one of the two boys before Trevor Perry approached them, thereby exploding the petrol fumes. He dismissed the action, holding that there had been no negligence on the part of the defendants and that the rule in *Rylands* v. *Fletcher* [1] did not in the circumstances apply.

The plaintiff appealed, and the case is reported only on the question whether the rule in *Rylands* v. *Fletcher* applied.

M. A. B. King-Hamilton Q.C. and *C. P. Burke* for the plaintiff.

D. P. Draycott for the defendants.

The following cases were cited in argument by counsel, in addition to those referred to in the judgments: *Creed* v. *McGeoch & Sons Ltd.* [2]; *Mulholland & Tedd Ltd.* v. *Baker* [3]; *Yachuk* v. *Blais Co. Ltd.* [4]; *Martin* v. *Stanborough* [5]; and *Philco Radio and Television Corporation of Great Britain* v. *Spurling.* [6]

SINGLETON L.J., having approved the finding of the trial judge that there had been no negligence by the defendants,

[1] (1868) L.R. 3 H.L. 330.
[2] [1955] 1 W.L.R. 1005; [1955] 3 All E.R. 123.
[3] [1939] 3 All E.R. 253.
[4] [1949] A.C. 386; 65 T.L.R. 300; [1949] 2 All E.R. 150.
[5] (1924) 41 T.L.R. 1.
[6] [1949] 2 K.B. 33; 65 T.L.R. 757; [1949] 2 All E.R. 882.

continued: The second way in which the case is put by the plaintiff is that the motor-coach placed upon the defendants' land was something of a kind likely to do mischief if it escaped, or if something from it escaped, and that the defendants, having it upon their land, must keep it and fumes or flames from it upon their land at their peril. The submission is based upon that which is spoken of as the rule in *Fletcher* v. *Rylands*.[1] I will read the words of Blackburn J., which were expressly approved in the House of Lords: "We think that the true rule of law is, "that the person who for his own purposes brings on his lands "and collects and keeps there anything likely to do mischief if it "escapes, must keep it in at his peril, and, if he does not do so, "is prima facie answerable for all the damage which is the "natural consequence of its escape."

I assume for this purpose that an action for damages for personal injuries will lie in such a case, and I further assume for this purpose that a motor-coach which had had petrol in the tank is covered by the words "anything likely to do mischief if it "escapes." I suppose that an ordinary person would have thought that the tank or the coach and the tank would be safer if the petrol was removed from the tank than if the petrol was left in the tank, but upon the evidence given by the inspector of the Dudley Fire Brigade it may be said that an empty tank is more dangerous than a full tank, that is, if there has been petrol in it. Upon the evidence of the inspector, Mr. King-Hamilton submitted that here was a dangerous coach, for there might well be an accident through fumes from the tank escaping if the cap was taken off. It appears clear upon the facts, and upon the case put forward by the plaintiff, that there was interference by someone with the coach and with the cap on the top of the tank.

The principle laid down in *Fletcher* v. *Rylands*[1] may be avoided or may cease to be applicable if the harm done was due to the act of a stranger. If the mischievous, deliberate and conscious act of a stranger causes the damage, the occupier can escape liability; he is absolved. That is clear from a number of authorities. The one referred to by the judge is *Box* v. *Jubb*.[2] I do not cite it directly. It is sufficient if I take a passage from the speech of Lord Moulton in *Rickards* v. *Lothian*.[3] Lord Moulton, having referred to *Rylands* v. *Fletcher*,[4] said[5]: "Following the language of this judgment their Lordships are of "opinion that no better example could be given of an agent that "the defendant cannot control than that of a third party "surreptitiously and by a malicious act causing the overflow. "The same principle is affirmed in the case of *Box* v. *Jubb*.[6] In

[1] (1866) L.R. 1 Ex. 265, 279; affd. sub nom. *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.
[2] (1879) 4 Ex.D. 76.
[3] [1913] A.C. 263, 279; 29 T.L.R. 281.
[4] L.R. 3 H.L. 330.
[5] [1913] A.C. 263, 279.
[6] 4 Ex.D. 76.

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" that case the defendants had a reservoir on their land which " was connected both for supply and discharge with a watercourse " or main drain. Through the sudden emptying of another " reservoir into the drain at a higher level than their reservoir " and by the blocking of the main drain below, the defendants' " reservoir was made to overflow, and damage was done to the " lands of the plaintiff. The defendants were guilty of no " negligence either in the construction or maintenance of the " reservoir, and the acts which led to its overflow were done by " persons over whom they had no control. In giving judgment " Kelly C.B. says: ' The question is, what was the cause of this " ' overflow? Was it anything for which the defendants are " ' responsible? Did it proceed from their act or default, or from " ' that of a stranger over which they had no control? The case " ' is abundantly clear on this, proving beyond a doubt that the " ' defendants had no control over the causes of the overflow " ' and no knowledge of the existence of the obstruction. The " ' matters complained of took place through no default or breach " ' of duty of the defendants, but were caused by a stranger " ' over whom and at a spot where they had no control. It " ' seems to me to be immaterial whether this is called vis major " ' or the unlawful act of a stranger; it is sufficient to say that " ' the defendants had no means of preventing the occurrence. " ' I think the defendants could not possibly have been expected " ' to anticipate that which happened here, and the law does not " ' require them to construct their reservoir and the sluices and " ' gates leading to it to meet any amount of pressure which the " ' wrongful act of a third person may impose.' Their Lordships " agree with the law as laid down in the judgments above cited, " and are of opinion that a defendant is not liable on the " principle of *Fletcher* v. *Rylands* [7] for damage caused by the " wrongful acts of third persons."

In the present case there were two acts which had to happen before the damage could be done. The first was the removal of the cap. By whom that was done there is nothing to show. The second is the throwing into the tank of a lighted match which immediately brought about flames and which caused injury to this young boy. The two boys who were near the plaintiff, and who were up against the coach as he approached, were about the same age as the plaintiff, about 10 years old. It is submitted by Mr. King-Hamilton that, in view of their age, they cannot have been capable of a deliberate or conscious act, and Mr. Burke, who followed, put this general proposition, that children are incapable of deliberate volition. That submission was sought to be reinforced by the reading of a passage from the speech of Lord Atkinson in *Cooke* v. *Midland Great Western Railway of Ireland*.[8] I do not propose to read the passage. I do not think that it affects anything which has to be decided in this case.

[7] L.R. 1 Ex. 265; L.R. 3 H.L. 330.

[8] [1909] A.C. 229, 237; 25 T.L.R. 375.

The way in which Mr. King-Hamilton seeks to use it is this: the defendants knew, said he, that boys played on their parking ground; they knew that coaches were an attraction to them; a coach ought to be regarded as an allurement; and thus the defendants ought to have anticipated any action of any kind on the part of those boys of 10 years of age, and they ought to have guarded against it.

I regard that as placing much too high a duty upon the occupiers of property. I am prepared to accept this position. If the person who interferes with something of the defendants is a person whom they might expect to be upon their ground, and if the character of the interference is something which they ought to anticipate, then they do owe some duty. The measure of that duty depends upon the circumstances, the nature of the object, and the age of the children. I do not think that it can extend to that which happened in this case. Someone removed the cap. Someone threw the lighted match into the tank. There is no evidence to show that either of those things ought to be anticipated. If it is said that because boys pass through a parking ground there is a duty on the owner of the vehicle or the occupier of the parking ground who has a vehicle there to see that the cap is not removed from the petrol tank, in other words, to lock by a padlock or otherwise the cap, that is something new, in my view. I do not know the basis on which it can be said that the occupier must anticipate that kind of thing: still less do I think that the occupier ought to anticipate that a boy of 10 would throw a lighted match into the tank. There is nothing to show that it has ever been done before and I hope it will never be done again. A boy of 10 years of age knows that it is wrong. He knows that he is asking for trouble if he does it. That, I think, is shown by the fact that both boys jumped back. The match was thrown into the tank mischievously and deliberately. It cannot be said that it was something which the defendants ought to have anticipated, and it was the act of one who was not under their control in any sense. He was a stranger.

Lynskey J. gave judgment for the defendants, having considered both aspects of the case, and in that I think he was right, and the appeal, therefore, should be dismissed.

JENKINS L.J. I agree. So far as the plaintiff's claim is founded on negligence it seems to me that he has wholly failed to make out his case. As the trial judge found, the defendants did all that could reasonably be expected of them to prevent children meddling with the disused motor-coach. The happening which brought about the accident was one which the defendants could not reasonably have been expected to foresee.

As to the alternative contentions that the defendants are liable, even if they were not negligent, on the principle of

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Rylands v. *Fletcher*,[9] I am prepared to accept the view that this motor-coach, in the condition in which it was on the defendants' land, was an object of the class to which the rule in *Rylands* v. *Fletcher*[9] applies, that is to say, that it was for this purpose a dangerous thing, so that the defendants were under an obligation under the rule to prevent it, or the dangerous element in it, escaping on to a neighbour's land and doing damage there. It was a dangerous thing for this purpose in that its tank contained inflammable petrol vapour. But the fact that it was a thing to which the rule in *Rylands* v. *Fletcher*[9] applied, and the fact that the vapour escaped and was ignited and did damage, cannot conclude the matter against the defendants, because, as is well settled, an occupant of land cannot be held liable under the rule if the act bringing about the escape was the act of a stranger, and not any act or omission of the occupier himself or his servant or agent, or any defect, latent or patent, in the arrangements made for keeping the dangerous thing under control. In this case, it seems to me plain that the escape was caused by the act of a stranger or strangers in the shape of one or both of the two small boys Whittaker and Rawlinson.

Mr. King-Hamilton submitted that a child cannot for this purpose be a stranger because ability should not be imputed to a child of doing a conscious and deliberate act when he does such a thing as setting fire to petrol vapour in the tank of a vehicle. Speaking for myself, I see no necessity to confine the exception from the rule in *Rylands* v. *Fletcher*[9] of acts of strangers to acts which proceed from the conscious volition or the deliberate act of the stranger. It seems to me that the relevance of the exception is that the stranger is regarded as a person over whose acts the occupier of the land has no control. Then the real cause of the escape is not the occupier's action in having the dangerous thing on his land: nor is it any failure on his part, or on the part of his agents, in keeping the dangerous thing on the land: nor is it due to any latent or patent defect in his protective measures. The real cause is none of these things. The real cause is the act of the stranger, for whose acts the occupier of the land is in no sense responsible, because he cannot control them.

If I may be allowed to cite a further passage in addition to those my Lord has read, it is interesting in this connexion to observe that in *Rickards* v. *Lothian*[10] Lord Moulton, after referring to the judgment of the Exchequer Chamber in *Nicols* v. *Marsland*,[11] continued: "To follow the language of the judgment "just recited—a defendant cannot in their Lordships opinion be "properly said to have caused or allowed the water to escape if "the malicious act of a third person was the real cause of its "escaping without any fault on the part of the defendant. It is "remarkable that the very point involved in the present case

[9] L.R. 3 H.L. 330.
[10] [1913] A.C. 263, 278.
[11] (1875) L.R. 10 Ex. 255.

" was expressly dealt with by Bramwell B. in delivering the " judgment of the Court of Exchequer in the same case. He " says: ' What has the defendant done wrong? What right of " ' the plaintiff has she infringed? She has done nothing wrong. " ' She has infringed no right. It is not the defendant who let " ' loose the water and sent it to destroy the bridges. She did " ' indeed store it, and store it in such quantities that if it was " ' let loose it would do as it did, mischief. But suppose a " ' stranger let it loose, would the defendant be liable? If so, " ' then if a mischievous boy bored a hole in a cistern in any " ' London house, and the water did mischief to a neighbour, " ' the occupier of the house would be liable. That cannot be. " ' Then why is the defendant liable if some agent over which " ' she has no control lets the water out? . . . I admit that it is " ' not a question of negligence. A man may use all care to keep " ' the water in . . . but would be liable if through any defect, " ' though latent, the water escaped. . . . But here the act is " ' that of an agent he cannot control.' "

There Baron Bramwell gives, by way of reductio ad absurdum, the example of a mischievous boy boring a hole in a cistern. He says that if the defendant in *Nicols* v. *Marsland* [11] was liable, then the occupier of a house in which there was a cistern, if a mischievous boy bored a hole in it, would be liable, and adds " that cannot be." If we are to accept Mr. King-Hamilton's argument on this point in its full form, then if any mischievous boy chose to come on the defendants' land and chose to set fire to the petrol or the petrol vapour in the tank of a vehicle there, the defendants would be liable. I repeat, with Baron Bramwell, " that cannot be."

It seems to me that this argument must be limited to saying that in the circumstances of a particular case it may be that children doing some mischievous act whereby the dangerous thing escapes are not strangers, but I cannot regard that as aiding a plaintiff in an action such as this, unless it can be shown that in the circumstances of the case the dangerous thing was left by the defendants in such a condition that it was a reasonable and probable consequence of their action, which they ought to have foreseen, that children might meddle with the dangerous thing and cause it to escape. If facts such as those were made out in any particular case, then, in my view, the defendants could not claim to rely on the act of the mischievous child as constituting the act of a stranger. It would be an act brought about by the defendants' own negligence in dealing with the dangerous thing, and the consequence, which they should have foreseen, of a negligent act. But if that is made out, then one reaches the point where the claim based on *Rylands* v. *Fletcher* [12] merges into the claim in negligence: for if such a state of affairs could be made out, then it would no longer be necessary for the

[11] L.R. 10 Ex. 255.

[12] L.R. 3 H.L. 330.

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plaintiff to rely on *Rylands* v. *Fletcher* [12] at all. He could rely simply on the defendants' negligence. But Mr. King-Hamilton is precluded from taking that course here by the circumstance that the judge, in my view rightly, held that there was no negligence on the part of the defendants.

Accordingly, while I feel great sympathy for this unfortunate infant plaintiff, who has sustained very serious injuries through no fault of his own, I have come to the conclusion that no ground has been shown upon which this court could properly hold the defendants liable to compensate him for his hurts. I agree that this appeal must be dismissed.

PARKER L.J. I agree, and I would only add a word in deference to Mr. King-Hamilton's argument on his submission in regard to the rule in *Rylands* v. *Fletcher*.[12] Though the decision in *Musgrove* v. *Pandelis* [13] has been the subject of some criticism (see the speech of Lord Porter in *Read* v. *J. Lyons & Co. Ltd.*[14]), it is still binding upon this court. Accordingly, I feel bound to approach the matter upon the basis that the facts here bring the case within the rule in *Rylands* v. *Fletcher* [15]: nor do I think it is open to this court to hold that the rule only applies to damage to adjoining land or to a proprietary interest in land and not to personal injury. It is true that in *Read* v. *Lyons & Co. Ltd.*[16] Lord Macmillan, Lord Porter and Lord Simonds all doubted whether the rule extended to cover personal injuries, but the final decision in the matter was expressly left over and, as the matter stands at present, I think we are bound to hold that the defendants are liable in this case, quite apart from negligence, unless they can bring themselves within one of the well-known exceptions to the rule.

It has for a long time been an exception to the rule if the defendants can show that the act which brought about the escape was the act of a stranger, meaning thereby, someone over whom they had no control. The acts in question here, firstly, of removing the petrol cap, and, secondly, of inserting a lighted match, are, as it seems to me, prima facie undoubtedly the acts of strangers in that sense. Mr. King-Hamilton, however, contends that, nevertheless, since at any rate the last of those acts, the insertion of the lighted match, was almost certainly the act of a young child, the exception does not apply, and for this reason, so he says, that in law the act of a young child is not a novus actus interveniens. Speaking for myself, I do not think the matter can be approached in quite that way. In a *Rylands* v. *Fletcher* [17] case the plaintiff need only prove the escape. The onus is then on the defendants to bring themselves within one

[12] L.R. 3 H.L. 330.
[13] [1919] 2 K.B. 43; 35 T.L.R. 299.
[14] [1947] A.C. 157, 176; 62 T.L.R. 646; [1946] 2 All E.R. 471.
[15] L.R. 3 H.L. 330.
[16] [1947] A.C. 157.
[17] L.R. 3 H.L. 330.

of the exceptions. Once they prove that the escape was caused by the act of a stranger, whether an adult or a child, they escape liability, unless the plaintiff can go on to show that the act which caused the escape was an act of the kind which the occupier could reasonably have anticipated and guarded against. In that connexion it seems to me that it is not sufficient for the plaintiff to show that the defendants knew that children played in the vehicle park, played on the roof of a motor or inside a coach. They must show that the defendants reasonably should have anticipated an act of a kind which would cause the escape.

Sorry as one is for the infant plaintiff in this case, it seems to me that he has utterly failed to show that the defendants should have anticipated any such thing. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Peacock & Goddard for Clulow & Rudge, Brierley Hill, Staffordshire; Bentleys, Stokes & Lowless for Turner, Bayley & Co., Dudley.*

A. W. G.

[PROBATE, ETC., DIVISION.]

* MILLER (FORMERLY KOZUBOWSKI) *v.* KOZUBOWSKI. (HEKNER (CITED AS HEPNER), DENESTER (CITED AS DENNISTER) AND NIEKRASZ CITED.)

1955
Nov. 24;
Dec. 21.

Mr. Commissioner Latey Q.C.

PRACTICE NOTE.

Husband and Wife — Divorce — Practice — Decree — Form of decree — Naming parties found guilty of adultery.

APPLICATION (by successful party) to amend decree nisi of divorce.

The following statement of facts is taken from the judgment. On November 9, 1955, the commissioner found the wife petitioner, who did not proceed with her case but against whom the husband had charged adultery, guilty of adultery with three men, whose names were Hekner, Denester and Niekrasz. Hekner was dismissed from the suit as there was no evidence against him, the wife's confession being evidence only against herself. Denester and Niekrasz were found guilty of adultery with the wife petitioner. An order for the husband's costs was made against Denester only, and not against Niekrasz.

According to the accustomed practice over many years the order for the decree nisi was drawn up so as to name only Denester as the party cited guilty of adultery, as he was the only party cited who had been ordered to pay costs.

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Norman Lermon, for the husband, applied for a correction of the order so that it should be recorded therein that the wife had committed adultery with each of the three men cited in accordance with the commissioner's finding against her.

The wife did not appear and was not represented on the application, which was unopposed.

Cur. adv. vult.

MR. COMMISSIONER LATEY Q.C. said that he would grant an order on the application. After stating the facts substantially as set out above, the commissioner continued: On consideration of this somewhat technical matter I have decided that properly the order should be drawn up so as to record therein the fact that the wife was guilty of adultery with Denester and Niekrasz. I understand that you agree and that that will accord with your requirements?

Lermon. Yes, my Lord.

MR. COMMISSIONER LATEY Q.C. A direction under date December 6, 1955, has now been issued by the senior registrar as follows: "Where there is a specific finding of adultery against "a co-respondent or second respondent"—and, of course, the same thing applies to parties cited—"the name should appear "in the statement of the ground for divorce in the decree "('So and so had been guilty of adultery with A.B. the "'co-respondent'), whether or no there is any order for costs." The order as now drawn reads: ". . . be dissolved by reason "that since the celebration thereof the petitioner has been guilty "of adultery with Denester, the second party cited, and with "Niekrasz, the third party cited, and they with the said "petitioner."

Order accordingly.

Solicitors: *Martin & Nicholson.*

J. B. G.

[PROBATE, ETC., DIVISION.]

1955
Dec. 7.

* KEEBLE *v.* KEEBLE.

Mr. Commissioner Latey Q.C.

Husband and Wife—Divorce—Separation agreement—Covenant not to institute proceedings for restitution of conjugal rights "or otherwise"—No bar to proceedings for divorce.

Ejusdem generis rule.

As a result of conduct of his wife which formed the basis of a divorce petition in 1955, the husband left the matrimonial home in 1953. By a separation agreement of August, 1953, in which no misconduct was alleged, the husband made financial provision for the wife and the parties covenanted not to institute any proceedings

against each other "for restitution of conjugal rights or otherwise." It was further agreed that the financial provision for the wife should cease to be payable on a dissolution of the marriage.

At the hearing of the husband's petition it was submitted for the wife that the words "or otherwise" constituted a bar to proceedings for divorce:—

Held, that, the ejusdem generis principle must be applied to the words "or otherwise." As the whole purpose of the agreement was to separate the parties on terms which excluded any reference to misconduct, those words meant that neither by a process for restitution of conjugal rights nor in any other possible way could legal steps be taken by either party to compel the other to come together. The wider meaning sought to be put upon them was excluded by the fact that the possibility of a future divorce had been taken into consideration in the agreement, and the words, therefore, constituted no bar to proceedings for divorce.

HUSBAND'S DEFENDED PETITION for divorce on the ground of cruelty.

The parties were married on January 9, 1926. As a result of the wife's alleged conduct dating from 1938, which was eventually the basis of the charge of cruelty, the husband left home in 1953, and consulted solicitors. Correspondence then ensued between the husband's solicitors and those consulted by the wife in which no allegations of cruelty nor any other form of matrimonial misconduct were made against the wife.

On August 1, 1953, the parties entered into a separation agreement by which in clause 1 they agreed that "the husband and "the wife shall live and continue to live separate and apart from "each other and neither shall molest annoy or interfere with each "other or institute any proceedings for restitution of conjugal "rights or otherwise." By clause 2 it was agreed that the husband should pay to the wife for life a sum of £3 a week net, but that such sum "shall cease to be payable if the marriage "between the husband and the wife shall be dissolved by a final "or absolute decree of a court of competent jurisdiction." Clause 10 of the agreement provided that the agreement should cease to have effect on a resumption of cohabitation. The agreement made no allegation of misconduct against the wife. The husband, in his evidence in the divorce suit, said that at the time of entering into the agreement all that he had in his mind was to get away from a position which had become intolerable to him.

On March 3, 1955, the husband filed his petition praying for a dissolution of the marriage on the ground of cruelty; the wife, by her answer, denied the allegations of cruelty.

At the hearing of the petition counsel for the wife submitted that the words "or otherwise" contained in clause 1 of the agreement of August 1, 1953, were a bar to the proceedings.

Rudolph Castle-Miller for the husband.
A. E. Bolton for the wife.

The cases cited in argument are referred to in the judgment.

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MR. COMMISSIONER LATEY Q.C. stated the facts and continued: It is submitted on behalf of the wife that the words "or "otherwise" in the separation agreement bar this petition. I have been referred to the well-known and somewhat antique case of *Rowley* v. *Rowley*,[1] in which the wife sued for dissolution of marriage on the joint grounds of her husband's cruelty and adultery; that was not proceeded with on terms that the parties should execute a deed of separation, and the wife's undertaking not to institute other proceedings in the Divorce Court. Notwithstanding that undertaking, the wife petitioned afresh for divorce, alleging the old charges of cruelty, and new charges of adultery. One has to recall that as the law then stood a wife could obtain a divorce only by proving cruelty or desertion, coupled with adultery, apart from exceptional grounds which it is not necessary to mention. But in that case there were plain unambiguous words which Lord Chelmsford L.C. construed [2] as intended to prevent "future proceedings in respect of matters forming the ground of "a petition for a divorce which had occurred prior to the agree-"ment," so the petition was dismissed upon the exact language that the parties used in the agreement, as was pointed out by Sir Wilfred Greene M.R. in *Goldblum* v. *Goldblum*.[3] In the latter case, which was relied upon by Mr. Castle-Miller on behalf of the husband, the wife's suit for judicial separation was compromised by a deed of separation, providing that the petition should be dismissed, but it contained no express provision that the charges of cruelty in that petition should be withdrawn. The Court of Appeal there held that on the true construction of the deed the wife had not undertaken to withdraw the charges, nor had she undertaken not to use them in subsequent divorce proceedings; therefore, the petition was heard and tried.

Mr. Bolton relied upon *H*—. v. *H*—.[4] In that case, the wife had petitioned for divorce and it was submitted that she was barred by her withdrawal of charges of cruelty which had been made in a previous petition by her for judicial separation, those charges being withdrawn specifically in a deed of separation which compromised that petition. It was there held by Lord Merriman P. that as she had withdrawn the charges, she could not go on with them in the later petition. Lord Merriman P. reviewed [5] the leading cases on this particular subject, including *Rowley* v. *Rowley* [6] (to which I have already referred), *Rose* v. *Rose*,[7] a case which generated the well-known and comprehensive *Rose* v. *Rose* clause, and *L.* v. *L.*,[8] in which Lord Merrivale P. held that the husband's covenant in a deed of separation not to charge adultery committed before the deed was binding on him and,

[1] (1866) L.R. 1 Sc. & Div. 63.
[2] Ibid. 68.
[3] [1939] P. 107, 116; 55 T.L.R. 148; [1938] 4 All E.R. 477.
[4] (1938) 54 T.L.R. 1000; [1938] 3 All E.R. 415; [1938] W.N. 273.
[5] 54 T.L.R. 1000, 1002.
[6] (1866) L.R. 1 Sc. & Div. 63.
[7] (1883) P.D. 98.
[8] [1931] P. 63.

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therefore, the husband was debarred from raising such charges later.

It should be noted that in the present case, in the correspondence between the solicitors leading up to the agreement there was no allegation of cruelty and no allegation of any other form of matrimonial misconduct; and the husband in his evidence told me that all that he had in his mind was to get away from a position which had become intolerable to him, that he had thus entered into this agreement to separate, and that he had no intention of going back on it.

Now, Mr. Bolton contended, and it was a very able submission that he made, that the words "or otherwise" meant that the husband could bring no civil proceedings against the wife at all, and, in support of that contention, he cited two cases in which the words "or otherwise" had, in his view, been decided on the lines he maintained.

I ought now to recall the exact words of clause 1 of the agreement in the present case: "The husband and the wife shall "live and continue to live separate and apart from each other "and neither of them shall molest annoy or interfere with the "other"—and these are the words that are relevant to the present judgment—"or institute any proceedings for restitution "of conjugal rights or otherwise."

Of course, there are any number of cases, scores and scores of them, on the meaning of the words "or otherwise," or "or "other" in the authorities, and Mr. Bolton put before me two of them. I am afraid that neither of them assisted me very much, owing to their peculiar context, but it is only fair to pay tribute to Mr. Bolton's submission by dealing with them. In one of them, *Whittaker* v. *Kershaw*,[9] it was a question of whether a married woman could be sued by an executor having regard to the words of section 1 (2) of the Married Women's Property Act, 1882. That section reads: "A married woman shall be capable of "entering into and rendering herself liable in respect of and to the "extent of her separate property on any contract, and of suing "and being sued, either in contract or in tort, or otherwise, in "all respects as if she were a feme sole." The Court of Appeal in that case applied the well-established principle of ejusdem generis, that is to say, that where general words follow particular ones, the rule is to construe the general words as meaning "other such like." Applying that principle to the words "or "otherwise," the Court of Appeal held that the genus was the status of feme sole in which capacity she could be sued. In the other case cited by Mr. Bolton, the *National Association of Local Government Officers* v. *Bolton Corporation*,[10] the question arose from the statutory definition of a "workman" as "any person "who . . . works under a contract with an employer, whether

[9] (1890) 45 Ch.D. 320.

[10] [1943] A.C. 166, 167; 59 T.L.R. 1; [1942] 2 All E.R. 425.

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"the contract be by way of manual labour, clerical work or otherwise." Here the House of Lords had to construe the meaning of words in a statutory order, and Lord Simon said [11] that the use of the words "or otherwise" did not bring into play the ejusdem generis principle because "manual labour" and "clerical work" did not belong to a single limited genus. He held that "or otherwise" meant "or in any other way."

Those cases did not seem to assist me in the context of the present case. Clearly the ejusdem generis principle must be applied to the present case if the words "or otherwise" are no more than empty surplusage. The whole purpose of the deed was to separate the parties on terms which excluded any reference to matrimonial misconduct of any kind. If I am compelled to give a meaning to the words "or otherwise," I have concluded (a) that the genus being the separation of the husband and wife, those words mean that neither by a process for restitution of conjugal rights, nor in any other possible way, could legal steps be taken by either party to compel the other to come together; and (b), that the very much wider meaning sought to be put on those words is excluded by the fact that in clause 2 the possibility of a divorce in the future is taken into consideration. Therefore, I find that this petition is not barred by those words in the deed, and that there is no estoppel.

[His Lordship then proceeded to review the facts upon which the husband's allegations of cruelty were based, holding that acts of cruelty before January, 1953, had been condoned but had been revived by subsequent acts of cruelty; and pronounced a decree nisi.]

Solicitors: *Theodore Goddard & Co.; H. B. Wedlake, Saint & Co.*

E. J.

[11] [1943] A.C. 166, 176–177.

[LIVERPOOL ASSIZES.]

1955
Nov. 11, 14, 15, 16, 17.

Ashworth J.

* SZUMCZYK *v.* ASSOCIATED TUNNELLING CO. LTD. AND ANOTHER.

[1954 S. No. 1395.]

Negligence—Safe system of work—Dangerous premises—Coal mine—Unsafe roof in mine—Employers undertaking work under contract with occupiers of mine—Breach of statutory duty by occupiers—Accident to employee—Liability of employers.

The plaintiff's employers, A. T. C., were engaged under contract with the National Coal Board, the occupiers of a mine, in constructing a tunnel in the mine when some controversy arose as to

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

the manner in which the roof should be supported. The supervisor of A. T. C. wished to employ a system of support which he was prohibited from using by the officials of the Board, who laid down a system of support which was less adequate. The controversy was reported to a senior official of A. T. C., who conveyed the substance of it to a senior official of the Board, as a result of which nothing further was done and the plaintiff, although he complained to his superiors, was instructed to carry on with the system of support laid down by the officials of the Board. While so working the plaintiff sustained injuries by a fall of the roof, which was due to its being, in breach of the statutory duty imposed on the Board, insufficiently supported:—

Held, dismissing the plaintiff's claim against his employers, that, in the circumstances, the employers, even though they were aware of the situation, were not in breach of their common law duty to take reasonable care to provide a safe system of work for the plaintiff.

Dicta of Lord Wright in *Thomson* v. *Cremin*, post, pp. 103, 109 applied.

ACTION.

The plaintiff, Jan Szumczyk, was employed by the first defendants, Associated Tunnelling Co. Ltd., who were engaged under contract with the second defendants, the National Coal Board, in constructing a tunnel in a mine owned and occupied by the Board. In the course of some eight or nine months the tunnel had been driven a distance of about 1,000 yards, and in August, 1953, had reached a point where it made a junction with an old airway. Because of the risk of fire, instructions were given by the second defendants that all the old timber supports should be removed from the old airway. As the tunnel was driven further, the old airway and the increasing space between it and the tunnel had to be packed and the roof had to be supported while such packing proceeded. The difficulty of supporting the intervening space was increased by the presence of a stump of ungot coal and two schools of thought arose as to the manner of meeting the situation. The first defendants' supervisor, Chester, contended that substantial support in the form of chocks and "goalposts" was necessary. The officials of the second defendants maintained that single or self props were enough to carry the weight provided an adequate number were set. The support afforded by "goalposts" would have been greater than the individual support afforded by props alone.

When the old airway was first encountered, Chester started working in accordance with his own method, putting in the supports he wanted and leaving the old timber in position; he was then ordered to remove the old timber and while doing so there was a fall of dirt. He informed the under-manager of the Board, Houghton, of the danger involved, but was ordered to continue to remove the old timber. Chester was subsequently

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ordered by the Board's officials to remove some chocks and "goalposts" which he had set up, and he was prohibited from using the system of support he wished to employ. The controversy was reported by Chester to the first defendants' senior official, Major Greenhalgh, who took the matter up with the manager of the mine, Whincup, but nothing further was done and Chester was told by Major Greenhalgh to carry on in accordance with the instructions given by the Board's officials.

On September 23, 1953, the plaintiff was engaged, in the course of his employment, in packing the old airway and getting out some coal when a stone fell from the roof and he sustained injuries. The plaintiff had worked at this place for only three or four days before his accident and in that time had formed an adverse view of the method of working and had said so to his superiors, but he was told by Chester and by his chargehand that he must carry on.

The plaintiff brought this action claiming damages against the first defendants on the ground of negligence and against the Board on the ground of negligence and/or breach of section 49 of the Coal Mines Act, 1911. Ashworth J. found that the fall of the roof was due to its being insufficiently supported, which was conceded on behalf of the Board to be sufficient of itself to render them liable for breach of their statutory duty, their attempt to show that it was not reasonably practicable to avoid or prevent the breach being abandoned. The judge also found that had the roof been supported in the manner advocated by Chester, it was likely that it would not have fallen and the prohibition by the Board of the use of that method of support played a direct and important part in causing the fall.

J. S. Watson Q.C. and *George Bean* for the plaintiff.

D. J. Brabin Q.C. and *J. M. Davies* for the first defendants.

J. D. R. Crichton Q.C. and *Leslie S. Rigg* for the National Coal Board.

The following cases, not referred to in the judgment, were cited in argument: *Wilsons and Clyde Coal Co.* v. *English*[1]; *Garcia* v. *Harland & Wolff Ltd.*[2]; *Bott* v. *Protheroe Steel Tube Co. Ltd.*; *L. Dainty Ltd., Third Parties.*[3]

ASHWORTH J. stated the facts and continued: On my findings up to this stage it is clear that the Coal Board must bear a major responsibility for this accident, but it is still said that the tunnelling company are partly responsible, and the attack on that company, both by the Coal Board and by the plaintiff, has been pursued right to the end. It is not quite the same attack.

[1] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[2] [1943] K.B. 731; 60 T.L.R. 16; [1943] 2 All E.R. 477.

[3] [1951] W.N. 595.

Mr. Crichton, for the Coal Board, sought to assign the blame to Chester. The way he put it was that Chester should have been more emphatic with Major Greenhalgh and the latter with Mr. Whincup. I have no doubt whatever that Chester did report to Major Greenhalgh to the following effect: first, that there was trouble in the area of operation and that two views were in conflict; secondly, that the trouble related primarily to the removal of the old timber in the airway; thirdly, that the trouble related generally to the safety of the conditions down there; and fourthly, that the Coal Board would not let him carry on by the method which he wanted. I am also satisfied that Major Greenhalgh conveyed the substance of the first three of those complaints to Mr. Whincup. I do not think that it would be right to say that Major Greenhalgh made it plain to Mr. Whincup that the Coal Board had issued any prohibition against the method which Chester wished to adopt as regards chocks and "goalposts," but I am quite satisfied that Major Greenhalgh himself was aware that safety was involved; trouble had arisen, and he passed on the substance of that to Mr. Whincup. I find it myself somewhat ironical that the Coal Board, after insisting on having their way, should now complain that someone made insufficient protest to persuade them to change their minds. If Chester had done nothing it may be that there would be some substance in this complaint by the Coal Board, but I take the view that he acted reasonably and understandably, and that Major Greenhalgh also acted reasonably and understandably. It was put up to high level, which Mr. Crichton demanded, and if as a result of what Major Greenhalgh said to Mr. Whincup nothing was done, I do not think the fault lies with Major Greenhalgh. I therefore reject the contention of the Coal Board that the tunnelling company was to blame on the ground suggested.

Mr. Watson, for the plaintiff, took a quite different line, and understandably so. For the plaintiff he said that the tunnelling company, as his employers, were under a duty to take reasonable care to provide a safe system of work and that the tunnelling company could not escape from the consequence of the system being unsafe by saying that they relied on the Coal Board. He referred to the authority which laid down that it is not enough to rely on the provision of a competent foreman, and he cited to me a passage from the speech of Lord Wright in *Thomson* v. *Cremin*[1]: "To hold a master stevedore, in the absence of special "circumstances of suspicion, subject to a general duty towards "his men to inspect the structure of the vessel, whether per- "manent or temporary, whether shifting-boards, stanchions or "the like, would, I think, be contrary to practice and inconsistent "with the exigencies of the case. He comes on board the vessel, "the shipowner's premises, to carry out the loading or dis- "charging, and, unless there are special stipulations in the

[1] Post 103, 109.

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Ashworth J.

"contract, is prima facie entitled to assume that the shipowner "has discharged his duty of care in regard to the safety of the "premises. He is on board the ship for a special and limited "purpose and has in the ordinary course no right to interfere "with the structure, temporary or permanent, of the vessel. "No doubt, if there are apparent indications which he observes, "or ought to observe, that the structure is defective, he owes a "duty to take reasonable measures for the protection of his men. "But there was nothing of the sort in the present case. I agree "generally with what was said on this question by the Lord "Justice-Clerk (Rt. Hon. J. H. A. Macdonald) in *M'Lachlan* "v. *Peverill S.S. Co. Ltd.*,[2] though, if there was something "manifestly wrong and dangerous, I think the stevedore should "refuse to go on with the work until the defect was remedied."

It must be kept in mind that the employers' duty is to take reasonable care. It is not an absolute duty, as has been laid down in many cases. I ask myself whether the tunnelling company took reasonable care to provide a safe system of work. No authority precisely covering the present point has been cited, but there were sentences in the extract from Lord Wright's speech which dealt with premises which lead me to a conclusion in favour of the tunnelling company. I take the view that the tunnelling company were aware, as they must have been aware, that the Coal Board were under a statutory duty regarding the support of the roof. The tunnelling company knew that there was a controversy as to the method of support. They reported the controversy, they knew the Coal Board were experts, and even though the method proved wrong I am prepared to hold that the tunnelling company were not in breach of their duty to the plaintiff in what they did.

It seems to me that in a case of this sort one has on the one hand the Coal Board under a statutory duty which is almost absolute to take steps for the support of the roof. The Coal Board said to the relevant witnesses that their method of support was the one which was adequate; not merely adequate, but the one which must be employed. I ask myself whether it is right to hold that the tunnelling company, who were aware of that situation, were in breach of their duty because they followed the advice of the Coal Board and instructed their men to do what those charged with the statutory duty were insisting on being done, and I answer that question "No." Quite clearly the tunnelling company could not insist on Chester's method, and short of withdrawing their men, which in the circumstances was not suggested as being incumbent on them, there was nothing more, in my view, which they ought to have done which they

[2] (1896) 23 R. (Ct. of Sess.) 753.

omitted to do. I am therefore prepared to hold, and I do hold, that this claim fails against the tunnelling company.

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Judgment for the plaintiff against the second defendants.
Judgment for the first defendants.

Solicitors: *Canter, Levin & Mannheim, Liverpool; Weightman, Pedder & Co., Liverpool; P. E. Lissant, Manchester.*

NOTE.

[HOUSE OF LORDS.]

* THOMSON *v.* CREMIN AND OTHERS.

H. L. (Sc.)

1941
July 14, 15, 17, 18, 22, 23, 24; *Oct.* 20.

Invitor and Invitee — Independent contractor — Negligence of—Ship—Injury to stevedore's labourer—Third party's negligence—Fall of "shore" fixed by Australian shipwrights in accordance with Australian regulations—Stevedores' duty to inspect ship—Liability of shipowner or employing stevedores.
Negligence—Safe system of work—Dangerous premises.

A labourer, employed by a firm of Glasgow stevedores, in discharging bulk grain in a ship's hold, was injured when he was struck by the fall of a "shore" fixed by shipwrights in Australia to hold a shifting-board and certified as satisfying Australian Government regulations:—

Held, first, that compliance with the regulations (which were concerned with securing the safety of the ship and cargo from the dangers of the voyage) was not the full extent of the shipowner's duty to the labourer as an invitee, that duty being to take adequate care and, if such care was not taken in fixing the shore, the shipowner was not exonerated by the fact of having employed an independent contractor.

Wilkinson v. *Rea Ltd.* [1941] 1 K.B. 688; [1941] 2 All E.R. 50, approved.

Held, secondly, that there was evidence on which the courts below could find, as they did, that the shore was fixed without adequate care.

Held, thirdly, that on the evidence negligence on the part of the firm of stevedores was not established, since it was not proved to be part of the regular practice of such firms to inspect the shores and unless they observed a defect in a particular shore they were not obliged to take special precautions.

Held, lastly, that the shipowner was accordingly liable in damages.

Decision of the Second Division of the Court of Session affirmed.

APPEAL from the Second Division of the Court of Session.

The first respondent in this case, Joseph Cremin, received serious injuries while employed as a stevedore's labourer by the second respondents, Andrew Main & Sons, in discharging bulk grain from No. 2 hold of the S.S. *Sithonia* belonging to the appellant, Henry Murray Thomson, which was lying in Princes Dock, Glasgow. This respondent

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raised an action in the first instance against the appellant and, on the appellant attributing the accident to the fault and negligence of the second-named respondents, he convened them as defenders in the action and sued the appellant and the second-named respondents jointly and severally for damages in respect of the injuries which he had sustained.

The facts are fully set out in the opinion of Viscount Simon L.C.

A. P. Duffes K.C. and *George Reid* for the appellant.
John Wheatley and *G. G. Stott* for the first respondent.
G. R. Thomson K.C. and *J. H. Bassett* for the second respondents.

The House intimated that the appeal would be dismissed and their Lordships took time to formulate their reasons.

Oct. 20. VISCOUNT SIMON L.C. My Lords, on April 29. 1938, the first respondent, Joseph Cremin, who was pursuer in the action, received serious injuries while employed by the second-named respondents as a stevedore's labourer in discharging bulk grain from No. 2 hold of the S.S. *Sithonia,* belonging to the appellant, which was lying in Princes Dock, Glasgow, after a voyage from Fremantle in Western Australia. A heavy wooden "shore" which stretched from the ship's side to the "shifting-board" fell upon the pursuer's head while he was below propelling a grain "plough," which was being used for feeding the buckets of an elevator working from No. 2 hold to the main deck. The pursuer in the first instance brought his action against the appellant alone, alleging that, owing to the negligence of the appellant, the shore was insecurely attached to the shifting-board. Upon the appellant attributing the accident to the negligence of the second-named respondents, the pursuer added them as defenders in the action and sued the appellant and the second-named respondents jointly and severally for damages in respect of the injuries which he had sustained.

The Lord Ordinary (Lord Robertson) reached the conclusion that the appellant's negligence was established, and that he was liable to compensate the pursuer in the sum of £1,350. As against the master stevedores, the Lord Ordinary held that negligence was not proved and he accordingly assoilzied the second-named respondents.

The present appellant appealed to the Second Division of the Court of Session, contending either that the second-named respondents were solely responsible, or at any rate that the responsibility should be shared between them. The Inner House affirmed the interlocutor of the Lord Ordinary. Lord Mackay, however, would have preferred a finding of joint responsibility, and there are indications that other of the judges composing the court did not in all respects agree with the mode of reasoning by which the Lord Ordinary reached his conclusion.

The case for the appellant before this House was again stated alternatively, his contentions being (*a*) that there was no failure of duty by him towards the injured man but that the sole responsibility lay on the second-named respondents; (*b*) that, in any event, if liability was established against the appellant, fault causing the accident was also proved against the second-named respondents. This double-barrelled case was presented to us in an argument which thoroughly examined every detail of the evidence, but the House intimated that the decision already reached by the courts in Scotland must stand, for reasons which would be given later. I have now to state, with such brevity as the subject-matter permits of, what are the reasons why I consider that the appeal should be dismissed.

The holds of a vessel which is about to undertake a voyage with grain in bulk as its cargo require to be fitted with "shifting-boards," i.e., wooden partitions running fore and aft from bulkhead to bulkhead

in the centre line of the ship, so as to obviate the danger of the grain shifting in heavy weather from one side to the other. These shifting-boards are for the most part supported in position by attachment to the permanent iron pillars which are fixed at intervals inside the holds; but, in the way of the hatch, lateral support for the shifting-board is provided by "shores"—short shores stretching from the hatch coamings (with these we are not in this case directly concerned) and long shores stretching from either side of the ship at a rising angle of about 10 degrees from the horizontal. These long shores in the case of the *Sithonia* were about 27 feet long with a scantling of 6 in. by 8 in., and these dimensions were not challenged as inadequate.

Since the long shores meet the uprights of the shifting-boards at a slope, it is important that their midship ends should be cut at such an angle as will present a flat surface for making contact with the perpendicular. The Lord Ordinary held, and the fact may be accepted, that this was done in the case of the *Sithonia*. But it is not enough that the midship ends of the long shores should be suitably shaped, or even that the shores should be pressed down so as to make solid contact; they must be so held in position as to make sure that they will remain firm. There was some difference of view as to what additional precautions were needed, but the evidence fully warranted the Lord Ordinary's conclusion that a safe construction would be provided by (1) securely nailing and (2) fitting a "chock" or "cleat" of wood above the midships end of the shore by nailing it with 5 inch by 5 gauge nails driven through it into the upright, and thus counteracting any upward thrust of the midships end of the shore. Indeed, I understand the appellant to accept this standard. His argument on the facts was directed to establishing (a) that the shore which fell on the pursuer was securely fixed in Australia in accordance with the above construction; (b) that its fall was not due to any default in the shipowner, but was caused by the negligent operations of the second-named respondents while discharging the cargo under contract with the appellant.

As regards (*a*) the testimony was conflicting. The appellant relied on the evidence of three witnesses taken in Australia, where Messrs. Petterson & Co., a firm of shipwrights with a large experience of fitting grain ships with shifting-boards, were employed for this purpose on the *Sithonia* in preparation for her taking on board her cargo. The partner in this firm who supervised the work gave evidence that the construction above described was duly carried out; a marine surveyor who inspected and certified the work for an underwriting association testified that the structure was properly executed—(the Lord Ordinary notes that he did not state that the inboard ends of the shores were secured by nails, but, on the other hand, he declared that he would not expect the shore to be dislodged by less than repeated blows with a sledge hammer)—and a Government inspector who gave the official certificate spoke more generally of the shifting-boards being efficiently fitted. As against this, there is the fact that, after the shore was exposed by the removal of the grain in which it was embedded during the voyage the shore fell, and fell without the application of any violence corresponding to sledge-hammer blows; and, according to the evidence of three fellow-workmen of the pursuer who were in the hold when it fell, the "chock" which should have helped to keep the shore in position became detached and fell also, when it was observed that the nails in it, instead of being 5 inches long, were short nails of about 2½ inches. The details of Messrs. Petterson's bill show that a quantity of 3 inch nails were charged for in the course of the work, but no evidence was given as to the purpose for which they were used.

The erection of the shifting-boards, and the fitting of shores to

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support them, were required by regulations made under the Navigation Act of the Commonwealth of Australia, and the *Sithonia* could not have left the port of Fremantle with her cargo of bulk grain without the official certificate that these regulations had been complied with. The appellant's counsel contended that compliance with the regulations was the full extent of the shipowner's duty. This is plainly not the case. The regulations are for the purpose of securing that ship and cargo can safely face the dangers of the voyage, but the shipowners have undertaken, not only to carry the cargo to its destination, but to unload it there, and must have contemplated that stevedores would be employed for this purpose. As between the shipowner and the pursuer, the former must be regarded as the occupier and the latter as an invitee who comes to work in the hold in consequence of the contract made between the shipowner and the pursuer's employers. The shipowner's responsibility for the safety of the structure is not indeed absolute, but, on the principle of *Indermaur* v. *Dames*,[1] he owes to the invitee a duty of adequate care. If adequate care was not exercised in fitting and securing the shore, it would be no answer (as the appellant's counsel candidly admitted) to say that the shipowner employed an independent contractor at Fremantle to do the work. For this last proposition reference may usefully be made to a recent decision of the Court of Appeal in *Wilkinson* v. *Rea Ltd.*,[2] and especially to the observations of Luxmoore J.[3] I can see no ground for drawing a distinction between the permanent structure of the ship and the temporary erections put up in her holds for the purpose of the special cargo she was carrying.

The first, and crucial, question, therefore, is whether the fixing and securing of the shore at Fremantle were done with adequate care. This, in turn, largely depends on whether the "chock" was fastened by nails of adequate length, or whether the evidence as to shorter nails is to be believed. It would be difficult to imagine an issue in which the decision more completely depends on the view of the trial judge as to the trustworthiness of the testimony given in his presence by the witnesses who asserted that the "chock" became detached by the accident, and that they found that it had only been fastened with short nails. The Lord Ordinary, who alone had the opportunity of judging of their veracity at first hand, has believed what they said. It is unfortunate that neither the "chock" nor the shore were preserved after the accident so that they could be produced at the trial, but I am not satisfied that their absence helps the shipowner to whom the pieces of wood belonged. Without throwing any doubt upon the sincerity of the Australian witnesses, it is fair to observe that they were testifying some 15 months after the accident and 18 months after the work was done. If small nails were improperly used to fasten the "chock," this must have escaped their attention, and once the mistake was made it may well be that inspection would not detect it. The four judges of the Second Division did not differ from the Lord Ordinary's view that short nails were employed and, in such a case as this and in view of the evidence given, the House could not, in my opinion, properly set aside this concurrent finding of fact.

As regards (b), the appellant made a series of allegations of fault against the second-named respondents and contended that the proximate cause of the accident was to be found in one or other of these alleged shortcomings. First, he contended that it was the duty of master stevedores, as soon as the unloading of the cargo had proceeded far enough to expose the shores which had been buried in the grain, to

[1] (1866) L.R. 1 C.P. 274; (1867) L.R. 2 C.P. 311.

[2] [1941] 1 K.B. 688; [1941] 2 All E.R. 50.

[3] [1941] 1 K.B. 688, 701–702.

remove the shores altogether and thus obviate the possibility of their falling at a later stage upon those who were working below them. The appellant's evidence in support of this view largely related to practice in a particular line of vessels where the company does its own stevedoring, and where the removal of shores might be explained because they would otherwise impede the work of discharge, or because the holds were being cleared for a return cargo other than bulk grain. I agree with the view of the Lord Ordinary that the evidence did not establish any practice of removing shores for reasons of safety or security, and, indeed, if shores are securely and properly fixed, there would seem to be no need to remove them for such reasons. The *Sithonia* met with no exceptionally severe weather on her voyage, and it is a striking fact that the fall of a shore in circumstances like the present is so unusual an event that none of the witnesses called in the case could speak to it ever having happened before. This circumstance, to my mind, strongly confirms the view that there was something faulty in the fixing of this particular shore that was the cause of the accident. Next, the appellant contended that the second-named respondents were liable for failure to inspect the shores and to detect the weakness of this particular shore before it fell. Here again, I agree with the view of the Scottish courts that it was not proved to be part of the regular practice or course of duty of stevedoring firms to make such inspection; of course, if they observed that a particular shore was loose, their duty would be to take immediate precautions, but in the present case there seems no reason to think, and it certainly was not proved, that the shore which collapsed gave any appearance, before its fall, of being dangerous. The appellant further urged that an explanation of the collapse might be found in the vibration set up by the working of the two elevators used for discharging the grain, or by a portion of this apparatus getting into actual contact with the shore, or by the wires which hauled the "ploughs" in the hold fouling the shore in some way. These arguments were developed before us at considerable length, but the short answer to them is that, though it is conceivable that one or other of these matters might bring about the accident, there is not sufficient evidence that any of them did. The method of discharging grain cargoes at Princes Dock, Glasgow, is exceptional, for the more modern and customary use of suction is not employed. But the evidence does not at all justify the conclusion that the methods of unloading employed at Princes Dock are not proper, and, as I have said, no one was able to say that an accident of this sort had happened there before. The appellant went so far as to argue that, since Glasgow was not named in his contract as the port of discharge, he was not required to provide against the special circumstances of unloading at that port. The answer, of course, is that Glasgow was within the range of ports at which he might be required to discharge, and that in any event it is not proved that the methods employed at Princes Dock caused the shore to fall when it would not have fallen had the unloading taken place elsewhere.

My Lords, the decision in this case turns almost entirely on questions of fact, as to which the courts in Scotland have given the fullest attention and have reached the unanimous conclusion that the appellant, and the appellant alone, is liable for this deplorable accident. There are no adequate grounds on which that conclusion could be disturbed, and I accordingly move that the appeal be dismissed with costs.

My Lords, my noble and learned friend, Lord Romer, authorizes me to say that he has read the opinion which I have just delivered, and concurs in it.

LORD THANKERTON. My Lords, in this action the first respondent

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seeks to recover damages for injuries sustained by him on April 29, 1938, while employed as a stevedore's labourer by the second respondents in the discharge of bulk grain from No. 2 hold of the S.S. *Sithonia*, which belonged to the appellant and was then lying alongside in Princes Dock, Glasgow. The first respondent originally raised the action against the appellant, but, in view of the defence stated by the appellant, he convened the second respondents as defenders, and now sues the appellant and the second respondents jointly and severally or severally for the damages claimed. After proof led before him, the Lord Ordinary (Lord Robertson) decerned against the present appellant for payment to the pursuer of £1,350 in the name of damages, and assoilzied the present second respondents. On a reclaiming motion by the appellant, who did not challenge the quantum of damages awarded, the decision of the Lord Ordinary was affirmed by the Second Division of the Court of Session. The present appeal is taken against these decisions.

As in the Inner House, the appellant maintained in this House that he was entitled to absolvitor, and, alternatively, that the first respondent's injuries were jointly caused by his (the appellant's) fault and that of the second respondents, who were thus jointly liable with him. Again, no question was raised as to the quantum of damages, if liability was established.

There is no doubt that the serious injuries sustained by the first respondent were caused by a heavy timber shore which fell on his head while he was operating a grain plough, which gathered the grain so as to feed the elevator, which raised it to the main deck. The Lord Ordinary has fully described the position and purpose of the shore in relation to the shifting-boards, and the construction of the shifting-boards, as also the way in which the discharge of the grain was being conducted by the second respondents, who were employed by the appellant for that purpose. The shifting-boards are a necessary precaution in the case of cargoes of grain in bulk, so as to obviate the risk of the grain shifting during the voyage in heavy weather; the province of the shores is to maintain the shifting-boards in position. While the shifting-boards serve no purpose after the cargo has reached its destination, it is not really practicable to remove the shores until at least a substantial portion of the grain in the particular hold has been removed.

The Lord Ordinary held it proved that the amidships end of the shore in question had not been properly secured at Fremantle, in respect that the wooden chock, which was designed to prevent the shore from springing upwards, had been nailed to the shifting-board by nails of an inadequate length, and that this was the cause of the accident; he held that the appellant was therein negligent, and that such negligence was a breach of the duty owed by the appellant to the first respondent. This view was affirmed by the Inner House. As regards the crucial finding of fact as to the failure of the appellant to have the shore properly secured at Fremantle, I may express my concurrence in the view of my noble and learned friend on the Woolsack in the speech which he has just delivered, which I have had the opportunity of considering, and I agree that this finding must stand. There remains the question whether such failure of the appellant constituted a breach of any duty owed by him to the first respondent, and, if so, whether it can be causally connected with the accident.

My Lords, I have no doubt that the shifting-boards, including the shores, were part of the fittings of the ship, and, contrary to the views of Lord Mackay, I am of opinion that the cases of *Simpson* v. *Burrell & Son & Paton*[4] and *M'Lachlan* v. *Steamship "Peveril" Co. Ltd.*[5] are directly relevant, and that, unless the appellant can show

[4] (1896) 23 R. (Ct. of Sess.) 590. [5] (1896) 23 R. (Ct. of Sess.) 753.

special circumstances which would impose the duty of inspection on the stevedore, he is liable for the results of the unsafe condition of the shore to the first respondent, to whom he owed a duty to take reasonable care under the well-known principle of *Indermaur* v. *Dames*.[6] While the certificate of the Australian surveyors, given under the statutory regulations of Australia, may be of some evidential value, in a case such as the present one, as to the steps taken by the appellant to secure the proper construction of the shifting-board, it cannot absolve the appellant of his duty to the first respondent; further, the ship undertook not only the carriage of the grain during the voyage, but also the discharge of the grain at any port at which it undertook to discharge by the contract of carriage or by subsequent agreement. Counsel for the appellant submitted that this would place an unreasonable burden on the ship, as the ultimate port of discharge might not be in view at the time of the construction of the shifting-boards, but the answer is simple, viz., either secure adequately the shifting-boards, or take steps to remove them or make sure of their adequacy by inspection at the port of discharge by the ship itself or by arrangement with the stevedores. Of course, it might be that the practice of a particular port was so inveterate that the ship was entitled to rely, as part of their arrangement for employment of the stevedore, on the discharge of such duty of inspection by the latter, and it may be that the employees of the stevedore would be affected by such transfer of the duty of inspection, but that question does not arise for consideration in this appeal, for I am clearly of opinion that the evidence in this case falls far short of proving any such inveterate practice. If it proves anything it proves a variety of practice, and is inconsistent with the appellant's case. The same is true of the alleged practice of removal of the shores by the stevedore.

The appellant maintained that the second respondents were negligent in three respects, viz., (1) in putting in an apparatus which might foul the shore in course of the operations, (2) in the amount of vibration caused during the operation, and (3) in the operation of the ploughs, any of which caused, or might tend to cause the loosening of the shore. But, in my opinion, these contentions are excluded by the admission of the appellant's counsel, made in answer to a question by one of your Lordships, that nothing that was done in the present case was unusual, and that this is the first time that a shore has fallen as this one did. It is not suggested that, in the present case, the second respondents, or any of their employees, observed, or should have observed, prior to the falling of the shore, anything which would have warned them that the shore was loose or dangerous. The appellant's case against the second respondents fails, and it follows, in my opinion, that the courts below were well justified in holding that the appellant's negligence in construction of the shifting-boards was the cause of the accident and was in breach of the duty owed by him to the first respondent, and that he alone is liable to the first respondent. I therefore agree with the motion proposed by my noble and learned friend.

LORD WRIGHT. My Lords, I have had the advantage of considering in print the speech which my noble and learned friend the Lord Chancellor has just delivered. I agree with it and merely add a few supplementary observations on some general matters of principle which seem to me to be involved.

That the first respondent was working on the appellant's premises, the steamship *Sithonia*, as an invitee and not as a mere licensee has not been questioned. Thus the case fell within the general rule

[6] L.R. 1 C.P. 274; L.R. 2 C.P. 311.

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enunciated in *Indermaur* v. *Dames*.[7] The rule there laid down as to the duty of the invitor to the invitee has been affirmed in several decisions of this House, whether the particular case was held to fall within or without the rule. In the present appeal, however, the failure to exercise due care for the safety of the invitee which has been found, was due not to the negligence of the appellant or his servants but to that of independent contractors, the Australian shipwrights who constructed the shifting-boards before the grain was loaded. I agree with the Lord Chancellor in his approval of the decision of the Court of Appeal in *Wilkinson* v. *Rea Ltd.*,[8] where it was held by Luxmoore L.J., with whom MacKinnon L.J. concurred, that the invitor was not excused for a failure to perform his duty to the invitee merely because he had entrusted performance to another. Luxmoore L.J. adopted the view of Williams J. in *Pickard* v. *Smith*.[9] The duty of the invitor towards the invitee is, in my opinion, a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer: he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by leaving the work to contractors however reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill. This is only an instance of the general rule which was stated by Lord Blackburn in another connexion in *Dalton* v. *Henry Angus & Co.*,[10] where he distinguished the case of what has been called the collateral negligence of a sub-contractor from their negligence in failing to perform a duty resting on the principal himself who "cannot escape from the responsibility attaching to him of seeing "that duty performed by delegating it to a contractor." Lord Blackburn again enunciated the same principle in *Hughes* v. *Percival*.[11] More recently this House, again in a different context of fact, applied this rule in *Wilsons and Clyde Coal Co. Ltd.* v. *English*.[12] It is always a question of the extent of the duty incurred. In the present case the invitee is not concerned with the course which the invitor adopts by way of discharging the duty. He is entitled when he comes on the invitor's premises to rely on the warranty that the invitor's duty to him has been performed and to complain if he is injured because the duty has not been properly performed.

Mr. Duffes, when this question was raised in the argument before this House, said that he did not rely on the fact that the neglect was that of the sub-contractor, first, because the point was not pleaded, and secondly, because he was not optimistic of success in arguing it. I feel that the fairness and candour of Mr. Duffes deserve a recognition on my part that he was justified in his want of optimism. On the facts found and admitted the question raised by the employment of the independent contractors hits one in the face; speaking for myself, I should be unwilling to decide against the appellant if I did not think, as I do, that the employment by the appellant of the Australian shipwrights, though a competent firm of good repute, afforded him no defence in this action.

Nor do I think that the appellant can in this action rely on the Commonwealth Government certificate that the regulations as to shifting-boards had been complied with, or claim that it constitutes sufficient evidence that he had fulfilled his duty to the first respondent.

[7] L.R. 1 C.P. 274; L.R. 2 C.P. 311.
[8] [1941] 1 K.B. 688.
[9] (1861) 10 C.B.(N.S.) 470.
[10] (1881) 6 App.Cas. 740, 829.
[11] (1883) 8 App.Cas. 443, 446.
[12] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

These regulations are for the purpose of satisfying the requirements of the public policy of the Commonwealth, and do not in general affect private and personal duties and rights, whether contractual or such as those arising in this case from the relationship between the appellant and the first respondent.

With the greatest respect to Lord Mackay, I cannot see any reason to hold the second respondents responsible to the first respondent either solely or conjunctly with the appellant. To hold a master stevedore in the absence of special circumstances of suspicion subject to a general duty towards his men to inspect the structure of the vessel, whether permanent or temporary, whether shifting-boards, stanchions or the like, would, I think, be contrary to practice and inconsistent with the exigencies of the case. He comes on board the vessel, the shipowner's premises, to carry out the loading or discharging and, unless there are special stipulations in the contract, is prima facie entitled to assume that the shipowner has discharged his duty of care in regard to the safety of the premises. He is on board the ship for a special and limited purpose and has in the ordinary course no right to interfere with the structure, temporary or permanent, of the vessel. No doubt if there are apparent indications which he observes, or ought to observe, that the structure is defective, he owes a duty to take reasonable measures for the protection of his men. But there was nothing of the sort in the present case. I agree generally with what was said on this question by the Lord Justice-Clerk in *M'Lachlan* v. *Peveril S.S. Co. Ltd.*,[13] though if there was something manifestly wrong and dangerous, I think that the stevedore should refuse to go on with the work until the defect was remedied. I cannot, however, see what purpose would be served by a slight inspection of the structure by the master stevedore where there was no special ground of suspicion, while to require it would place an unwarranted and unbusinesslike burden on the stevedores.

I do not find in this case any occasion for invoking the formula generally described as res ipsa loquitur. That is little more than a prima facie presumption of evidence of very limited use; where it exists, it can always be rebutted. It does not arise at all in the present case. Though the structure was throughout in the possession and control of the shipowner, it was exposed to many external influences not involving negligence of the appellant from the date when it was erected until the time when the shore fell, such as perils of the seas, and possible damage in the course of the unloading operations; in addition, the risk of a latent defect cannot be ignored. Hence the occurrence of the accident is not in itself any evidence, even prima facie, of breach of duty by the appellant. Some evidence pointing to a specific fault is in my opinion here necessary to satisfy the onus which rests on the respondent to establish negligence. It is on the specific evidence of defective workmanship that the decision is to be justified in this case.

The various observations which I have made are merely supplementary to the reasoning of the Lord Chancellor, with which, as I have already stated, I agree.

I concur in the motion proposed.

LORD PORTER. My Lords, the question to be considered in the present case is, I think, one of fact rather than of law, and ultimately turns upon whether the view of the Lord Ordinary and his method of solving the problem can be supported. The first respondent, Joseph Cremin, was injured by the fall of a shore in No. 2 hold of the S.S. *Sithonia* when he was engaged in discharging her at Princes Dock,

[13] 23 R. (Ct. of Sess.) 753.

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Glasgow. He was a docker in the service of the second respondents, Andrew Main & Sons, who were the stevedores employed by the appellant to effect that discharge.

The shore was erected to support certain shifting-boards placed below the hatch in accordance with the provisions of statutory rules made under the Navigation Act, 1912–1926, of the Commonwealth of Australia. By Part III, r. 9 of those rules it was provided: "(1) Where bulk grain is loaded in any ship shifting-boards shall be "erected in the ship to the satisfaction of the surveyor. . . . "(2) Shifting-boards where fitted . . . (*b*) shall be properly secured "to the satisfaction of the surveyor . . . between uprights and shored "or stayed in position."

In the *Sithonia* the shifting-boards in way of the hatchway did not extend to the bottom of the hold; they were supported by stilts and by vertical wooden uprights nailed on each side of the shifting-boards. They received lateral support from the shores, which were made fast at the skin of the ship and ran thence at an upward angle of 10 to 15 degrees to the shifting-boards in the centre of the hold where they were kept in position by being driven down on the vertical wooden uprights and fastened with nails; a wooden chock was then fastened above the inboard end of the shore, also with nails, in order to prevent upward thrust.

It was found by the Lord Ordinary that had nails of an adequate size been used this was a proper and usual method of securing the shore, its lateral movement being prevented by the nails fastening it to the uprights whilst the upward thrust, which was the chief force exercised upon it, was checked by the chock nailed above. The nails, however, in each case should have been 5 inches long by 5-inch gauge, and the Lord Ordinary has found that whereas those used to prevent lateral movement were of the right kind, those used to secure the chock were only $2\frac{1}{2}$ or at most 3 inches in length, with the result that the chock and shore came away and fell, injuring the first respondent.

This finding was strongly controverted by the appellant on the grounds that: (1) It was not relied upon in the condescendence. (2) It was not put, or any rate not adequately put, to the witnesses in Australia who were responsible for the erection. (3) It was against the weight of evidence.

As to (1) and (2), the allegation in the condescendence is that the shore rested on a light piece of wood about 1 inch thick secured to the shifting-board by means of small nails, and by cross-interrogatories the Australian witnesses were asked whether such a construction was a proper one.

It is true that the suggested defence might have been put more clearly and definitely. The statement as made contains, I think, three separate grounds of complaint not differentiated one from the other, viz.: (1) that the chock was too narrow, (2) that it was placed below the shore instead of above it, and (3) that both chock and shore were secured by small nails. But I think the condescendence does give sufficient warning that one ground upon which reliance was placed was that improper nails were used in the chock as well as the shore.

In the case of the cross-interrogatories the same case was put to the Australian witnesses and the same warning given.

The method of obtaining evidence from abroad by means of interrogatories and cross-interrogatories has the advantage of cheapness and often saves time. No doubt it is fully justified for these reasons, but in a case where the facts are seriously in dispute and a careful inquiry into the observation and recollection of witnesses is called for it necessarily fails to achieve the best results. Even a direct inquiry whether short nails were not used would be an inadequate test since it would not probe the grounds upon which the witness based his answer. The

court, which has to decide the question, must in such circumstances do the best it can on the material before it, acting upon the general impression created by the answers to the interrogatories in conjunction with the viva voce evidence given in Scotland.

As to (3), the Lord Ordinary was able to form a view of the witnesses he saw and of their evidence, and, if he thought it more reliable than that from Australia, to accept it as against the other. Indeed, speaking for myself, I should say that there is a good reason for thinking that the Australian witnesses were not recollecting exactly what was done on the particular ship, but speaking to a general practice. I recognize that Mr. Heron, who was in charge of the work on behalf of the contractors, does say that 5-inch nails of 5-inch gauge were used in this ship in fastening both the shore and the chock, but, as his evidence had to be obtained by means of interrogatories, he could not be subjected to close cross-examination and the Scottish witnesses may well have been more accurate.

If, then, 5-inch nails were required to make the structure secure and were usually inserted, and if only 3-inch nails were used, the shipowner, subject to certain considerations with which I deal below, would be guilty of negligence and would be liable to the injured man.

The first consideration urged against his liability was that the only duty which the shipowner owed in respect of the shifting-boards and any shores erected to secure them was that the requirements of the surveyor in Australia should be complied with. Admittedly this had been done and the appropriate certificate secured.

Primarily, shifting-boards are erected for the safety of the ship to prevent the grain shifting and to make her seaworthy for the voyage she is undertaking. Even for that purpose the certificate of the surveyor would, I think, only be effective provided the obligation was merely to take due care to make the ship seaworthy, not if the obligation were absolute to make her so. To comply with the regulations is to fulfil an obligation towards the Commonwealth and to avoid the guilt of breaking a statutory obligation. Its fulfilment would protect the shipowner from criminal liability for such a breach, but would not insure him against all claims for negligence by a third party. I cannot accept the argument as having any bearing on the liability of the ship to a docker working in her holds. Towards him the duty is at least to refrain from negligently erecting anything likely to do him injury, or, to put it more broadly, as a minimum to take due care to make the structures in the hold secure against causing injury to anyone required to work in the hold for the ship's purposes. But, said the shipowner, this shore was not likely to injure the man because it should have been removed by the master stevedore before the docker worked under the place where it was, and even if its removal was not obligatory it should have been carefully inspected on behalf of the stevedore as soon as the discharge of the grain which surrounded its fastenings made this course possible.

Accordingly the stevedore, it was contended, was either solely responsible for the accident or, at any rate, his negligence contributed to its incidence and if so, by Scottish law, each of the defenders, the ship and the stevedore, would be under a conjunct and several liability to the injured man under which he could recover the whole sum awarded from either or both, but each would be liable to indemnify the other if that other should pay more than half.

In my opinion this argument fails on the evidence given and facts as found. No general practice of removing shores was proved except in a case where they interfered with the work being done in the hold. Indeed, the general effect of the evidence was to the contrary.

It is true that some of the witnesses from amongst the dockers and their representatives speak to the practice of removing shores, as does

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one of the ship's officers, but the former base themselves largely upon the practice of the Donaldson Atlantic Line, who do their own stevedoring and therefore are authorized by the ship itself to remove the shores from their own ship without requiring special permission, and the latter has a very slight acquaintance with the carriage of grain in bulk. Moreover, the stevedores employed on the Donaldson Atlantic Line themselves stated the object of removing the shores to be, not the safety of the men engaged, but the due performance of the work, which would be impeded by leaving the shores in position. In the case of their Line bulk grain is generally carried in the bottom of the hold only. Where this occurs the shifting-boards must extend to the bottom of the hold and if not removed would interfere with the discharge of the grain. They are not erected, as in the case of the *Sithonia*, at the top of the hold only, where they do not get in the way of men working below. Nor can I put much reliance upon the allegation of dockers who say, after an accident has occurred, that the removal is for their safety. The administrative staff, not the workers, know the object of the removal, and it is illuminating to remember that the occurrence of such an accident was unprecedented, and even after it had occurred the men discharging the *Sithonia* continued to work below the long shores without demur, though some shorter shores across the mouth of the hatch, which have no bearing upon the matters discussed before your Lordships but appear to have been loose, were first made secure on the orders of the only ship's officer left on board.

But the appellant argues that there was another circumstance to which the loosening of the shore should be attributed. It is common ground that two elevators were used in discharging the hold, and it was said that to use two and not one would result in greatly increased vibration and would naturally shake the shore from its fastenings.

Some vibration no doubt there was, and it may well have had some effect on loosening a shore which was insufficiently secured, but it was not proved to be unusual to use two elevators and the Lord Ordinary did not accept the contention that any undue vibration had occurred.

A further argument, however, was put forward on behalf of the ship. It was said that the normal method of discharge of a bulk grain cargo is by suction, that that method does not require the presence of dockers in the hold, and that the shipowner was not obliged to make himself acquainted with unusual means of discharging which are confined to an individual port. It was further said that the ship was sent to discharge part of her cargo at Southampton and that it was not until that port was reached that she received orders to proceed to Glasgow for final discharge. Therefore her owners, when erecting the shifting-boards, did not know that the method of discharge adopted at Princes Dock, Glasgow, would be used or that the dockers would be exposed to the risk of a falling shore.

The simplest answer to this argument is, I think, that a shipowner chartering a ship or carrying a cargo to a range of ports, even though the choice of the individual port be postponed until a later date, knows, when loading, to what ports or range of ports he may be ordered and must make himself familiar with the normal incidents of discharge at those ports.

To fulfil his contract he requires stevedores to put out the cargo, and he must safeguard them against risks of which he knows or ought to know and they do not. In the present case such an obligation casts no great burden upon him when it is remembered how important a grain port Glasgow is, and that even Princes Dock received a considerable number of cargoes of bulk grain.

If, then, the ship be responsible at least for taking all reasonable precautions that the structures in her hold, whether permanent or temporary, be erected with care sufficient to ensure that no danger shall

exist which is likely to cause injury to men employed to work in her holds, she is liable in the present instance unless some intervening negligence of another, in this case of the stevedores, is also a cause of the accident, and is solely liable unless that negligence contributed to the accident.

In the present case I agree with the Lord Ordinary and the Inner House in thinking that no negligence has been shown on the part of the stevedores.

If the shore had been obviously loose and if any casual observation would have shown this state of affairs, the stevedore might have had to share the blame. But no general practice of examination was proved to exist, no severity of weather in the course of the voyage gave rise to any suspicion of damage and no such accident had been known to occur before.

In *M'Lachlan* v. *Steamship "Peveril" Co. Ltd.*[14] the pursuer was injured by the fall of a stanchion which was said to be insufficiently fastened so that the slight touch of a sling in the course of the discharge caused it to fall and injure him. He sued both ship and stevedores and against the latter his allegation was that their foreman knew or ought to have known that the stanchion was practically unfastened and unsupported. Yet the Inner House held that no relevant plea had been averred against the stevedores. The Lord Justice-Clerk, with whom Lords Trayner and Moncrieff agreed, in the course of his judgment[15] assented to the proposition "that a stevedore is "not called upon to look to the security of the fastenings on board a "ship on which he has to work." He added: "Of course a stevedore "who happened to notice anything which was seriously wrong should "point it out, but he could not have any power in the management of "the ship; and if the people on board the ship—the master or "owner—to whom he made a complaint were to say to him, 'Attend "'to your own business, we will attend to ours; we are quite satisfied "'with it,' I do not think he could have refused to carry on his "work to the best of his ability." Even Lord Young, who dissented, said[16]: "I think there is authority to the effect that a very slight "supervision will be sufficient on the part of the stevedore to exempt "him from responsibility, and that he may assume that this, that, "and the other thing are all right in a ship without making a special "examination."

In dealing with the present case it is not necessary to go so far as the Lord Justice-Clerk. If Lord Young is right, and I think that he is, the stevedores are not liable. There is nothing to suggest that the shore was so obviously loose that it must have been seen by anyone making a casual inspection and no circumstances which would fasten an accusation of negligence upon those to whom the discharge was entrusted.

It was urged, however, that the Lord Ordinary had approached the subject in the wrong way—he had relied upon the argument that the shore had fallen, that shores do not normally fall without some negligence on the part of those who set them up and that the shipowner was in control of the ship's hold from the time of the erection until the finish of the discharge. He accordingly applied the doctrine which is commonly referred to as res ipsa loquitur. Even if the first two assumptions were conceded, it was contended that the third was not justified since the stevedore and not the ship was in charge of the unloading.

I doubt if this criticism is justified. It is true, I think, to say that the doctrine cannot strictly apply inasmuch as the shore might

[14] 23 R. (Ct. of Sess.) 753.
[15] Ibid. 757.
[16] Ibid. 758.

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have been displaced by the activities of the stevedore or his men. Had there been no evidence except that the shore fell, the argument that the shipowner had not been proved to be in fault would have had considerable weight. But the method of discharging, the events which happened during its incidence, and the possibility of negligence on the part of the stevedore and of danger from vibration were all thoroughly canvassed. The Lord Ordinary, after hearing this evidence, came to the conclusion that no act of the stevedore or his men caused or contributed to the accident and there was ample evidence to support his finding.

If all causes except improper fastening in Australia be eliminated the blame may rightly be attributed to those responsible for failure to make the shore fast there, and in a somewhat loose sense it may be said that the mere fall of something which should not have fallen shows negligence in those who erected it.

I agree that the shipowner was solely to blame and would dismiss the appeal.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co. for Boyd, Jameson & Young W.S., Edinburgh; Landons for Thomas J. Addly S.S.C., Edinburgh, and William Thornton, Glasgow; Lawrence Jones & Co. for Macpherson & MacKay W.S., Edinburgh, and Niven, Macniven & Co., Glasgow.*

[PROBATE, ETC., DIVISION.]

1955
Nov. 29, 30.
Sachs J.

* BEZZI *v.* BEZZI.

Legal Aid — Costs — Divorce — Divorce Department — Wife's case conducted through Divorce Department—Recommendation for increased fee to wife's counsel—Allocation of cases to Divorce Department—Notional ability of husband to provide security for costs—Interpretation of regulation—Legal Aid and Advice Act, 1949 (12 & 13 *Geo.* 6, *c.* 51), *s.* 6 (7)—*Legal Aid (General) Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *regs.* 5 (10), 18 (5) *and Schedule.*
Barrister—Fees.

On the hearing of an issue as to domicile, the husband unsuccessfully contended that he was domiciled in England when his petition for divorce was presented. Both parties were assisted persons; the husband's disposable income had been assessed at £362, the wife's at nil. The conduct of the wife's case was given to a solicitor employed by the Law Society Divorce Department under section 6 (7) of the Legal Aid and Advice Act, 1949, and regulation 5 (10) of the Legal Aid (General) Regulations, 1950 (as amended in 1954). No order had been made at the hearing of an application (after the grant of her legal aid certificate) for security for her costs. Approval had been given by the appropriate area committee for the husband to be represented by leading counsel. The disbursements on behalf of the wife were estimated at some £40:—

Held, (1) That the case was one in which it was proper in the circumstances for a recommendation to be made under regulation 18 (5) of the Legal Aid (General) Regulations, 1950 (as amended in 1954), that counsel for the wife should receive a higher fee than the amount set out in the schedule. The case had been adjudged by

the area committee to be one of difficulty which should properly be met by the briefing of two counsel for the husband; and it was of equal difficulty in respect of the wife's case.

(2) That while the Divorce Department are entitled, as against the litigant, to ask for costs to be taxed and paid on the footing that they act as a normal solicitor entitled to full profit costs, the proper order in all the circumstances of the present case would be that the husband pay £60 by instalments of £3 a month.

Per curiam: The test for sending a case to the Divorce Department is not "has an order for security been made" nor "has it "been refused." The test is "if an order were made might the "husband reasonably be expected to find" a sum of £10 or such lesser sum as may be applicable; and this simply turns on estimating his financial resources. The proviso to regulation 5 (10) was worded so as to avoid uneconomic applications being made for small amounts of security. The allocation of the present case to the Divorce Department appeared to have been made on the wrong basis.

APPLICATION for costs.

The parties were both Italian subjects, were Roman Catholics, and were married in Italy in 1948. There were two children of the marriage. In 1952 the husband came to England, leaving the wife and children in Italy. One of the express purposes for which he came to this country was to seek a divorce, which was not available to him in Italy. On July 13, 1953, he presented a petition for divorce on the ground of cruelty. The wife entered an appearance under protest, alleging that the husband was not domiciled in England when the petition was filed; and it was directed on September 6, 1954, that there should be a separate trial of the issue as to domicile. The court found in favour of the wife upon the issue.

Both parties were assisted persons, the husband having been granted a certificate before the presentation of his petition and the wife who had previously been represented by a private firm of solicitors, in June, 1954. The husband's disposable income was assessed at £362 a year; the wife's contribution was assessed as nil. The conduct of the wife's case was given to a solicitor employed by the Law Society in the Law Society, Divorce Department, who applied on her behalf for security for her costs; no order was made on the application. Leave was given by the appropriate area committee on an application under regulation 14 (3) (*d*) of the Legal Aid (General) Regulations, 1950, for the husband to be represented by leading counsel.

It appeared that at the time of the hearing the husband was in receipt of a salary of £670 a year in a temporary post, that he was making through his mother an allowance of £16 10s. a month to his wife and children, and that his salary was likely to be reduced to £425, from which £125 would be deducted for maintenance, as his new post would be an internal one.

Application was made at the conclusion of the issue for the wife's costs. It was stated that the actual disbursements on her behalf had amounted to some £40.

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James Stirling Q.C. and *John Mortimer* for the husband.

A. B. Hollis for the wife applied for costs taxed on the footing that it was an ordinary case.

Stirling Q.C. Should not the costs be assessed as incurred by the Divorce Department?

SACHS J. The result of the Act and the regulations as they stand is that, although the Divorce Department conducts work on a footing which is regarded as "cut price," and does it on that basis extremely well, they are entitled as against the litigant to ask for costs to be taxed and paid on the footing that they act as a normal solicitor entitled to full profit costs. Whether that is a happy position or not is somewhat debatable. The order for profit costs is normally in excess of the expenditure which the Law Society actually incurs (by which I mean out-of-pocket expenses coupled with a rateable proportion of the salaries and office costs) and the profit goes towards the other expenses of the Divorce Department.

A matter of a different type to which I must give consideration is that the area committee having given leave for the husband to have two counsel, this may be one of those exceptional cases where I ought to make a recommendation under regulation 18 (5) of the Legal Aid (General) Regulations.[1] It seems a bit odd that the Law Society should be able to make a profit on their own costs, and at the same time that counsel should be in the position of having to conduct the case at a fraction of the normal fee.

Hollis. That is a matter for your Lordship.

SACHS J. Can you assist me on this further matter, Mr. Hollis: How did it come about that this is a Divorce Department case in view of the proviso to General Regulation 5 (10)?

Hollis. In fact, there was an application for security for costs although I do not know how far it was pressed; but certainly no order was ever made.

[1] Legal Aid (General) Regulations, 1950 (as amended by Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954/166)): Reg. 18 (5): "Until the Lord Chancellor otherwise prescribes, the determination of the sums allowed to counsel retained by solicitors employed by The Law Society for salaries to act in connection with matrimonial causes concluded after the date upon which this regulation comes into force [March 1, 1954] shall, having regard to the lack of means of assisted persons of that class (being persons from whom, had there not been legal aid, solicitors and barristers would have customarily accepted specially low remuneration), unless the Lord Chancellor in any particular case otherwise orders, be the amounts set out in the schedule to these regulations."

Schedule: ". . . On a brief in a defended cause: £5 10s. If the total time occupied by a trial shall exceed five hours, in respect of the excess, for every complete period of five hours (if any) and for any less period not included in any such complete period: £3 5s. 6d.. . ."

[The corresponding fees for leading counsel are £8 18s. and £5 10s., and for junior counsel where two counsel are allowed, £5 10s. and £3 5s. 6d.]

SACHS J. The test for sending a case to the Divorce Department is not "has an order for security been made," nor "has it been refused." The test is "if an order were made might the husband reasonably be expected to find" a sum of £10 or such lesser sum as may be applicable; and this simply turns on estimating his financial resources. The proviso to regulation 5 (10) [2] was worded so as to avoid uneconomic applications being made for small amounts of security. The question of the case going to the Divorce Department seems to have been dealt with on the wrong basis.

[Counsel referred to the fact that the application for security was dismissed after the legal aid certificate had been granted.]

Hollis. But it is, of course, extremely rare for an order for security to be made where the husband is an assisted person.

SACHS J. That is exactly why the regulation was framed as it was. A wrong basis appears to have been applied here by a committee as regards the case being one which fell within the proviso.

Stirling Q.C. submitted on the question of costs that the husband had behaved very properly in regard to his financial obligations to his wife and children, and could not be put forward as a dishonest man because he had sworn to an English domicile.

[2] Legal Aid (General) Regulations, 1950, reg. 5 (10): "Where an application relates to a matrimonial cause and the maximum contribution payable by the applicant is not more than £10, the local committee shall inform the applicant that if he accepts the terms upon which they are prepared to issue a certificate they will arrange for the case to be conducted, in accordance with section 6 (7) of the Act,* by a solicitor employed by The Law Society for a salary in connection with matrimonial causes: Provided that this paragraph shall not apply where the applicant is a wife and it appears to the local committee that the husband might reasonably be expected, if ordered to do so, to provide such security for her costs as would, with her contribution, if any, amount to more than £10."

The proviso was amended in 1954 by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, as follows: "Provided that this paragraph shall not apply—(*a*) to an application made under paragraph (8) of regulation 10; [which relates to emergency certificates] or, (*b*) where the applicant is a wife . . . etc. . . . [as before]."

s. 6 (7): "Notwithstanding anything in subsection (4) of this section, [which relates to the assisted person's right to select counsel and solicitor from the appropriate panel himself] where the maximum contribution payable to the legal aid fund by a person receiving legal aid in connection with a matrimonial cause is not more than £10, then, unless regulations otherwise provide, the solicitor to act for him shall not be a solicitor selected from the panel but a solicitor employed whole-time for a salary to deal with cases to which this subsection applies; and where the solicitor who acts for a person receiving legal aid is one employed as aforesaid—(*a*) he shall not be entitled to any further payment under subsection (5) of this section [which relates to payments to solicitor and counsel out of the legal aid fund] except for his disbursements; and (*b*) no sum paid or payable to him otherwise than under the said subsection (5) shall be treated for the purposes of subsection (7) of section 3 of this Act [which relates to the net liability of the legal aid fund] as paid or payable on account of the person for whom he acts."

* Legal Aid and Advice Act, 1949,

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SACHS J. As regards the conduct of the parties you have the fact that the area committee not only considered it a fit case to proceed with, they considered it a fit case for two counsel. There is obviously no question of misconduct within the meaning of section 2 (2) (*e*) of the Act; but save for that protection given to him by that subsection of the Act he would be liable to pay costs in full—and the only question before me is as to what amount is " reasonable " for him to pay.

Stirling Q.C. submitted that in view of the husband's means and his conduct, including the monthly payments he was making to his wife and children, only a modest order for costs should be made.

SACHS J. This is not an easy matter on which to come to the correct conclusion. The application made before me is for costs to be taxed, which would result, of course, in the costs being taxed on the normal scale applicable to a case where a solicitor was acting in the normal way. That would result, as Mr. Hollis has agreed, in a very considerable profit to the Divorce Department of the Law Society, which would be applied to other cases in that department. On the other hand, the husband has come to England—and I have come to the conclusion that one, at any rate, of his express purposes in coming here was to get a divorce: further, having in fact taken that protection for himself which the law entitles him to take under the Legal Aid Act, he assumes also the risks inherent in litigation within the framework of that Act.

I propose to make an order against him for such costs as I consider will be reasonable in all the circumstances, including his likely future means. I think that that order should be for £60, payable by instalments of £3 a month, the first instalment to be paid one month after the final instalment due to the Law Society upon his own certificate.

There is one other thing I would mention, and that is, that the issue of domicile has been rightly adjudged by the area committee to be one of a difficulty which could be properly met by the briefing of two counsel. It seems to follow—and I am certainly going to act on that footing—that on the facts of the present case it is of equal difficulty from the point of view of those representing the wife. This is, to my mind, a case for a recommendation under General Regulation 18 (5) as being one in which counsel should receive a higher fee than that provided by the schedule to those regulations. Otherwise counsel would, of course, be paid at what I on a previous occasion have called a relatively token figure—and that would be so even where the Law Society is entitled, should they obtain a full order for costs, to make a profit out of the case.

Solicitors: *Samuel Dalton; G. E. C. Dougherty, The Law Society Divorce Department.*

J. B. G.

[COURT OF APPEAL.]

*WISBECH ST. MARY PARISH COUNCIL *v.* LILLEY.

C. A.

1956
Jan. 12, 13.

[1955 L. 329.]

Evershed M.R., Birkett and Romer L.JJ.

Landlord and Tenant—Forfeiture of lease—Repudiation of landlord's title — Adverse title set up — Yearly tenancy — Oral disclaimer — Sale by tenant of "all . . . the interest of the vendor"—Whether purported sale of freehold interest—Whether disclaimer by denial of landlord's title.

A yearly tenant of a cottage owned by the plaintiff council agreed to sell to the defendant "all that [his] interest" for the sum of £20. After the death of the tenant the council discovered that the defendant was occupying the cottage. They brought proceedings against him to recover possession on the ground that the tenant had disclaimed his interest by denying his landlords' title and that, therefore, the defendant was merely a trespasser. The basis for that allegation was information given by the solicitor who had acted for both parties on the occasion of the sale. He stated that the tenant had then alleged that he had owned the cottage for many years and had never paid rent for it. Accordingly, the council said that, notwithstanding the equivocal nature of the agreement, it had been intended to let the defendant into possession of the cottage with the intention of enabling him to set up a title adverse to the landlords.

Held, that if a tenant deliberately asserts a title in himself adverse to his landlord, or lets a stranger into possession with the intention of enabling him to set up such an adverse title, *semble*, even though (in the case of a yearly tenancy) the assertion of title against the landlord is oral, that amounts to a repudiation of the landlord's title; but that this was a question of fact; and that the council was unable to establish that such principle applied on the facts of the present case.

Principle in *Doe d. Ellerbrock* v. *Flynn* (1834) 1 C.M. & R. 137, as qualified in *Doe d. Graves, Downe* v. *Wells* (1839) 10 Adol. & E. 427, approved.

APPEAL from Deputy Judge Garth Moore sitting at Wisbech County Court.

The Wisbech St. Mary Council were the freeholders of a cottage, known as "Folleys Drove" Guyhirne, Wisbech St. Mary, Cambridgeshire, which was erected on land awarded before 1855 by an enclosure award to the predecessors in title of the council. In 1914, the property being then vested in the council, they let it to Charles James Donger (hereinafter called the tenant) at a rent of 10s. per annum. From 1914 until 1952 the tenant lived in the cottage and paid the rent, the council paying all rates and water rate. In 1952 the tenant was admitted to hospital, but he continued to pay the rent until October, 1953. Thereafter no rent was paid by anyone. In 1953, the council desired to obtain possession of the cottage in order to demolish it, and, on December 5, 1953, they wrote to the tenant who was still in hospital and asked if he would give up possession and return the

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key. The tenant did not reply. The council subsequently became aware that the defendant, William Lilley, was occupying the cottage at weekends, and on February 26, 1955, they wrote and asked him for the key. No reply was received to this letter. On March 19, 1955, the tenant died, and after his death it was discovered that in 1952 and shortly before being admitted to hospital he had purported to transfer his interest in the cottage to the defendant. On March 22, 1955, the council again wrote to the defendant and again received no reply. On April 7, 1955, the solicitors acting for the council wrote to a firm of solicitors stating that they understood that in 1952 the tenant had purported to convey the cottage to the defendant and that that firm had acted in respect of the transaction. A member of the firm, a Mr. Farrow, replied on April 19, 1955, stating that the tenant had come to them in July, 1952, and said that he had agreed to sell his cottage to the defendant, but that as he had been unable to produce any deeds they had only been able to draw up an agreement between the parties whereby the tenant had agreed to sell all his interest in the cottage to the defendant. The letter continued: "We think we should point out that Donger "told us that he had owned the place for some 40 years and had "never paid rent and we think that at any rate no rent has been "paid for the last three years, for Donger was practically "penniless." The council brought proceedings against the defendant in the county court to recover possession. At the hearing on September 27, 1955, the defendant did not appear. The agreement of August 2, 1952, was put in evidence and, so far as material, read as follows: "The vendor shall sell and the "purchaser shall purchase all that the interest of the vendor in "the cottage . . . for the sum of £20 . . ." There followed a provision that the purchaser was to allow the vendor to come and live in the cottage when and if he wanted to. Mr. Farrow gave evidence, according to the judge's note, as follows: "July, 1952, "Donger told me he had agreed to sell cottage to Lilley. I "acted then for both. I prepared the agreement of August 2, "1952, there being no deeds. About September 14, 1955, "defendant came to my office about ten minutes before registrar "sat [a reference to the proceedings taken by the council "against him]. I said I could not act for him after that time "as he had not given me a fair chance. In writing the letter "of April 19, 1955, I was acting for the defendant. The facts in "the letter are true."

It was submitted on behalf of the council that the agreement of August 2, 1952, was a denial of the title of the council as landlords and that, accordingly, the interest of the tenant had been determined. The county court judge dismissed the council's claim and they appealed.

Nigel Bridge for the council

The defendant did not appear and was not represented.

No cases other than those referred to in the judgment of Evershed M.R. were cited in argument.

EVERSHED M.R. In this appeal Mr. Bridge, for the council, has raised a point of interest and of an unusual character which he has put with his usual attractiveness; but I have felt unable to accept it. Mr. Bridge has contended that where a tenant (namely, a tenant from year to year) of a cottage has let a stranger into possession with the intention of enabling that stranger to set up an adverse title to the landlord, so that the landlord is thereby put in a worse position, then the tenant must be taken by his act to have disclaimed and put an end to his interest as tenant. It is said by Mr. Bridge that the circumstances of this case form an example of the proposition which I have stated.

[His Lordship stated the facts and after reading the note of Mr. Farrow's evidence which is set out above, went on:]

I have read the whole of that evidence because upon it and upon the last statement, "The facts in the letter are true," really hangs the whole of Mr. Bridge's case. The reason that he must so link his case to that statement and the letter emerges from the terms of the agreement of August 2, 1952. It is merely an agreement. [His Lordship referred to the terms of the agreement and went on:] That agreement is plainly, upon its terms, equivocal as to the title, if any, which the tenant was alleging that he had.

As Mr. Bridge therefore concedes, if the matter rested on that document alone he could not for a moment contend that it formed evidence of a letting by the tenant of a stranger into possession with the intention that an adverse title to the landlord should be set up. In order to bring himself within his proposition at all Mr. Bridge prays in aid the letter of April 19, which Mr. Farrow said was true as to the facts therein stated. [His Lordship read the letter as set out above:]

I felt some doubt as to the admissibility of some of the evidence that Mr. Farrow gave; for he was, at relevant dates, acting as solicitor for the defendant as well as for the tenant, and if professional privilege existed Mr. Farrow was in no position to waive it. But, assuming that no question of that kind arises, it is said by Mr. Bridge that the statement in Mr. Farrow's letter (if true, as one must assume it is) proved that the tenant at the date of the transaction was asserting that he was the owner —that is, the absolute owner—of this cottage, and that, contrary to the facts, he had never paid any rent in respect of it: so that such assertion, together with the sale to the defendant (according to the argument), amounted to an act aimed at enabling the defendant to set up a title adverse to the council. I was myself inclined to think during the argument that the tenant, assuming these facts are true, was really deceiving the defendant by telling him (contrary to the fact) that no rent was paid, and that he

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was the owner, in order that he might extract £20 from the defendant. It may be that that uncharitable view is wrong. It may be, as Romer L.J. pointed out, that this old gentleman (for he was old then and in a very ailing condition) may have regarded the slight sum of 10s. a year as of no account and he may genuinely have thought that he had paid and was paying no rent in any true sense of the term. On either view it seems to me, put at its highest, by no means clear, as an inference from these facts (assuming them all to be true), that this was a transaction aimed at enabling the defendant to set up a title adverse to the true owner. It seems to me that, whatever the tenant may have thought or may have tried to represent as to his position, he was not concerned to enable somebody, namely, the defendant, to challenge a title which he was not himself in any way concerned to dispute.

The proposition which Mr. Bridge has founded upon is illustrated by old cases in the books. We were referred to *Doe d. Ellerbrock* v. *Flynn*.[1] That was a case in which (as the jury found) the defendant Flynn was beyond any question claiming and intending to claim and to assert a proprietorship of the property adverse to the lessors of one Townsend, and the transaction between Townsend and Flynn was, as the jury found, and (as the court held) found justly, designed to enable Flynn to oust the lessors of Townsend if he could. Thus, Lord Lyndhurst C.B. said[2]: "I think that the jury, upon the "facts proved at the trial, came to a right conclusion. If the "tenant sets up a title hostile to that of his landlord, it is a "forfeiture of his term; and it is the same if he assists another "person to set up such a claim. Whether he does the act "himself, or only colludes with another to do it, it is equally a "forfeiture."

Of course, the conception of the relation of landlord and tenant has undergone many changes since that case was decided in 1834. The rule asserted was founded upon the feudal law, as counsel in the case pointed out. Still, if the facts were strictly brought within the scope of the decision in *Doe d. Ellerbrock* v. *Flynn*,[3] I do not doubt that even today the court would follow it. But later, as Mr. Bridge very properly pointed out, in *Doe d. Graves, Downe* v. *Wells*,[4] Lord Denman C.J. pointed out that the rule stated in *Doe d. Ellerbrock* v. *Flynn* must be somewhat cautiously applied. He said[5]: "I "think *Doe d. Ellerbrock* v. *Flynn*[6] is distinguishable from the "present case. There it was thought that the tenant had "betrayed his landlord's interest by an act that might place "him in a worse condition: if the case went farther than that, "I should not think it maintainable. The other instances are "cases either of disclaimer upon record, which admit of no

[1] (1834) 1 C.M. & R. 137.
[2] Ibid. 141.
[3] 1 C.M. & R. 137.
[4] (1889) 10 Ad. & E. 427.
[5] Ibid. 435.
[6] 1 C.M. & R. 137.

" doubt as to the nature of what is done, or of leases from year " to year, in speaking of which the nature of the tenancy has " been sometimes lost sight of, and the words ' forfeiture ' and " ' disclaimer ' have been improperly applied. It may be fairly " said, when a landlord brings an action to recover the possession " from a defendant who has been his tenant from year to year, " that evidence of a disclaimer of the landlord's title by the " tenant is evidence of the determination of the will of both " parties, by which the duration of the tenancy, from its par- " ticular nature, was limited. But no case, I think, goes so far " as the present: and I feel the danger of allowing an interest " in law to be put an end to by mere words."

Patteson J. observed [7]: " We know that mere words cannot " work a disseisin, although some acts have been held to work a " disseisin at the election of the party disseised, which, as against " him, would not work a disseisin."

In that case the tenant had in terms stated that he was the owner, and in his declaration repudiated the title of his lessor. *Doe d. Graves, Downe* v. *Wells* [8] was, it must be pointed out, not a case of a tenancy from year to year but of a term of years; and the passage I have read from the judgment of Lord Denman C.J. indicates that what is applicable to the one is not necessarily applicable to the other. Still, the principle, I think, as stated by Lord Denman C.J., is sound, namely, that it is somewhat dangerous to allow an interest at law to be put an end to by mere words; and, in effect, that, I think, would be the result if we were to accept Mr. Bridge's argument in the present case. Certainly, as it seems to me, the landlord, for practical purposes, was not put in any worse position by the transaction between the tenant and the defendant in 1952; and I for my part agree with the judge that in the end of all, when one is relying upon a disclaimer, it is a question of fact how far, properly interpreted, ought the transaction to be treated as having gone. Put interrogatively, in the language of Mr. Bridge's own formulation, can it be said here that the council proved (and clearly proved, because they are the plaintiffs, and the onus is upon them) that the tenant let the defendant into possession with the intention of enabling him to set up an adverse title?

As the judge put it, " It is, of course, true that a tenant's " denial of his landlord's title can give rise to forfeiture, and " the claim is none the less good for being rare and somewhat " archaic. But the denial, though it need not be express and can " be implied, must, nevertheless, be a clear denial and it must " be clearly proved." I entirely agree with those observations; and I agree, no less, with the sentence which follows: " I am " far from satisfied that any such denial, express or implied, " has in this case been proved."

[7] 10 Ad. & E. 427, 436.

[8] 10 Ad. & E. 427.

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In the result I, therefore, conclude that this appeal fails and must be dismissed.

BIRKETT L.J. I am entirely of the same opinion and there is really nothing on the main point to be added. There are one or two rather curious and obscure features of this case but, even if they were satisfactorily cleared up, I do not think it would affect in the smallest degree the essential point which has been dealt with by my Lord. For example, there was always an assessment, No. 564, upon this cottage; that was always available in the rate book; and the moment inquiries were made it was shown that the rates had always been paid by the council, and that the water rate had been paid by the council. Those two facts could have been ascertained at once, I should have thought. But, at any rate, however obscure and curious some of the features of the case may be, as I say, if they were cleared up it would not make any difference, I think, to the essential legal point.

I agree with the judgment of my Lord, and that this appeal ought to be dismissed.

ROMER L.J. I also agree. As Evershed M.R. has pointed out, the law on this subject is archaic in some degree and is founded upon feudal principles which certainly do not loom very large in modern life. But I accept Mr. Bridge's submission that, even now, if a tenant does in fact deliberately assert a title in himself adverse to his landlord, or if he lets a stranger into possession with the intention of enabling him to set up a title adverse to the landlord, then that amounts to a repudiation of the landlord's title; and it would seem that where the tenancy in question is a yearly tenancy it is sufficient to constitute a repudiation if the assertion of title against the landlord is made orally. But, as Evershed M.R. has pointed out, it is a question of fact as to what intention underlies the words or the actions of a tenant, as to whether in fact he is definitely asserting a title adverse to the landlord, or, as the case may be, intending to enable somebody else to set up such a title. I have no doubt but that this old gentleman, the tenant, had no such intention in his mind at all when he had this talk with Mr. Farrow and with the defendant. He thought, though wrongly, that he did not pay any rent, and that he had lived there for years without paying any rent. The judge came to the conclusion that all he had in mind was an intention to instruct the solicitor so that he could take such steps as were necessary to transfer such interest as the old man had in this property to the defendant, and the judge said that he believed that that was the intention of the tenant, which fell far short of an intended and definite assertion of an adverse title which is requisite to enable Mr. Bridge's clients to succeed. On that finding of the judge (with which, on the evidence, I entirely agree) it appears to me that the highly technical ground on which the council tried to succeed was of no

avail; and I think the judge was right and that this appeal must fail.

Appeal dismissed.

Solicitors: *Metcalfe, Copeman & Pettefar.*

E. D.

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[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION

(GRANT TO TRUST CORPORATION).

1956 *Jan.* 2.

Probate — Practice — Corporation — Grants to trust corporations and other corporate bodies—Grant to nominee of non-trust corporation —Non-contentious Probate Rules, 1954 (*S.I.* 1954, *No.* 796 (*L.* 6)), *r.* 34 (3).

Before a grant can be made under rule 34 (3) of the Non-contentious Probate Rules, 1954,[1] to the nominee of a corporation (not being a trust corporation) entitled as executor it must be established that the corporation has power under its constitution to take a grant through its nominee. This will normally be evidenced by the production of a copy of the constitution.

A corporation or association or public or charitable or private body of persons entitled as beneficiary or creditor need be required only to provide its nominee with a copy (authenticated in accordance with the rule) of a resolution passed by the committee or other body most completely representing it.

B. LONG,
Senior Registrar.

January 2, 1956.

[1] Non-contentious Probate Rules, 1954 (S.I. 1954, No. 796 (L.6), r. 34 (3): "Where a corporation (not being "a trust corporation) would, if an "individual, be entitled to a grant, "administration for its use and bene- "fit, limited until further representa- "tion is granted, may be granted to "its nominee or, if the corporation "has its principal place of business "outside England, its nominee or "lawfully constituted attorney, and a "copy of the resolution appointing the "nominee or, as the case may be, "the power of attorney, sealed by the "corporation or otherwise authenti- "cated to the registrar's satisfaction, "shall be lodged with the application "for the grant, and the oath shall "state that the corporation is not a "trust corporation."

[CHANCERY DIVISION.]

1956
Jan. 19.

Upjohn J.

**In re* TENNANT'S APPLICATION.

Bankruptcy—Salary or income—Husband and wife—Maintenance—Maintenance payments "income" of the bankrupt—Payable to bankrupt although vesting in trustee—Application to court required for payment to trustee—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 51 (2).

By an agreement made in 1940 on dissolution of marriage, a husband covenanted to pay his former wife a monthly sum of £50. In 1952 the wife was adjudicated bankrupt; she obtained her discharge in 1955 subject to two years' suspension. The husband took out an interpleader summons asking for the direction of the court as to how, as between the wife and her trustee in bankruptcy, he should dispose of the monthly payments under the deed of 1940.

Held, (i) that the maintenance payments were "income" of which the wife was in receipt within the meaning of section 51 (2) of the Bankruptcy Act, 1914.

In re Landau [1934] Ch. 549; 50 T.L.R. 403, applied.

(ii) That section 51 controlled the vesting of the property in the trustee under sections 18 and 38, and although the payments vested in the trustee in bankruptcy, they remained payable to the wife until the trustee applied to the court that they should be paid to him.

In re Landau [1934] 1 Ch. 549; 50 T.L.R. 403 and *In re Huggins, Ex parte Huggins* (1882) 21 Ch.D. 85 applied.

INTERPLEADER SUMMONS.

The bankrupt, an actress (professionally known as Miss Hermione Baddeley) was married to the applicant, David Francis Tennant, in 1928. That marriage was dissolved in 1937. By a deed of covenant date May 21, 1940, the applicant covenanted to pay Miss Baddeley the sum of £50 a month for her life. The deed contained provisions for security, and for the realization of that security if the applicant failed to make the monthly payments. That had not arisen.

On April 3, 1952, a receiving order was made on Miss Baddeley, and she was duly adjudicated bankrupt during 1952. On April 29, 1955, she was discharged from bankruptcy, subject to a suspension of two years. On her adjudication in 1952 Miss Baddeley had agreed that her trustee in bankruptcy should receive her maintenance payments for the benefit of her creditors as a voluntary gesture. Owing to her financial position in June 1955 she had given the trustee notice of revocation of that arrangement, which the trustee refused to accept.

The applicant took out this interpleader summons asking for the direction of the court as to how, as between Miss Baddeley and her trustee, he should dispose of the maintenance payments under the deed of 1940.

D. H. Mervyn Davies for the applicant.
Edward Grayson for Miss Baddeley.
Peter Oliver for the trustee in bankruptcy.

Cases cited in argument: *Hollinshead* v. *Hazleton* *; *In re Gallard. Ex parte Harris* †; *Ex parte Dann. In re Parker* §

UPJOHN J. having stated the facts continued: The question is, as between Miss Baddeley and her trustee in bankruptcy, who is entitled to these payments at any rate until the discharge takes effect, and possibly for the rest of her life?

The trustee's claim is a perfectly simple one. He submits that under sections 18 and 38 of the Bankruptcy Act, 1914,[1] all the property of the bankrupt is vested in him, and that, having regard to the very wide definition of property in section 167, the right of Miss Baddeley to receive for the rest of her life the monthly sum which the applicant had covenanted to pay vests in him. The trustee, therefore claims to be able to give a good receipt for it, to sell and realize it to the best advantage for the benefit of the creditors.

The claim put forward by Miss Baddeley is that under section 51 (2) of the Bankruptcy Act, 1914,[1] the property in question, that is the right to receive these monthly payments, vests in the trustee only subject to the right of the trustee to make an application for payment to him under that section. I must consider that section. [His Lordship read section 51 of the Bankruptcy Act, 1914, and continued:] The first question to be determined is whether the monthly sums payable under the deed of 1940 can properly be described as "a salary or income" for the purposes of subsection 2.

I shall not attempt any definition of what is meant by "salary or income" for the purposes of that subsection. It is

* [1916] 1 A.C. 428; 32 T.L.R. 177.

† [1892] 1 Q.B. 532.

§ (1880) 17 Ch.D. 26.

[1] Bankruptcy Act, 1914, s. 18: "(1) Where a receiving order is made "against a debtor, then . . . the court "shall adjudge the debtor bankrupt; "and thereupon the property of the "bankrupt shall become divisible "among his creditors and shall vest "in a trustee."

S. 38: "The property of the bankrupt divisible amongst his creditors ". . . . shall not comprise . . . "(1) Property held by the bankrupt "on trust for any other person; "(2) The tools (if any) of his trade "and the necessary wearing apparel "and bedding of himself, his wife "and children . . . not exceeding £20 "in the whole: But it shall comprise [inter alia] the following particulars:—(*a*) All such property as "may belong to or be vested in the "bankrupt at the commencement of "the bankruptcy. . . . (b) The capacity to exercise and to take proceedings for exercising all such powers "in or over or in respect of property "as might have been exercised by the "bankrupt for his own benefit at the "commencement of his bankruptcy or "before his discharge. . . ."

S. 51 (2): "Where a bankrupt is "in receipt of a salary or income . . . "the court, on the application of the "trustee, shall from time to time "make such order as it thinks just "for the payment of the salary, income . . . or of any part thereof, to "the trustee, to be applied by him "in such manner as the court may "direct."

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clear that the phrase has a somewhat limited meaning. Indeed, Lord Esher, M.R., in *In re Shine*,[2] said this[3]: "We have held "that the word 'income,' as used in this section, [the predecessor "of section 51 (2)] does not mean all income, or all that property "of a man which is generally called his income; for, in most "cases, income of that kind would vest in the trustee on his "bankruptcy, and thus go to the creditors. But the Act assumes "that there is some income of a bankrupt which is not part of "his property so as to vest in the trustee in his bankruptcy".

It seems to me, however, that the matter is concluded in this court by the judgment of the Court of Appeal in *In re Landau*.[4] In that case, which was again concerned with a payment made on a divorce—it was made as an order of court but by consent—a substantial sum of about £1,800 per annum tax free was payable by the respondent to the petitioner, and it was held that that sum was "income" for the purposes of section 51 (2). Romer L.J.[5] said this: "The only other question which remains "is whether the payments in question in this case can properly "be described as income within the meaning of section 51 (2). I "confess that, even after hearing Mr. Tindale Davis's interesting "argument, I have not the least idea now why this annual sum "paid by the husband to the wife under the direction contained "in the order of the Divorce Court is not her income." Then he considered the judgment of Lord Esher in *In re Hutton, Ex parte Benwell*,[6] and continued: "in the passage read by the "Master of the Rolls [from *Ex parte Benwell*][6] the learned Lord "Justice [Cotton L.J.] said[7]: 'In my opinion section 90 points "'to some definite annual amount which is coming to the bank-"'rupt.' This £1,800 a year, free of tax, without any question "whatsoever is a definite annual amount coming to the bank-"rupt. That being so, it follows from the decision of *Ex parte "Benwell*,[8] if one wanted any authority for the proposition, that "this sum is income within the meaning of section 51 (2)." That covers this point on the summons. It cannot, for this purpose, make any difference that this sum is paid under an agreement in lieu of an application to the court for maintenance, and not under an agreement made in pursuance of an application to the court where the sum is agreed and contained in a consent order. It seems to me, therefore, that this is income within the meaning of section 51 (2).

If the matter were res integra it seems to me that there would be something to be said for the view that subsection (2) was referring to the case where the "income" or "salary," did not vest in the trustee in bankruptcy under the Bankruptcy Act: such, for instance, as a contract for personal services or possibly something as vague as future earnings or future salary, or

[2] [1892] 1 Q.B. 522; 8 T.L.R. 279.
[3] [1892] 1 Q.B. 527.
[4] [1934] Ch. 549; 50 T.L.R. 403.
[5] [1934] Ch. 560.
[6] (1884) 14 Q.B.D. 301.
[7] Ibid. 308.
[8] 14 Q.B.D. 301.

something of that kind. Indeed that was the view taken in some of the earlier authorities, and if that was so, section 51 would not avail Miss Baddeley for, prima facie at all events, the right for this monthly sum vested in the trustee under sections 18 and 38. But it is plain that the later authorities take a different view, and that subsection (2) applies equally to income or salary which vests in the trustee as to income or salary which does not. Authority for that is again to be found in *In re Landau.*[9] In that case the argument, curiously enough, was that subsection (2) applied only to property which vested in the trustee and did not include property which did not vest in the trustee. That argument was rejected by the Court of Appeal. Slesser L.J. said this[10]: "yet nevertheless I am of opinion that later "authorities show quite clearly that even in the case of salary "or income which is not within sections 18 and 38, the court "has jurisdiction to make an order under section 51 where it is "salary or income within that section." That implies a fortiori that it did apply where the property vested under sections 18 and 38 of the Bankruptcy Act. It was put more succinctly by Romer L.J. in this way[11]: "Now it was held by Farwell J. in "*In re Garrett*[12] that section 51 of the Bankruptcy Act, 1914, "applies to property whether or not vested in the trustee. I "entirely agree with him. Farwell J. said, and said truly, that "that conclusion was amply justified by the decision of this "court in *In re Shine.*[13] I agree with that too, but I would add "this, that even in the absence of authority I should have arrived "at the same conclusion without any hesitation whatsoever."

The question is: How does subsection (2) work in any case where the trustee would prima facie seem to be in a position to claim that the property in question vested in him and ask the person bound to make these monthly payments to pay all future sums to him? The answer to that is to be found partly in a decision to which I will refer in a moment, and partly in the section itself. If one reads the subsection in the light of the authorities establishing that it applies to an income vested in the trustee in bankruptcy, the position is this: where a bankrupt is in receipt of a salary or income or is entitled to any part of it, the court, on the application of the trustee, shall make such order as it thinks fit for the payment of the salary to the trustee. That would seem to indicate that, although the right to the income vests in the trustee, he must, in order to reduce it into possession, obtain some order of the court in bankruptcy ordering that the income, or some part of it, be paid to him. It is noteworthy that only the trustee can make the application, the bankrupt has no such right.

That view is confirmed by the decision of the Court of Appeal

[9] [1934] Ch. 549.
[10] Ibid. 558.
[11] Ibid. 560.
[12] [1930] 2 Ch. 137; 46 T.L.R. 464.
[13] [1892] 1 Q.B. 522.

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in one of the earlier cases, *In re Huggins, Ex parte Huggins,*[14] where the trustee in bankruptcy made an application under section 90 of the Bankruptcy Act, 1869, the predecessor of section 51 (2) of the Bankruptcy Act, 1914. The application was made in respect of a salary payable to the bankrupt as a retired judge of a Crown Colony; and it was held that that pension vested in the trustee. Sir George Jessel M.R., having held that the property vested in the trustee, said this[15]: "My view of the "meaning of the provisions of the Bankruptcy Act is this. "Sections 15 and 17" [the predecessors of sections 18 and 38 of the Act of 1914] "vest all the 'property' of the bankrupt in "the trustee, but this vesting is subject to exceptions such as "that which is made by section 23 of leases and onerous con- "tracts which the trustee is authorized to disclaim. The "'property' vests by virtue of sections 15 and 17, but subject "to the exceptions made by subsequent sections of the Act. The "series of sections beginning with section 87 and ending with "section 95, is prefaced by the words 'As to property devolving "'on trustee.' The proceeds of executions, which are dealt "with by section 87, would clearly vest in the trustee but for "the provisions of that section." Then he considers the case of a beneficed clergyman who may have the misfortune to become bankrupt, which I need not read. He refers then to section 89 (which is the predecessor of section 51 (1)), in regard to which he says[16]: "In such cases section 15 is controlled by section 89, "and a person who holds such a position and who becomes a "bankrupt, is not necessarily to be left to starve, however "improvident he may have been, but a discretion is given to "the court to fix how much of his pay and salary is to be made "available for the payment of his creditors. If this be so, why "do not the cases which are dealt with by section 90 stand in "a similar position? Section 90 applies to a bankrupt 'who is "'in the receipt of a salary or income other than as aforesaid.' "The present appellant's income is not a 'salary,' but it is "'income.' The word 'income' is as large a word as can be "used. It is not the less 'income,' because it has to be voted "every year by the Colonial Legislature. The court is "empowered to 'make such order as it thinks just for the pay- "'ment of such salary or income, or of any part thereof, to the "'trustee.' That means that, though the salary or income "would vest in the trustee by virtue of sections 15 and 17, the "court may order that only a part of it shall be set aside for "the benefit of the creditors. This is a specific provision which "to that extent controls the operation of sections 15 and 17. "I think, therefore, that the trustee in this case applied to the "court for the right order, i.e., for a declaration that the bank- "rupt's pension had vested in him, and then a direction what

[14] (1882) 21 Ch.D. 85.
[15] Ibid. 91.
[16] Ibid. 92.

"proportion of it should be set aside for the payment of the "creditors."

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In my judgment section 51 (2) controls the vesting of the property under sections 18 and 38, and that payment must necessarily be subject to an application by the trustee in bankruptcy for that purpose. The only way of giving effect to that, although the result is curious, is this: although the property vests in the trustee, it remains nevertheless payable to the bankrupt unless and until the trustee makes some application under the section. I propose to declare that the monthly sum of £50 continues to be payable to the bankrupt subject always to an application under section 51 (2) of the Bankruptcy Act by the trustee asking for payment to him of the monthly sum or some part thereof.

Declaration accordingly.
Leave to appeal.

Solicitors: *Vizard, Oldham, Crowder & Cash; C. Butcher & Simon Burns; Stafford Clark & Co.*

I. G. R. M.

[COURTS-MARTIAL APPEAL COURT.]

* REGINA *v.* BRYANT (No. 2).

C.-M. A. C.

Jan. 23. 1956

[PRACTICE NOTE.]

Lord Goddard C.J., Hilbery and Stable JJ.

Criminal Law — Larceny — Simple larceny — Common law offence — Reference in charge to Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 2.

"Simple" larceny is an offence at common law, but reference to section 2 of the Larceny Act, 1916, when it is charged does not make the charge bad.

LORD GODDARD C.J. I desire to refer briefly to *Reg.* v. *Bryant*,[1] heard before the Courts-Martial Appeal Court on May 9, 1955, when Hallett and Byrne JJ. were sitting with me. We understand that the decision has caused some difficulty to clerks to justices, and those who have to prepare charges and indictments, and we desire to give a short explanation of the decision which we think will clear up any difficulty that may be felt.

The argument for the appellant in that case was, that as section 18 of the Army Act provided a special punishment for the stealing of military property, the accused could not be charged, as he was, with stealing contrary to section 2 of the Larceny Act. We pointed out that section 2 is concerned with

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[Reported by E. J. BARTON, Barrister-at-Law.]

[1] [1955] 1 W.L.R. 715; [1955] 2 All E.R. 406.

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punishment and does not create the offence of larceny which is and always has been a crime at common law, though the punishment has varied from time to time. The effect of the section is that for any larceny for which no special punishment is provided the maximum sentence is 5 years' imprisonment. If, then, a person is charged merely with larceny he cannot receive a heavier sentence, but if charged or indicted with larceny from the person or from a dwelling-house, to take two instances, he is liable to heavier punishment. We did not say, nor did we intend to say, that in civilian courts the addition of the words "contrary to section 2 of the Larceny Act" is improper, though if all that is intended is to charge a simple and not a compound or aggravated larceny these words are in truth surplusage. That this was the opinion of that great authority on the criminal law, Sir James Fitzjames Stephen, is clear from page 47 of volume III of his History of the Criminal Law, where he said that the expression "simple larceny," which first appeared in sections 2 and 4 of the Larceny Act, 1861, obscured those provisions and had no definite meaning. At the same time it is unobjectionable, and indeed convenient, to refer to section 2 where a simple charge of larceny is preferred, as it serves to direct the attention of the court to the fact that the charge is not one of compound or aggravated larceny, and to the punishment which the offence charged carries. The reference to the section does not make the indictment bad and, equally, if the indictment charged larceny contrary to the common law it would be good, but the sentence could not exceed 5 years even if the evidence disclosed a compound larceny.

It is true that schedule 1 of the Magistrates' Courts Act, which enumerates the indictable offences which can be tried summarily, refers among others to offences under section 2, but that must be taken to mean that a larceny for which no special punishment is provided is one of the offences which can be dealt with summarily. If, then, for the words in the penultimate sentence of the report "as it is proper to charge him in this "country" are substituted "as he might have been charged "in this country," we think that any difficulty or misunderstanding will be dispelled. I make this statement with the concurrence of Hallett and Byrne JJ., the members of the court who are sitting today, and Havers and Ashworth JJ. who would have been sitting if the court of five judges fixed for today had become effective.

[QUEEN'S BENCH DIVISION.]

* SHILVOCK *v.* BOOTH.

1956 *Jan.* 27.

Lord Goddard C.J., Hilbery and Stable JJ.

National Insurance — Contributions — Failure to pay — Conviction for failing to pay one contribution—Order for payment of arrears— National Insurance (Contributions) Regulations, 1948 (*S.I.* 1948, *No.* 1417), *reg.* 19 (1) (3) (5).

The defendant pleaded guilty to the offence of failing to pay a contribution which he was liable to pay under the National Insurance Act, 1946, as a self-employed person, contrary to section 2 (6). The prosecutor, having served with the summons a notice of intention to prove the defendant's failure to pay other contributions, proved at the hearing that the defendant had failed to pay contributions amounting to £17 8s. 7d. The prosecutor asked the justices to make two orders, one, under regulation 19 (1) of the National Insurance (Contributions) Regulations, 1948, ordering the defendant to pay to the National Insurance Fund 7s. 5d. in respect of the contribution for which he had been convicted, and the other under regulation 19 (3) ordering the defendant to pay £17 8s. 7d. in respect of the arrears of contributions. The justices refused on the ground that they had no power to make the orders. On appeal:—

Held, that since the defendant was liable to pay the contributions under regulation 19, the justices had power, on the failure to pay the contributions having been proved, to make the orders both under paragraph (1) and paragraph (3).

CASE STATED by Sutton Coldfield justices.

An information was preferred by Ashleigh Kenneth Shilvock against the defendant, Thomas Booth, charging him with failing to pay a contribution in respect of the week commencing May 16, 1955, which he was liable to pay under the National Insurance Act, 1946, as a self-employed person, contrary to section 2 (6).

At the hearing of the information the defendant pleaded guilty to the offence and was duly convicted, and the justices then found the following facts. A summons was issued in respect of the information and duly served on the defendant together with a notice dated August 16, 1955, under regulation 19 of the National Insurance (Contributions) Regulations, 1948,[1] to the effect that in the event of the defendant being convicted,

[1] National Insurance (Contributions) Regulations, 1948, reg. 19: "(1) In any case where . . . an insured person has been convicted of the offence under subsection (6) of section 2 of the Act of failing to pay a contribution, he shall be liable to pay to the National Insurance Fund a sum equal to the amount which he failed to pay. . . . (3) On any such conviction . . . if notice of intention to do so has been served with the summons or warrant, evidence may be given— . . . (*b*) in the case of an insured person (other than an employed person), of the failure on his part to pay other contributions as such an insured person during those two years; and on proof of such failure . . . the insured person shall be liable to pay to the National Insurance Fund . . . a sum equal to the total of all the contributions under the Act . . . which he is so proved to have failed to pay. . . . (5) Any sum ordered to be paid to the National Insurance Fund . . . under this regulation shall be recoverable as a penalty."

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it was intended to give evidence of his failure to pay other contributions, therein specified, amounting to £17 8s. 7d. The defendant had not paid 7s. 5d. in respect of his contribution as a self-employed person for the week commencing May 16, 1955, and he was liable to pay that sum to the National Insurance Fund; nor had he paid £17 8s. 7d. in respect of the arrears and he was liable also to pay that sum to the fund.

It was contended by the prosecutor that the justices had jurisdiction to make two orders; one, under regulation 19 (1) ordering the defendant to pay 7s. 5d. in respect of the contribution which he was liable to pay for the week commencing May 16, and the other under regulation 19 (3) ordering the defendant to pay £17 8s. 7d. in respect of the arrears of contributions during the period between September 21, 1953, and May 15, 1955, as set out in the notice, and that the justices were under a duty to make such orders on proof that the defendant had failed to pay such contribution and arrears of contributions respectively.

The defendant, who was not represented, offered no observations.

The justices were of the opinion that they had no jurisdiction to make the orders. The provision in regulation 19 that in certain circumstances an insured person "shall be liable to "pay" in their opinion confirmed the view that there was no pre-existing liability on which an order for payment could be made and that the liability only arose on proof being given, after conviction, of failure or neglect to pay. If there had been a pre-existing liability the words "shall be liable to pay" would have no meaning. The authorities showed that the liability to pay was a civil and not a criminal obligation and there was nothing in regulation 19 or in the Magistrates' Courts Act, 1952, nor in the Magistrates' Courts Rules, 1952, to confer jurisdiction on a magistrates' court in connexion with making an order for payment of a civil debt on proceedings on an information for a criminal offence. Nowhere in the National Insurance (Contributions) Regulations, 1948, was to be found the expression "the "Court may order the defendant to pay" or any similar expression. The amount which an insured person was liable to pay could, under section 54 of the National Insurance Act, 1946, be recovered summarily before justices on complaint and after due service of a summons thereon. Section 47 (3) of the Magistrates' Courts Act, 1952, required the service of a summons issued on a complaint, before a magistrates' court could make an order for the payment of a civil debt. The notice served under regulation 19 was neither a complaint nor a summons and therefore they had no power to make the order.

The prosecutor appealed.

Rodger Winn for the prosecutor.

The defendant did not appear and was not represented.

No cases were cited in argument.

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LORD GODDARD C.J. This is a case stated by the justices for the Borough of Sutton Coldfield, before whom the respondent was charged with failing to make an insurance contribution under the National Insurance Act, 1946, and the simple question raised is whether the justices have not only power to order him to pay the contribution in respect of which he was expressly summoned, but other contributions which stood in exactly the same position and which he ought to have paid and had not.

The matter turns on the true construction of regulation 19 of the National Insurance (Contributions) Regulations, 1948. Under the National Insurance Act, 1946, a self-employed person is liable to pay contributions and if he fails to pay contributions for which he is liable, there is a penalty not exceeding £10 for any contribution which he fails to pay. For the purpose of collecting those contributions, section 8 (1) of the Act provides: "Regulations may provide—(*a*) for any matters incidental to the "payment and collection of contributions under this Act, includ- "ing the co-ordination thereof with the payment and collection "of contributions under the Industrial Injuries Act. . ." Then the regulations of 1948 make provision for the recovery of contributions.

[His Lordship read regulation 19 and continued:] That seems to me to be so far a perfectly intelligible provision. It is akin to the practice of taking into account other offences. They say: "We summon you for one offence and at the same time we "serve on you a notice telling you that if you are convicted of "that offence, which will establish your liability, we shall ask for "an order on you to pay all these other contributions which you "have not paid." It is really done, I think, not only to save time, but expense and various other things because if a man has not paid, for example, 20 contributions, he might take the point, "I am not liable to pay." If it is established that he is liable on one of these occasions, then it follows that he ought to have paid and might be liable to be prosecuted for every one of them, and he would be held liable by the justices to pay.

Regulation 19 having provided that on proof of such failure the insured person should be liable to pay the amount, it is then provided in paragraph (5) "Any sum ordered to be paid to the "National Insurance Fund . . . under this regulation shall be "recoverable as a penalty"; in other words, the amount shall be recovered in the same way as the fine is recovered.

I fully realise the trouble the justices and their clerk have taken over this case, and if they have doubts on a point of law it is very desirable that they should express them; but I venture to think that they have imagined difficulties which do not really exist. A statute or regulation very often says that a person who fails to do something shall be liable to a fine; that means he will be fined. If he is liable to pay, that means he can be told

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he must pay. He is liable to pay these contributions as he is liable to pay the fine; and although it might be the draftsman might have put "On proof of such failure the insured person "shall be ordered to pay", I think it is clear enough that that is what is meant, that is to say, it is a summary and cheap method of recovering these contributions without further proceedings.

For these reasons, I think the justices came to a wrong decision, and this case must go back telling them that it is their duty to make an order that the respondent should pay the contributions which it has been proved he has failed to pay, by such instalments as the justices may order.

HILBERY J. I agree.

STABLE J. I agree.

Appeal allowed.

Solicitors.—*The Solicitor, Ministry of Pensions and National Insurance.*

C. J. E.

[COURT OF APPEAL]

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Jan. 11, 12, 13.

Singleton, Jenkins and Hodson L.JJ.

*STRINGER *v.* AUTOMATIC WOODTURNING CO. LTD.

[1954 S. No. 4015]

Factory—Dangerous machinery—Woodworking machine—Circular saw—No duty to comply with Act if compliance with regulations—Saw not used for sawing—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1)—*Woodworking Machinery Regulations*, 1922 (*S.R. & O.*, 1922, *No.* 1196), *reg.* 10 (*c*).

The plaintiff, a girl aged 18 years, who was employed by the defendants at their factory, was engaged in cutting lengths of timber by means of a circular saw, and having cut a number of such lengths was removing, by means of a short stick, some off-cuts from the side of the bench, where they had accumulated, when her fingers came into contact with the revolving saw some inches of which were exposed and she sustained injuries. It was admitted by counsel for the plaintiff, and so found by the trial judge, that the saw had been fenced in accordance with the requirements of regulation 10 (*c*) of the Woodworking Machinery Regulations, 1922,[1] but the plaintiff contended that the defendants were in breach of their common law duty to safeguard their employees, because at the side of the machine from which the off-cuts had to be removed some

[1] Woodworking Machinery Regulations, 1922, reg. 10 (*c*): "The top "of the saw shall be covered by a "strong and easily adjustable guard, "with a flange at the side of the saw "farthest from the fence. The guard "shall be kept so adjusted that the "said flange shall extend below the "roots of the teeth of the saw. The "guard shall extend from the top of "the driving knife to a point as low "as practicable at the cutting edge of "the saw."

inches of the revolving saw were exposed. Oliver J. held that the defendants were in breach of their statutory duty under section 14 (1) of the Factories Act, 1937,[2] and he awarded the plaintiff damages. On appeal:—

Held, that regulation 10 (*c*) modified the provisions of section 14 of the Act in respect of circular saws and substituted the guarding and fencing prescribed by the regulation for the otherwise absolute obligation imposed by section 14.

Dicta in *Miller* v. *William Boothman & Sons Ltd.* [1944] K.B. 337, 341; 60 T.L.R. 218; [1944] 1 All E.R. 333 approved by House of Lords in *John Summers & Sons Ltd.* v. *Frost* [1955] A.C. 740; [1955] 1 All E.R. 870, applied.

Benn v. *Kamm & Co. Ltd.* [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833, distinguished.

Held, further, that the requirements of regulation 10 (*c*) having admittedly been complied with the defendants owed no statutory duty under section 14 of the Factories Act, 1937, but a new trial must be ordered to determine whether they were in breach of their common law duty to protect their employee against dangers not covered by the regulation.

Decision of Oliver J. [1955] 1 W.L.R. 971 reversed.

APPEAL from Oliver J., sitting at Liverpool Assizes.[3]

The plaintiff, a girl, 18 years of age, who was employed by the defendants at their furniture factory, had worked for about six months at a circular saw, and on January 7, 1954, was using the saw to cut timber to make chair legs. The saw had been set up and fenced for the purpose of cutting the timber so as to comply with regulation 10 of the Woodworking Machinery Regulations, 1922–1945. The timber to be cut by the plaintiff was in proper sized pieces and was placed upon and held tightly against a jig so that it was presented to the teeth of the circular saw and cut into particular lengths. After cutting each length of timber a piece of wood, called an off-cut, remained on the bench at the side of the saw after the saw had passed through the timber. The plaintiff was engaged in removing the off-cuts from the bench in the manner in which she had been trained, i.e., she moved to the side of the saw and, using her push-stick, flicked away the off-cuts whilst the saw was in motion. While so engaged her fingers came into contact with the saw and she sustained injuries. The plaintiff, suing by her father, brought this action claiming damages for personal injuries, leave being given at the hearing to amend the statement of claim so as to allege a breach by the defendants of the duty imposed upon them by section 14 (1) of the Factories Act, 1937.

Breach of a common law duty to take steps to safeguard their employee was also alleged against the defendants.

[2] Factories Act, 1937, s. 14 (1): "Every dangerous part of any "machinery . . . shall be securely "fenced . . . Provided that, in so "far as the safety of a dangerous "part of any machinery cannot by "reason of the nature of the opera-"tion be secured by means of a fixed "guard, the requirements of this "subsection shall be deemed to have "been complied with if a device is "provided which automatically pre-"vents the operator from coming into "contact with that part."

[3] [1955] 1 W.L.R. 971.

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Oliver J. held that if the plaintiff had been injured while she was sawing wood the defendants would have been protected by the regulation, but that the removing of off-cuts, while directly ancillary to such work, was not the job of sawing wood and that it was the duty of the defendants to comply with section 14 (1) of the Act of 1937, and notwithstanding that the defendants had provided a fence complying with the regulation, they were in breach of the duty imposed on them by the subsection. He therefore awarded the plaintiff damages. He did not in his judgment deal with the question of common law negligence.

The defendants appealed.

H. I. Nelson Q.C. and *J. M. Davies* for the defendants
G. G. Blackledge Q.C. and *J. M. Kennan* for the plaintiff.

Cases cited in argument are referred to in the judgment.

SINGLETON L.J., having stated the facts and read the trial judge's description of the machine, the work performed by the plaintiff, and also the material regulation and section, continued: The plaintiff and her advisers having abandoned any claim for breach of the regulation, I do not think that this court ought to go behind that, and it is right to say that we have not been asked to do so. Counsel for the plaintiff preferred to put her claim as one of negligence under the common law.

The case for the defendants is that once it is admitted that there was compliance by them with the regulations no question can arise under section 14 of the Factories Act, 1937. That submission was based upon the decision of this court in *Miller* v. *Boothman & Sons Ltd.*[1] The headnote reads: "Section 14 "(1), of the Factories Act, 1937, enacts that: 'Every dangerous "'part of any machinery . . . shall be securely fenced'. "Regulation 10 of the Woodworking Machinery Regulations, "1922, prescribes a certain form of fencing for circular saws. "The plaintiff was injured in operating a circular saw belonging "to his employers, the defendants. The fencing of the saw did "not comply with the sub-section, but did comply with the "regulation". It was held that the regulation which was deemed to be made under the Act modified section 14, subsection (1), and, accordingly, that the defendants had not committed a breach of a statutory obligation, and were not liable to the plaintiff.

The judgment of this court was given by Goddard L.J. who said[1]: "By section 159 of the Act of 1937 these regulations "continue in force, notwithstanding the repeal of the earlier "Act, and have effect as though made under the present Act, "that is, under section 60. They contain detailed provisions in "regulation 10 for the guarding of circular saws, hand saws and

[1] [1944] K.B. 337, 341; 60 T.L.R. 218; [1944] 1 All E.R. 333.

" planing machines. In our opinion, these regulations must be " regarded as modifying the provisions of section 14 in respect " of these machines and of substituting the prescribed guarding " and fencing for the absolutely secure fencing which the " section would otherwise require. It is difficult, indeed, to see " what other object these regulations could have. They clearly " contemplate the use of these saws. If saws are securely " fenced as required by section 14 they could not be dangerous " to life or limb, and, indeed, could not be used at all. The " use in section 60 subsection (1) of the words ' as appear to him " to be reasonably practicable and to meet the necessity of the " case ' we think clearly shows that it is intended to give the " Secretary of State power to modify the otherwise absolute " obligation so as to allow the use of the machine, provided " that reasonable, though not absolute, provision for safety is " made ". That decision was approved in the House of Lords in *John Summers & Sons Ltd.* v. *Frost*.[2] Mr. Nelson claims that section 14 of the Act does not apply in the circumstances of this case.

Oliver J. took a different view. Having found that this saw was properly set up within the Woodworking Regulation No. 10, the judge said[3]: " If the plaintiff had been injured while she " was sawing timber, nothing more would be said about it— " she would be quite clearly within the ruling of *Miller* v. " *Boothman*[4]; but she was not sawing wood. It seems to me " that this case is exactly the same as if she had left the saw " running and some other employee had come in contact with " it unfenced; I do not see any difference. It is quite true that " the moving of off-cuts is directly ancillary to the job of sawing; " but it is not the job of sawing. I find no difficulty in saying " that a saw may be correctly fenced for the purpose of operation " as a saw, but not correctly fenced for some other purpose. I " find full support for that proposition in two cases—*Dickson* v. " *Flack*[5] and *Benn* v. *Kamm & Co. Ltd.*[6] " The judge held that the defendants were in breach of section 14 of the Act of 1937, and that the plaintiff was entitled to damages subject to the question of contributory negligence.

The facts in *Benn* v. *Kamm & Co. Ltd.*[6] appear from the headnote, which reads: " Although special regulations made by " the Secretary of State under section 60 of the Factories Act, " 1937, with respect to the fencing of specified parts of a par- " ticular machine, may modify the duties imposed by section 14 " of the Act on the occupier of the factory with respect to the " fencing of those parts, they do not affect his duty to comply " with the provisions of that section as regards the fencing of " other dangerous parts of the machine with which the special

[2] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.
[3] [1955] 1 W.L.R. 971, 974.
[4] [1944] K.B. 337.
[5] [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840.
[6] [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833.

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"regulations do not purport to deal. The plaintiff was injured "by a dangerous and unfenced part of a horizontal milling "machine, to which the Horizontal Milling Machine Regulations, "1928, applied. Regulation 3 contained provisions concerning "the fencing of the cutters of the machine, but made no refer- "ence to the fencing of the dangerous part by which the plaintiff "was injured. *Held*, that regulation 3 did not define exhaustively "the duty of the occupier of the factory to fence horizontal "machines and the defendants were in breach of section 14 of "the Act, and the plaintiff was entitled to recover." *Miller* v. *Boothman & Sons Ltd.*[7] was distinguished.

In the course of his judgment in *Benn* v. *Kamm & Co. Ltd.* Somervell L.J. said[8]: "Mr. McIntyre, for the plaintiff, submits "that they do not exhaustively define the occupier's duty, and "that so far as fencing is concerned they define and regulate only "the fencing that is necessary for the cutter, and that if, as here, "there is on a milling machine, as there is here found to be, a "dangerous part other than the cutter, that is a subject-matter "with which the regulations do not purport to deal and the "general duty under section 14 is applicable. I have come to the "conclusion that that is right." Denning L.J. is recorded as having said[8]: "I am confirmed in the view that we should allow "this appeal because Parker J. would have himself decided in "favour of the plaintiff but for the fact that he felt himself "bound by authority. He said: 'it seems an extraordinary "'proposition that because the regulations have said that "'dangerous part A shall be guarded in a particular way, there "'is no obligation to guard dangerous parts B, C, D and E.' "Now that we have had the benefit of full argument on the "cases, I think that proposition is no part of the law. It seems "to me that when the regulations say, that a particular dangerous "part is to be guarded in a particular way, then the occupier "satisfies his statutory obligations in regard to that part by "guarding it in that way; but the occupier remains under his "ordinary statutory obligations in regard to other dangerous "parts."

In the present case we are dealing with a circular saw, and with nothing else. But for the regulations, section 14 of the Act would have applied. If the regulations apply to the saw, they modify the obligation of the employers. The employers fulfilled their duty in regard to the circular saw if they provided that which they had to provide under the regulations as a guard for the circular saw, and under the decision in *Miller* v. *Boothman & Sons Ltd.*[9] section 14 of the Act did not apply.

It appears to me, if I may say so with respect, that Oliver J. was not right in saying that on the facts of this case section 14 of the Act still applied—if it be right to say that the defendants complied with the regulation. It follows that I think

[7] [1944] K.B. 337.
[8] [1952] 2 Q.B. 131, 132.
[9] [1944] K.B. 337.

Mr. Nelson's point is sound and that there ought not to have been a decision in favour of the plaintiff on an alleged breach of section 14 of the Act once it was found or admitted that there had been full compliance with the regulation.

[His Lordship then considered the plaintiff's claim for breach of common law duty and continued:] There are features of this case which are unsatisfactory in a sense. I am satisfied that the correct way for this court to deal with it is to direct that there be a new trial upon the issue as to negligence or breach of duty under the common law. It appears to me from the words used by the learned judge himself that this is a case well worthy of consideration upon that head. I think further that as the case should go back for that purpose, it should be open to the judge, upon trial, when he has evidence from both sides about it, to consider to what extent (if any) it can be said that the plaintiff herself brought about this accident. In view of the admission by the plaintiff that the regulations were complied with by the defendants I do not think that the plaintiff ought to be at liberty to go into that question again. But for the purpose of ascertaining the true position between the parties the whole of the facts should be open to the judge on the new trial. I would allow the appeal accordingly and direct a new trial.

JENKINS L.J. I agree that there should be a new trial in this case on the issue of breach of common law duty, or in other words the issue of negligence. Like my Lord I have had great difficulty in relating the requirements of regulation 10 (*c*) of the Woodworking Machinery Regulations of 1922 to the physical characteristics of the circular saw with which this case is concerned, so far as those characteristics can be discerned and appreciated merely by inspecting certain photographs with such assistance as counsel have been able to give. But the case proceeded below upon an admission on the plaintiff's side that the fencing and guarding of this circular saw did comply with regulation 10 (*c*). It was not sought to retract this admission before us, and I think that the plaintiff must be regarded as bound by it. On the footing that as regards fencing and guarding the saw did comply with the requirements of regulation 10 (*c*) I think it follows from the principle stated in *Miller* v. *Boothman & Sons Ltd.*[10] and approved by the House of Lords in *John Summers & Sons Ld.* v. *Frost*[11] that the plaintiff cannot succeed on the ground of breach by the defendants of their statutory obligation to fence under section 14 of the Factories Act, 1937. These cases seem to me to provide clear authority for the proposition that the obligation of a special regulation, such as regulation 10 (*c*) of the Woodworking Machinery Regulations in the present case, where such special regulation has been duly complied with, is to be regarded as substituted for the more

[10] [1944] K.B. 337.

[11] [1955] A.C. 740.

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general obligation as to fencing contained in section 14 of the Act.

I need say no more about the authorities, to which my Lord has fully referred, except to mention with regard to *Dickson* v. *Flack* [12]—one of the cases referred to by the learned judge—that it seems to me that the observations attributed to my Lord and Denning L.J. in the headnote might appear to go rather further than *Benn* v. *Kamm* [13] and to be not altogether easy to reconcile with the principle of *Miller* v. *Boothman & Sons Ltd.*[10] But when the judgments are looked into, it seems to me to be clear that neither of their Lordships was really doing any more than applying the principle in *Benn* v. *Kamm*,[13] which is in no way inconsistent with the principle stated in *Miller* v. *Boothman & Sons Ltd.*,[10] but merely says that compliance with a special regulation as regards the fencing of some specific dangerous part of a machine does not absolve the employer from taking proper steps under section 14 of the Act to fence some other part of the machine for which no provision is made in the special regulation.

Accordingly, in my view, if this case rested only upon alleged breach of statutory duty, the judge's decision could not stand, and the defendants would be entitled to succeed in this appeal. But the case turns not only on breach of statutory duty (as to which the plaintiff's case must fail) but also on the defendants' common law duty to the plaintiff and their other employees, not to expose them to unnecessary risk, and to take all such steps as are reasonably practicable for their safety. That ground—that is to say the alleged breach of the common law duty—actually on the course that the case took below formed the main, and at one stage in the case the only, basis of the plaintiff's claim. The judge never in terms adjudicated upon it so far as one can tell from the judgment. We were told that in the course of the argument he made some observation from which it was inferred that he did not consider that that basis of claim could succeed. But the question was somewhat obscured by the introduction into the case of the claim which ultimately succeeded, namely, the claim under section 14 of the Factories Act, 1937, which was introduced by the judge himself.

In the result there is nothing in the reasons for his judgment to show that he had reached a final decision one way or the other upon the issue of common law negligence. [His Lordship referred to the trial judge's findings as to the danger to which the plaintiff was exposed and concluded:] It is obvious to my mind that the judge did not give adequate consideration to this aspect of the case, no doubt because the view which he formed on the application of section 14 of the Factories Act made it unnecessary to go into it for the purpose of his decision. In the result I agree with my Lord that there should be a new trial on the issue of

[10] [1944] K.B. 337.
[12] [1953] 2 Q.B. 464.
[13] [1952] 2 Q.B. 127.

negligence at common law at which, while the plaintiff must be considered as bound by the admission made as regards compliance with regulation 10, it should be open to the parties to call all such evidence relevant to the issue of negligence at common law as they may be advised.

HODSON L.J. I agree that there should be a new trial on the question of common law negligence. The case was presented on that footing in part, and the common law claim was never abandoned. Although in the course of speeches of counsel the judge made an observation which discouraged the plaintiff's counsel from pursuing the argument based on the common law claim, he never in his judgment dealt expressly with this claim, having made up his mind that he could find in favour of the plaintiff on another ground. I agree with my Lords that insofar as the judge found himself able so to do—namely, to find in favour of the plaintiff by reason of the breach of statutory duty under section 14 of the Factories Act, 1937—he was in error.

The first regulation which he had to consider in deciding whether or not the defendants had been guilty of a breach was regulation 10 (*c*) of the Woodworking Machinery Regulations. These regulations, and the sections of the Factories Act generally, when they deal with fences, deal with fences which are designed to protect the workman from danger. That is true of section 14 of the Factories Act, which requires that dangerous machinery shall be securely fenced. When one looks at the Woodworking Regulations, regulation 10 begins with the words: "Every circular saw shall be fenced as follows." But when one comes to the regulation under consideration, regulation 10 (*c*), one finds that it is possible that the word "fence" is used in a different sense; and indeed the plaintiff, through her counsel, accepted that the word "fence" in regulation 10 (*c*) was used in a different sense—that is to say, it did not mean something to protect the workmen from danger, but it referred to a standard part of a circular saw table which in this case was a rectangular piece of wood or metal (I know not which) which appears on one of the photographs at a distance of 2 ft. from the saw itself, and it was there not for protection, but as a guide for the purpose of holding the wood, and a moveable guide at that.

Reading the regulation in that sense, which the plaintiff admitted against herself, her counsel very naturally and properly, as I see it, at the conclusion of the plaintiff's evidence, came to the conclusion that no breach of regulation 10 (*c*) could be established because the circular saw in question was guarded in accordance with the regulation on what I will call the near-side of the circular saw—that is to say, the side from which the wood was fed to the machine—and on that reading of the regulation that is all that is required. That leaves what I will call the off-side of the saw exposed, and, so far as the regulation goes, no necessity for a flange protection on the off-side of the saw;

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although one of the photographs which was shown to the judge reveals the dangerous effect of the exposure of a number of teeth on the off-side of the saw. It may be that when the operator has to work only on the near-side of the saw, compliance with this regulation will be sufficient to protect the operator from danger. But when, as in this case, one finds that part of the operator's duty is to go round to the off-side (that is, the unprotected side of the saw) to remove the off-cuts from the table, there is no sufficient protection provided by the regulation. So that it would look as if there is a gap to be filled in that regulation, and that some amendment of it would be desirable.

The position of this court I think is this: Although in many cases where dangerous operations are covered by regulations, compliance with the regulations would absolve an employer from liability in the case of accident, yet the common law is not helpless to fill up gaps, because the duty of the employer remains. The duty is not to expose his employees to unnecessary risk, and that duty is not ousted by regulations.

The plaintiff, having accepted that there was no breach of regulation 10 (*c*) of the Woodworking Regulations, was in the position that she was thrown back upon her common law claim because regulation 10 (*c*), so far as the protection of the saw is concerned, is exhaustive and does oust the provisions of section 14 of the Factories Act, as was explained by Goddard L.J. in *Miller* v. *Boothman & Sons Ltd.*,[14] in the passage which was expressly approved by the House of Lords in *John Summers & Sons* v. *Frost*.[15] I respectfully disagree with the learned judge when he felt himself able to distinguish *Miller* v. *Boothman & Sons Ltd.*[14] on the ground that the plaintiff was not actually engaged in the operation of sawing, but of clearing the off-cuts from the table which was ancillary to the sawing. I see no valid distinction there, but I appreciate the way in which the judge may well have been misled by the headnote in *Dickson* v. *Flack*,[16] to which my Brother Jenkins referred, because the headnote in that case certainly seems to suggest that both Singleton and Denning L.JJ., in purporting to follow the decision in *Benn* v. *Kamm*,[17] nevertheless went in the face of *Miller* v. *Boothman & Sons Ltd.*[14] in saying that in certain circumstances the regulations might not be exhaustive, and the court might be thrown back on considering the duty to fence securely imposed by section 14 (1) of the Act of 1937. That this is not so is quite clear on reference to the judgments of both learned Lords Justices, who say in terms that they were dealing only with the situation where the regulation did not cover all the dangerous parts.

In *Dickson* v. *Flack*[18] Singleton L.J. said "Unless the "regulation covers all those parts section 14 comes into play."

[14] [1944] 1 K.B. 337, 340.
[15] [1955] A.C. 740.
[16] [1953] 2 Q.B. 464.
[17] [1952] 2 Q.B. 127.
[18] [1953] 2 Q.B. 464, 475, 478.

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Denning L.J. said: "The dangerous part provided for by regulation 17 is the part of the table where the man's hand is likely to come into contact with the cutters while he is doing his work. The regulation does not provide for the gap in the machine above the cutter where it may fly out and thus cause danger. That is another dangerous part. It falls within section 14, and must be securely fenced." So that when one looks at the judgments in that case, one finds no support for the proposition that one can fall back, as it were, on section 14 in such a case as this, because the protection of the circular saw itself is covered by the Woodworking Regulation which does modify the Act, as was recognised as being perfectly feasible in *Miller* v. *Boothman & Sons Ltd.*[19]

For these reasons, therefore, I agree with Mr. Nelson's submission for the appellant that the judge was wrong in finding himself able, upon the amended claim, to find the defendants' guilty of breach of statutory duty by reference to section 14 (1) of the Factories Act. Regulation 10 (*c*) was, according to the admission made by the plaintiff, complied with; and so far as the regulations are concerned, I think the defendants are entitled to succeed. The question of common law liability I need not elaborate because I agree entirely with what has been already said on the subject. I agree that the appeal should be allowed and with the order proposed.

Appeal allowed; new trial ordered.

Solicitors: *J. W. Davies; Vizard, Oldham, Crowder & Cash.*

A. W. G.

[19] [1944] K.B. 337.

[COURT OF APPEAL.]

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Jan. 25.
Denning, Hodson and Morris L.JJ.

[1955 C. No. 2432.]

Shipping — Charterparty — "Expenses"—Meaning—Austral charterparty—Seaworthy trim clause—"Any expense incurred in shifting "cargo to be paid by charterers"—Expenses of crew's overtime and loss of ship's time incurred in shifting cargo in order to trim ship—"Any expense" held to mean actual disbursements—Overtime recoverable expense—"Homogeneous cargo"—Cargo of wheat partly in bulk and partly in bags — Effect where cargo is homogeneous.

The seaworthy trim clause of the "Austral" charterparty provides: "If the option of ordering the vessel to discharge at two "ports is not exercised . . . before loading has commenced, any "expense incurred by the shipowners at the first port of discharge

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"in shifting, discharging and/or reloading any cargo . . . for the "purpose of putting the vessel into seaworthy trim for the passage "to the second port . . . shall be paid by the charterers. . . . In "the event of the cargo being a homogeneous cargo (i.e. of the same "description quality and mark) the master shall discharge the "cargo in such manner as to leave the vessel in seaworthy trim to "proceed to the second port of discharge."

Under a charterparty incorporating the seaworthy trim clause and other clauses providing for loss of time, a shipowner agreed to carry a cargo of wheat from the Argentine to India. The wheat was all of the same quality and bore no mark or special description. The charterers elected to load it in bulk, but the ship's master required part of it to be supplied in bags. The charterers, who had an option of requiring discharge at two ports, exercised it during the voyage, and part of the cargo was discharged at Cochin and the rest at Bombay. The part discharge at Cochin was completed at 4.30 p.m. on a Saturday, but the ship did not sail for Bombay until 21 hours later owing to the necessity for putting her into seaworthy trim. That involved, inter alia, wages for crew's overtime in shifting the ship and superintending the restowage of the cargo.

The shipowner claimed as "expense" under the seaworthy trim clause (*a*) moneys spent on crew's overtime and (*b*) an amount for loss of 21 hours ship's time. She claimed alternatively demurrage and/or damages for detention, calculated by agreement on the basis of the demurrage rate of £200 for 24 hours, which figure was also agreed as a reasonable amount for damages for detention, if any. The charterers denied liability.

Devlin J. held that "any expense" in the seaworthy trim clause included crew's overtime and loss of 21 hours' ship's time, and awarded the shipowner £175 for that loss of time, based on the agreed figure for demurrage or damages.

On appeal by the charterers:—

Held, per totam curiam (1) that on the agreed facts and the terms of the charterparty the claims for demurrage and damages failed.

(2) That, affirming Devlin J., the cargo of wheat partly in bulk and partly in bags was not a homogeneous cargo for the purposes of the seaworthy trim clause and the definition of "homogeneous "cargo" therein;

(3) That the crew's overtime was an "expense" recoverable by the shipowner under the seaworthy trim clause, albeit that the crew was occupied not in shifting the cargo but in shifting the ship and superintending the restowage of the cargo.

(4) *Per* Denning and Hodson L.JJ., reversing Devlin J., that the shipowner could not recover for loss of ship's time as "any "expense incurred in shifting the cargo" under the seaworthy trim clause. The words "any expense" in this clause must be construed in their primary meaning of actual disbursements, and should not be given the wider meaning to include the whole cost of running the ship and consequent loss to the owner during the period of delay; a fortiori since the charterparty expressly provided elsewhere for time occupied and time lost.

Per Morris L.J. The shipowners were entitled to receive as "any expense" under the clause a sum representing the expense necessarily and solely incurred at Cochin in shifting the cargo, which sum should include the expense of running and maintaining the ship while shifting the cargo and carrying out operations incidental to the trimming of the ship; but that the phrase "any "expense incurred" did not cover loss of time as such nor loss of

shipowner's profit or loss of earnings; and, accordingly, the amount to which the shipowner was entitled could not be measured on the basis of the demurrage rate nor by reference to what would be a reasonable figure of damages for detention. Calculation of the amount would necessitate further inquiry.

Decision of Devlin J. reversed in part.

APPEAL from Devlin J.

The facts taken from the agreed statement of facts and the judgments in the Court of Appeal were as follows:—By a charterparty dated September 15, 1948, between the agents for the shipowner, Mrs. Evgenia John Chandris (widow) and the charterers, Union of India, respectively, the owner agreed to carry in her steamship the "Evgenia Chandris" a full and complete cargo of wheat in bags and/or bulk to be loaded in the Argentine, the charterers having the option of discharging at two safe ports on the same coast of the Dominion of India, in which case the rate of freight was to be 2s. 6d. per ton more on the entire cargo. The charterers elected to load in bulk, but no shifting boards were erected, and accordingly in order to comply with the provisions for safe stowage contained in the charterparty, the master required that ten per cent. of the cargo of wheat should be supplied in bags; and accordingly 9,000 tons were loaded in bulk, and 1,000 tons in bags. All the wheat was of the same quality and bore no mark or special description.

The option of ordering the vessel to discharge was not exercised before loading began, but it was exercised on November 5, 1948, during the voyage, by an instruction to the master to discharge 2,900 tons of the cargo at Cochin and the remainder at Bombay. The vessel arrived at Cochin on November 25, 1948. Notice of readiness to discharge was given by 1 p.m. and discharge and the lay days began at that hour. The physical discharge of the 2,900 tons of wheat, all in bulk, was completed at 4.30 p.m. on Saturday, November 27, 1948; but the master was unable to sail immediately for Bombay because the removal of the 2,900 tons of bulk wheat had left the ship out of trim, and it was necessary to trim the rest of the wheat in the ship. The port authorities would not allow the ship to remain at the wharf at Cochin while this was being done, and in order to comply with their requirements the ship had to shift from the wharf at which discharge had taken place to a buoy in the stream. The shifting occupied two hours, from 4.30 p.m. to 6.30 p.m. on the Saturday. From that hour until 6 a.m. on Sunday, November 28, the time was occupied in trimming bulk wheat into the lower holds, covering it with tarpaulins, and stacking bagged wheat over it. The work was passed by the port authorities at midday on Sunday. A pilot boarded the ship at 1 p.m. and the ship sailed for Bombay at 1.30 p.m. The ship had thus been delayed for 21 hours owing to the necessity for putting her into seaworthy trim.

Clause 43 of the charterparty provided as follows:—"... Orders for second port of discharge to be given whilst

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" vessel is discharging at first port. Ports to be in geographical " rotation and the Seaworthy Trim Clause as per lines 38–43 of " the ' Austral ' charterparty to apply to this charter." Lines 38–43 of the " Austral " charterparty provide: " Safe trim between " ports of discharge. If the option of ordering the vessel to " discharge at two ports is not exercised, or if correct particulars " of the cargo to be discharged at the first port of discharge are " not given to the master, before loading has commenced, any " expense incurred by the shipowners at the first port of discharge " in shifting, discharging and/or reloading any cargo either for " the purpose of putting the vessel into seaworthy trim for the " passage to the second port or to enable the cargo for discharge " at the first port to be conveniently so discharged shall be paid " by the charterers, and the charterers shall indemnify the " shipowners against any claims by bill of lading holders in " respect of such shifting, discharging and/or reloading cargo. " In the event of the cargo being a homogeneous cargo (i.e. of the " same description quality and mark) the master shall discharge " the cargo in such manner as to leave the vessel in seaworthy " trim to proceed to the second port of discharge."

Clause 45: " Steamer shall be discharged at the average rate " of not less than 750 tons per weather working day (Sundays " and holidays excepted) provided vessel can deliver at such rate, " failing which demurrage to be paid to owners at the rate of " £200 per day or pro rata for part of a day. Time at discharging " port to count from notice of readiness, whether in berth or not."

Clause 48: " Overtime to be for account of the party ordering " it. If ordered by the port controller or his representative, " charterers to pay all extra expenses incurred."

Clause 49: " If two berths used at discharging port, cost of " shifting, including bunker fuel used to be for charterer's account " and time occupied in shifting to count."

Costs incurred at Cochin included amounts paid (a) for shifting charges payable and paid to the port authority, and stevedores' bill for trimming bulk wheat into the lower holds, covering it, and stacking the bagged wheat over it, amounting to £75 12s. 9d.; these were paid by the shipowner and subsequently refunded to her by the charterers but with no admission of liability to do so; and (*b*) crew's overtime totalling £9 13s. 6d., covering the work of officers and men in shifting the ship and looking after the stowage of the cargo.

It was admitted that Saturday was a weather working day. It was also admitted that the daily cost of the vessel and loss of earnings together exceeded £200, but the parties agreed that the demurrage rate of £200 per day (and pro rata) was a reasonable figure to take for the purpose of assessing any damages payable for the detention of the vessel.

The shipowner brought this action, claiming (i) the sum of £9 13s. 6d. in respect of crew's overtime under the seaworthy trim clause (clause 43) or a sum equal thereto as damages for

breach of charter; and (ii) to be recouped by the charterers in respect of the delay to the ship between 4.30 p.m. on Saturday, November 27, and 1.30 p.m. on Sunday, November 28—21 hours—or other the lesser appropriate period as the court should think fit in the light of the facts set out in the agreed statement of facts. She claimed the appropriate sum in respect of such delay under clause 43, or as demurrage, or alternatively as damages for detention for breach of one or more express or implied terms of the charterparty; or in the further alternative, partly under clause 43, partly as demurrage, and partly as damages for detention.

On the claim for demurrage or damages for detention, the parties agreed that if the court should decide that the shipowner was entitled to recover on those claims, the rate for 21 hours should be £175, calculated on the demurrage rate. The defendants denied all liability.

Devlin J. on July 7, 1955, gave judgment for the shipowner for £184 13s. 6d., being the total of £175 for loss of ship's time and £9 13s. 6d. for crew's overtime. His Lordship, considering the words " any expense incurred " in their place in the charterparty, said that the words did not contemplate only money that had actually been paid out. He continued: " Having regard to " the object of the clause and what, as it seems plain to me, " the parties were striving to attain the balance they wanted " to attain between the charterer and the shipowner in this " matter—I think it would be quite unnecessarily restrictive to " construe the words as meaning only specific disbursements. " There can be no reason in principle why specific disbursements " should be distinguished from any other form of loss or expense " which the shipowner has to bear as a result of the late declara- " tion of two ports. The same principle could, in fairness, be " made to cover them both; indeed, it is manifest, as I should " have thought, that delay and the cost of delay to the shipowner " is bound to be by far the larger part of the result of what I call " the delayed declaration, and to exclude that from the compensa- " tion he receives under the clause would be to give him very far " from an equitable recompense if delay and all the cost of " running the ship and so forth are to be excluded. Accordingly, " I think a broader meaning should be given to the words and " that they should cover the cost of the delay and the expenses " which are set out in the agreed statement of facts. I think " they cover in a broad sense the expense to the shipowner of " having to do the work of shifting, discharging and reloading the " cargo."

His Lordship went on to consider the second sentence of the " Austral " clause on the position when the cargo was " homo- " geneous " and said that for the purposes of this clause one had to look at the commercial description and not at natural properties. Plainly it made a difference for the purposes of safe trim between ports of discharge whether the cargo was a cargo

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in bulk or whether it was described as cargo in bags. For all commercial purposes there was a difference in description between cargo in bulk and cargo in bags. Accordingly, he held that this was not a homogeneous cargo and, therefore, that the second sentence of the seaworthy trim clause did not apply to the circumstances of the present case.

His Lordship went on to say: "Two questions arise on that "sentence; the first question is what is meant by 'homogeneous' "and the second is what is the place of that sentence in the "clause as a whole? Are they providing for two separate con- "tingencies, the first sentence for one and the second sentence "for the other, or does the second sentence merely qualify the "first in some way? It is not very clearly worded—and by that "I do not mean that it is not very clearly worded from a lawyer's "point of view I mean I think it would be extraordinarily "difficult for anybody not familiar with the subject matter to "know just what the parties meant when they put in that "second sentence, or what the draftsman of the 'Austral' "charterparty meant. I think that, broadly speaking, the "object behind it is this: The parties are saying to themselves: "There is no need for any expense to be incurred or for any "delay, for if the cargo, for example, is all of the same mark, "then it will not matter whether the ship discharges at one port "or two ports, whether it discharges some of the cargo at one "port and some more at the second port; so far as stowage is "concerned it is all the same mark and it will not make any "difference even if the master had known what the position was. "So it says: In that event the ordinary rule shall apply, the "master shall discharge the vessel in such manner as to leave "the vessel in seaworthy trim to proceed to the second port of "discharge; and merely because the declaration of the option is "delayed he cannot come against the charterers under the first "sentence of the clause and say that he had to shift, discharge, "or reload the cargo at the first port of discharge. I think that "is the object which the parties had in mind; they intend that "to apply to what they described as "homogeneous cargo"— "that is to say, cargo of the same description, quality and mark. "I took the example of marks just now, but the example of "quality might equally well be taken, because different qualities "might be separately stowed."

The charterers appealed.

A. A. Mocatta Q.C. and *Michael Kerr* for the charterers.
Eustace Roskill Q.C. and *B. S. Eckersley* for the shipowner.

The following cases were cited in the argument: *Britain Steamship Co. Ltd.* v. *Louis Dreyfus & Co. of New York* [1]; *Deacon* v. *Quayle*, *Neate* v. *Wilson* [2]; *Reg.* v. *The Governors*

[1] (1935) 51 T.L.R. 307; 51 Ll. L.R. 196.
[2] [1912] 1 K.B. 445.

and Guardians of the Poor of Kingston-on-Hull [3]; *Sully* v. *Duranty* [4]; *Argonaut Navigation Co. Ltd.* v. *Ministry of Food, S.S. Argobec* [5]; *Houlder* v. *Weir.* [6]

Cur. adv. vult.

1956: Jan. 25. DENNING L.J. stated the facts and continued: The ship was thus delayed for 21 hours owing to the necessity of putting her into seaworthy trim. The question is who is to bear the expense of the work and the loss caused by the delay. The charterers have paid the charges of the port authorities for shifting the ship and the stevedores' bill for work on the cargo, but they have not paid the crew's overtime, which amounts to £9 13s. 6d., nor have they paid anything for the loss caused by the delay, which is put at £175. The shipowners claim that the charterers should pay these also. This depends on the true construction of the charterparty. This was in the "Centrocon" form, but it incorporated the "seaworthy trim clause" of the "Austral" charterparty, which is in these words: "Safe trim between ports "of discharge. If the option of ordering the vessel to discharge "at two ports is not exercised, or if correct particulars of the "cargo to be discharged at the first port of discharge are not "given to the master, before loading has commenced, any "expense incurred by the shipowners at the first port of discharge "in shifting, discharging and/or reloading any cargo either for "the purpose of putting the vessel into seaworthy trim for the "passage to the second port or to enable the cargo for discharge "at the first port to be conveniently so discharged shall be paid "by the charterers, and the charterers shall indemnify the ship-"owners against any claims by bill of lading holders in respect "of such shifting, discharging and/or reloading cargo. In the "event of the cargo being a homogeneous cargo (i.e., of the same "description quality and mark) the master shall discharge the "cargo in such manner as to leave the vessel in seaworthy trim "to proceed to the second port of discharge."

Under this clause it is plain that the shipowner can recover "any expense incurred in shifting the cargo." This obviously includes the stevedores' bill. It also includes, I think, the charges of the port authority for shifting the ship: and also the crew's overtime. This overtime was incurred in shifting the ship from the wharf to the stream and in looking after the stowage of the cargo. It was an expense which was necessarily incidental to the shifting of the cargo and, as such, is recoverable under the seaworthy trim clause. It is true that clause 49 says: "overtime to be for account of the party ordering it," but that is a general clause which must give place to the particular provisions of the seaworthy trim clause. The shipowners are entitled, in my opinion, to the £9 13s. 6d. claimed by them.

[3] (1853) 22 L.J.Q.B. 324.
[4] (1864) 3 H. & C. 270.
[5] [1949] 1 K.B. 572; 65 T.L.R. 40; [1949] 1 All E.R. 160.
[6] [1905] 2 K.B. 267; 21 T.L.R. 503.

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I do not think, however, that the shipowners can recover any compensation for the 21 hours' delay to the ship. My reason is simply that the word "expense" means money spent out of pocket and does not include loss of time. At any rate, that is clearly its meaning in this charterparty, because there are numerous clauses which draw a distinction between "expense" or "expenses" on the one hand, and "time occupied" on the other hand. In clause after clause you will find that, whenever the parties intend that time is to count as lay days, they say so expressly. I may refer, for example, to clause 9 of the print and clause 49 of the type. This leads me to think that "time" is not included in "expenses." If it is to count, the parties must say so: otherwise it is not recoverable.

It was suggested in the course of the argument that "expense" might include the cost of running the ship for the time occupied, and thus enable the shipowner to recover a proportion of wages, insurance, overheads and so forth. Mr. Roskill did not press this suggestion very much because of the practical difficulties in its application. He put his case plainly and distinctly on loss of time, for which he should be paid a sum equal to the demurrage rate. On this he is wrong, because it is not an "expense." In any case, the cost of running the ship is, I think, not recoverable because it is not expense incurred "in shifting, discharging or "reloading the cargo."

Mr. Roskill next contended that the time should count as lay days because it was time occupied in discharging the cargo, in that the discharge could not be said to be completed until the ship was made trim again ready to proceed on her voyage. The answer is, however, that the discharge was completed as soon as the last grain of the 2,900 tons was put off. The time occupied thereafter in trimming the ship is another matter altogether, and must be recovered under the "Austral" clause or not at all.

At one time in the agreed statement of facts it was suggested that the sum could be recovered as damages for breach of an implied term in the contract: but that was not pressed before us, for the simple reason that the matter is covered by express clauses in the charterparty and there is no room for any implication.

I must mention one further matter. Mr. Mocatta urged that this cargo was a "homogeneous" cargo and came within the second sentence of the "Austral" clause. I think not. It was a cargo partly in bulk and partly in bags and was therefore not homogeneous. It is true that this came about only because the master required a proportion of it to be bagged, but that makes no difference. If the charterers themselves had elected to load partly in bulk and partly in bags, it would clearly not be homogeneous. The important matter is the nature of the cargo when it comes to be discharged: and that is the same, no matter whether it results from the charterers' choice or the master's direction.

In the result, on the agreed statement of facts, I think the shipowners are entitled to recover the sum of £9 13s. 6d. and no more. The appeal should be allowed accordingly.

HODSON L.J. stated the facts and continued: The main question to be determined is whether the charterers are liable to pay for the 21 hours' time during which the vessel was delayed at Cochin. This depends on the construction of the words "any "expense incurred by the shipowners at the first port of discharge "in shifting . . . any cargo . . . for the purpose of putting the "vessel into seaworthy trim for the passage to the second port."

Devlin J. said: "There can be no reason in principle why "specific disbursements should be distinguished from any other "form of loss or expense which the shipowner has to bear as a "result of the late declaration of two ports. The same principle "could, in fairness, be made to cover them both; indeed, it is "manifest, as I should have thought, that delay and the cost "of delay to the shipowner is bound to be by far the larger part "of the result of what I call the delayed declaration, and to "exclude that from the compensation he receives under the "clause would be to give him very far from an equitable recom-"pense if delay and all the cost of running the ship and so forth "are to be excluded. Accordingly, I think a broader meaning "should be given to the words and that they should cover the "cost of the delay and the expenses which are set out in para-"graph 9 of the agreed statement of facts. I think they cover "in a broad sense the expense to the shipowner of having to do "the work of shifting, discharging and reloading the cargo."

In my judgment the judge has given to the words "any "expense" in this context too extended a meaning. The extract from the "Austral" charterparty covers the situation which has arisen, since the option of ordering the vessel to discharge at two ports was not exercised before loading had commenced and is designed to compensate the shipowner for the particular expense described. This is expense incurred at the first port of discharge in shifting cargo, not by reason of shifting it. I do not find these words apt to cover the whole expense of running the ship during the period in which she was delayed. Such expense is not, in my opinion, properly described either as incurred at the first port of discharge or in shifting the cargo. The qualifying words following the words "any expense" have, in my opinion, the effect of showing that the expense is limited to specific disburse-ments and not extended to matters which are involved in the delay of the ship and the consequent loss to the owners.

When time is in question, provision is to be found in the language of the charterparty. Several examples of this are to be found, such as in clauses 11, 13, 15, 45 and 49. Clause 9 is typical. It deals with loading berths, and reads: "Steamer to "shift at her own expense to a second safe shoot or berth, in any "rotation, at each loading port or place if required by charterers.

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"If it is necessary for the steamer to get up steam to enable her "to shift to a second loading shoot or berth notice to be given "before loading at the first berth is completed otherwise time "lost to count as lay days." The expense of shifting and time are here dealt with separately, and clause 9 may, I think, be looked at as a parallel clause to the "Austral" clause under consideration for the purpose of construing the latter.

These clauses lead to the conclusion that if the parties had intended to cover loss of time in the "Austral" clause, they would have said so, for when time is to count it is made clear. Further, it is not, I think, irrelevant to remember that demurrage is, as I think Devlin J. has said in another case, an agreed quantity of damages for detention, and in this case it appears to have been taken as the basis of the award, for the expense caused by the 21 hours' delay has been equated to demurrage and thus has the figure of £175 been reached. This involves a simple calculation contemplated where time is counted as lay days.

I do not think, however, that the demurrage rate is necessarily the right measure of compensation for delay, for if the words "any expense" in their context are wide enough to cover cost of delay, the demurrage rate may well be too low. If the owner is right in her contention, the figure should be such as fully to compensate her for the delay incurred and would involve a detailed calculation of all the items which are included in the cost of running the ship. Such a calculation would be possible, and is made by the Admiralty Registrar in many cases where damages for detention are awarded; but I cannot think that the parties contemplated an elaborate inquiry in order to ascertain the cost to the owner of delay when using the words "any "expense" and defining this as that which is incurred at a specific port in shifting cargo. Moreover, most of the cost of running the ship was not incurred at Cochin and could not be ascertained until the end of the voyage. On the other hand, they must have had in mind specific disbursements incurred at the port in the operation of shifting cargo. Finally, apart from context, I think the primary meaning of the word "expense" is actual disbursements. Taking the words "any expense" in the context of the "Austral" extract and of the whole charterparty, I give the words their primary meaning.

I have confined what I have said to the first part of the incorporated extract from the "Austral" charterparty and have not referred to the last sentence, which deals with homogeneous cargoes, since I agree with Devlin J. and with his reasons for thinking that this cargo was not homogeneous in the sense of the definition provided in the same sentence. I need not, therefore, further consider the last sentence of the extract.

The second head under which the owner claims is demurrage. The discharge of cargo at Cochin ceased at 4.30 p.m. on Saturday, November 27, and the whole of the vessel's delay supervened.

The ship was then dealing with the restowing of the Bombay cargo. The claim, therefore, must fail under this head.

There was an alternative claim for damages for breach of charterparty based on an implied term in the charterparty to cover the cost of delay in the circumstances of this case, but this, it was rightly said by the charterers, would involve an embroidering of the charterparty without justification, and the claim was not pressed under this head. Any loss by delay not covered by the charterparty must lie where it falls.

There remains a sum of £9 13s. 6d. for crew's overtime after 4.30 p.m., being money expended in connexion with shifting the ship and looking after the stowage of the cargo. Clause 48 of the charterparty deals with overtime as follows: "Overtime to be "for account of the party ordering it. If ordered by the port "controller or his representative, charterers to pay all extra "expenses incurred." Since the owners cannot recover under this clause, they rely on the overriding effect of the typed clause taken from the "Austral" charterparty and say that this money represents expense incurred in shifting the cargo at the first port of discharge.

The charterers have not disputed certain sums for crew's overtime, but object to pay the sum in question for the following reasons: As to £3 19s. 6d., this was incurred, it is said, in shifting the ship and not in shifting the cargo. The answer to this objection is, I think, that in the circumstances of this case shifting the ship was part of the operation of shifting the cargo and therefore that the objection fails. As to the balance, it is said that looking after the stowage is not shifting cargo, but work of superintendence while the stevedores were working. I reject this objection also, as I think superintendence of the work is necessarily involved in its performance.

The "Austral" clause does, in my opinion, override clause 48 so as to cover these overtime payments and, accordingly, I would allow the claim for the £9 13s. 6d. Otherwise, I would dismiss the claim and allow the appeal to the necessary extent.

MORRIS L.J. The charterers had the option of discharging at two safe ports on the same coast of India. They did not, however, exercise that option before loading commenced. The result was that, under the seaworthy trim clause, they might be liable to pay certain expenses incurred by the shipowners. The question arises as to whether, in the events that happened, the charterers became so liable.

The vessel was required to discharge 2,900 tons of wheat at Cochin and that quantity (all in bulk) was discharged by 4.30 p.m. on Saturday, November 27. The vessel could not, however, immediately sail for Bombay, for the reason that the port authority lawfully required that the bagged cargo already on board should be restowed to their satisfaction before the vessel sailed. To comply with this requirement the vessel had to move from the

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wharf at which discharge had already taken place to the stream. This move took two hours—that is, until 6.30 p.m. From 6.30 p.m. until 6.0 a.m. on Sunday, November 28, the time was occupied in trimming bulk wheat into the lower holds, covering it with tarpaulins and stacking bagged wheat over them. The satisfaction of the port authority, which was requisite, was expressed at noon. A pilot boarded the vessel an hour later, and the vessel sailed half an hour afterwards (that is, at 1.30 p.m.).

In the circumstances to which I have referred, I consider that the following words of the seaworthy trim clause became applicable: " . . . any expense incurred by the shipowners at the " first port of discharge in shifting . . . any cargo . . . for the " purpose of putting the vessel into seaworthy trim for the " passage to the second port . . . shall be paid by the charterers." It was submitted on behalf of the charterers that the first part of the seaworthy trim clause does not operate in the event of the cargo being what in the second sentence of the clause is called " a homogeneous cargo," and it was submitted that the cargo on the vessel was " a homogeneous cargo." Such a cargo is referred to in the sentence as being cargo " of the same description quality " and mark." I do not think that it is necessary to say that the second sentence is alternative to the first. But where a cargo is a homogeneous cargo and where the master performs the duty of discharging the cargo " in such manner as to leave the " vessel in seaworthy trim to proceed to the second port of " discharge," there would not, in ordinary circumstances, be any expense incurred by the shipowners which, within the words of the first part of the clause, would qualify for payment by the charterers. In the present case, however, I do not consider that the cargo was " a homogeneous cargo " as that phrase in its context and with its definition was used. I consider that, for present purposes, wheat in bulk should not be regarded as " of " the same description " as wheat in bags.

The words of the seaworthy trim clause recited above as being applicable involve that in this case there can be recovery (*a*) if there was expense incurred by the shipowners, (*b*) if such expense was incurred at Cochin, and (*c*) if such expense was incurred in shifting cargo for the purpose of putting the vessel into seaworthy trim for the passage from Cochin to Bombay.

One part of the claim presented by the shipowners was that they should be recouped by the charterers " in respect of the " delay to the vessel." That the vessel was delayed is, I think, beyond doubt and the delay was caused by the necessity of putting the vessel into seaworthy trim for the passage from Cochin to Bombay (subject only to the subsidiary question as to whether the delay from noon on the Sunday to 1.30 p.m. was unconnected with the work of putting the vessel into seaworthy trim). If there had not been the necessity of putting the vessel into seaworthy trim at Cochin, she would have sailed for Bombay at 4.30 p.m. on Saturday, November 27. As it was, the vessel was delayed

because the trimming had to be done and the cost of running the vessel for 21 hours (or at least 19½ hours) was caused by the delay. The shipowners can only recover if they can bring themselves within the words of the contract which they made. The figure that has been awarded to the shipowners is £184 13s. 6d., of which £175 was on what was called "the delay account." That amount of £175 related to a period of 21 hours' delay and was calculated on the basis that a reasonable figure to take for the purpose of assessing any damages payable for the detention of the vessel would be £200 for 24 hours. Such a figure would include something for loss of profit. I find it difficult to see how, on any footing, a loss of profit related to time lost could be said to be an "expense" incurred at Cochin in shifting cargo.

Though it may well be that the shipowners incurred expense and also suffered a loss of profit as the result of delay, the sole question here is whether they proved that they incurred expense at Cochin in shifting cargo. The word "expense" conveys the idea of something spent or laid out or paid or disbursed or of some liability incurred. If it had been desired to compensate the shipowners on the basis of the value of time lost, that could have been provided for in the contract. The contract had of necessity to make provisions relating to time for purposes of loading and unloading and there were provisions as to when demurrage should be payable and as to the amount of it. Thus in clause 9 of the charterparty (which deals with loading berths) it is provided that "if it is necessary for the steamer to get up "steam to enable her to shift to a second loading shoot or berth "notice to be given before loading at the first berth is completed "otherwise time lost to count as lay days." Clause 11 deals with loading orders. If orders for the first loading port or place were not given as specified in the clause, then it was provided that "all time lost to the steamer through waiting for orders "shall be reckoned as loading time or, in the event of this charter "being cancelled, shall be paid for at the demurrage rate herein-"after mentioned." In the same clause it was provided that in a certain event "the time lost in putting up shifting boards (if "required) shall count as lay days . . . ." In other events it was provided by clause 15 that the time occupied in erecting shifting boards was not to count as lay days: and by that clause it was also provided that time occupied or time lost by reason of certain stated events should not count as lay days. Clause 13 provided for the rate of loading and for the amount of demurrage, if payable, and contained the necessary provisions as to when time for loading should commence to count. Other provisions in the charterparty related to unloading and to ports of discharge. Clause 26 contains a provision as to the time from which lay days are to count where there is insufficient water at a discharging port, and provides that in the defined circumstances "time occu-"pied in proceeding from the anchorage to the port of discharge "is not to count." Clause 45 provides for the average rate of

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discharging and for the amount of demurrage, and defines when "time" is "to count." When at a loading port or place, the steamer had (see clause 9), if required by the charterers, to shift at her own expense to a second safe shoot or berth. If two berths were used at the discharging port, then by clause 49 it was provided as follows: "cost of shifting including bunker fuel used "to be for charterers' account and time occupied in shifting to "count."

A consideration of these various clauses lends confirmation to the view that the words "any expense incurred" are not apt words to bring about the result that there is to be recoupment in respect of delay on the basis of what sum would be awarded if the ship were delayed or detained. If the parties had wished to provide that, in the stipulated circumstances, any time occupied at the first port of discharge in shifting cargo for the purpose of putting the vessel into seaworthy trim for passage to the second port should count as part of the lay days, it would have been easy for them so to provide and to use language comparable to that used where in various events they were agreeing that time should for certain purposes count.

For these reasons, I consider that the claim in its widest form was not established. But this still leaves the question as to whether expense was incurred at Cochin in shifting cargo. The facts are not in dispute. Instead of proceeding on her voyage to Bombay at 4.30 p.m. on Saturday, November 27, the vessel had to move from the wharf to a position in the stream. Why? Because some shifting of the cargo, to put the vessel into seaworthy trim, was necessary. The expense of moving the vessel seems clearly to be an expense within clause 43. I do not think that the words "any expense incurred . . . in shifting" in clause 43 can be limited to the expense incurred in the actual touching or handling of the cargo. This matter can be tested by considering what would have been the position if, instead of merely having to shift the cargo, the vessel had had to discharge cargo on to a quay or into a warehouse. It could hardly be said that the clause covered merely the handling of the cargo and did not extend to cover any warehouse charges or port charges or dues which might be involved. The expense referred to in the seaworthy trim clause must, I think, include any expense necessarily incurred and solely incurred in order to effect the required shifting or discharging or reloading of the cargo. In the present case I cannot think that the charterers could have avoided refunding to the shipowners the amounts which the latter had to pay to the port authority by way of shifting charges in respect of the ship. The charterers did in fact refund these amounts, but with no admission of liability so to do. In the move, bunker fuel may have been used. If so, the expense of this was, I think, clearly an expense that became necessary because cargo had to be shifted. It was only incurred because the cargo had to be shifted and in

order that the cargo could be shifted. It was, I think, an expense incurred in shifting the cargo.

The position may be compared with that which is covered by clause 9, to which I have referred. Under that clause, the charterers may require the vessel to shift to a second safe shoot or berth at each loading port or place and then ordinarily the vessel is "to shift at her own expense." In the present case, if the movement of the vessel was occasioned by the necessity of shifting the cargo, as I think it was, then the expense of moving the vessel has to be paid by the charterers. By a parity of reasoning, it seems to me that the expense of maintaining the vessel, not during the voyage or during loading or unloading times, but in the place where shifting of cargo for trimming purposes had to be done and for such time only as the process of trimming involved, was an expense incurred at that place in shifting cargo for the purpose of putting the vessel into trim.

After the vessel was moored in the stream, work was done by stevedores in trimming bulk wheat into the lower holds, covering it with tarpaulins and stacking bagged wheat over the tarpaulins. The sums payable to the stevedores constituted an expense incurred in shifting the cargo. But the stevedores could not have done this work unless the vessel remained at Cochin and, indeed, the vessel was not allowed to leave and was obliged to stay until the shifting had taken place. It seems to me, therefore, that the cost of running and maintaining the vessel at Cochin was an expense incurred in shifting the cargo. Had the necessity to shift the cargo not arisen, the vessel would not have been at Cochin at all after 4.30 p.m. on November 27. She would have been sailing on so as to complete her voyage, so as thereafter to be free to earn freight on a further voyage.

The necessity of shifting the cargo involved that some overtime had to be worked by the crew. An amount of £14 9s. 3d. in respect of such overtime is admitted by the charterers to be payable by them. This means that it is admitted that the overtime payments due from the shipowners to their crew constituted an expense incurred in shifting the cargo. Equally I think that the expense of maintaining the vessel for some time in a place where she otherwise would not be, and maintaining her there solely for the purpose of shifting the cargo, was an expense in shifting the cargo. Overtime also became payable to certain officers and men of the crew who had to look after the stowage of the cargo. The amount of such overtime was, I think, clearly an expense in shifting the cargo. It is true that by clause 48 it is provided that "overtime is to be for account of the party "ordering it." But that is a general provision and it is overridden by the special provision of clause 43 if particular facts bring the seaworthy trim clause, which is a part of clause 43, into operation. The overtime payments to certain officers and men only arose because of the necessity of, and in the process of, shifting the cargo to put the vessel into approved seaworthy

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trim: so the expense solely caused by having to wait while cargo was shifted and until trim was approved was an expense incurred at Cochin. If expense was there incurred, in the sense that liability to pay was there incurred or in the sense that things that cost money were there consumed (such as fuel for the ship or food for the crew) or in the sense that services which have to be paid for were there prolonged, then it is immaterial that actual payment may have been made elsewhere.

It was submitted on behalf of the charterers that, though the words of the seaworthy trim clause are borrowed from the "Austral" charter, they are firmly incorporated into the charter now under consideration, the whole of which can therefore be looked at where construction of words or phrases is necessary. I think that this is correct and it is, I think, a legitimate argument that where "time is to count" this is in terms agreed. In the events that have happened, it could not be said that time was to count as discharging time. The applicable words must be given only their reasonable meaning. The charterparty employs in some clauses the phrase "extra expenses." Clause 6 provides that in some circumstances "all extra expenses" in loading and discharging cargo other than grain are to be paid by the charterers. Clause 14 provides: "The steamer to work "at night if required by the charterers, they paying all extra expenses for such work." Clause 48 provides that if overtime is ordered by the port controller, then the charterers are to pay "all extra expenses" incurred. Overtime involves an "extra" expense because payments in respect of labour services for ordinary hours would merely be an expense. The phrase "extra "expenses" denotes expenses additional to expenses which would otherwise be incurred. The phrase "any expense "incurred" must have a wider import.

The conclusion that I have reached is that the phrase "any "expense incurred" did not cover loss of profit or loss of earnings and that the amount to which, in the events which happened, the shipowners became entitled could not be measured on the basis of the demurrage rate or by reference to a figure that would be reasonable to take for the purpose of assessing damages payable for the detention of the vessel. In my judgment, the shipowners are entitled to receive a sum which represents the expense they incurred at Cochin in shifting the cargo. On the agreed facts, which are special to this case, there was expense incurred of the nature to which I have referred. The material is not before the court to enable it to determine the exact sum. Unless it were agreed, there would have to be further inquiry. Any inquiry will involve investigating the facts and figures of this particular case. If any expense incurred in the period after midday on the Sunday (when the port authority expressed satisfaction with the trimming) was avoidably incurred, then it would not be allowed: but, in the absence of proof to the contrary, it would be reasonable to assume that the vessel sailed

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as soon as was practicable after permission to leave was forthcoming. In my judgment, the facts of the case show that the agreement would have operated somewhat hardly upon the shipowners had there not been an inclusion of words entitling them to be recouped for expense incurred.

An alternative method of claim, expressed as being one for damages for detention and alleging breaches of implied terms of the charterparty, was abandoned. A further alternative method of claim was argued, in that it was submitted that the activities between 4.30 p.m. on Saturday, November 27, and midnight should be regarded as being part of the process of discharging, with the result that the $7\frac{1}{2}$ hours should count as time used as part of the lay days. The submission did not extend to the time after midnight because of the provision in clause 45 that Sundays were to be excepted from inclusion as weather working days for discharging. I cannot accede to the submission made. It seems to me that discharging ended at 4.30 p.m. and that the later activities were of the nature for which special provision was made by the terms of clause 43.

In the result, while I am to a substantial extent in agreement with the conclusions of the judge, I consider that the sum to which the plaintiff is entitled should not include any allowance for loss of profit, but should be specifically computed so as to represent the actual expense incurred at Cochin in shifting the cargo. I have in my judgment indicated which are the kinds of items of expense which, in my judgment, should be computed.

In the result I would have allowed the appeal to the extent that, instead of receiving the sum awarded, the plaintiff should receive a sum to be calculated (either in a further hearing or in an inquiry or reference) on the basis which I have set out.

Appeal allowed in part.
Leave to appeal to House of Lords granted.

Solicitors: *William A. Crump & Son; Constant & Constant.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

*MUMFORD v. HARDY AND ANOTHER

1956
Jan. 18.

Lord Goddard C.J., Stable and Ashworth JJ.

Road Traffic—Third party insurance—Driver under age issued with licence — Whether driver "disqualified" from holding licence — Meaning of "disqualified" — Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 7 (4), 9 (5), 35 (1).

A third party policy of insurance in respect of a motor-car covered any person driving it on the policy holder's order or

[Reported by E. J. BARTON, Barrister-at-Law.]

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with his permission provided that such a person held a licence to drive such a motor-car or had held and was not disqualified for holding or obtaining such a licence. The son of the policy holder, aged 15, who had obtained a licence to drive by making a false statement to the licensing authority as to his age, drove a motor-car with the permission of the policy holder.

Held, that as between the insured and the insurers, the restriction in the policy extended to persons disqualified under sections 7 (4) [1] and 9 (5) of the Road Traffic Act, 1930; and that, by reason of the son being under age for holding a licence, both the son and the father were accordingly guilty of an offence against 35 (1) of the Act.

Edwards v. *Griffiths* [1953] 1 W.L.R. 1199; [1953] 2 All E.R. 874, distinguished.

CASE STATED by Essex justices sitting at Chelmsford.

Informations were preferred under section 35 of the Road Traffic Act, 1930, against the first defendant William Charles Hardy, alleging that on April 23 and June 1, 1955, he used a motor-car when there was not in force such a policy of insurance, or such a security, in respect of third party risks as complied with the requirements of the Act. An information was also preferred under section 35 against the second defendant, William Cullum Hardy, that on June 1, 1955, he permitted the user of a motor-car by the first defendant, while no such policy or security as is required by the Act was in force.

The following facts were found by the justices. At all material times the second defendant was the owner of a motor-car, index number UX 6292, and was insured by the General Accident Fire and Life Assurance Corporation. The conditions of user of the motor-car in the policy of insurance provided that it could be driven by any person on the second defendant's order or permission provided that such a person held a licence to drive such a motor-car or had held and was not disqualified from holding such a licence. The first defendant was born on June 7, 1939, and was at the time of the alleged offences aged 15. On April 13, 1955, Essex County Council had issued a provisional driving licence, for such vehicles as included the motor-car in question, to the first defendant on his falsely stating that he was born on January 22, 1938. On April 23, and June 1, 1955, the

[1] Road Traffic Act, 1930, s. 35: "(1) . . . it shall not be lawful for "any person to use . . . or permit any "other person to use, a motor vehicle "on a road unless there is in force in "relation to the user of the vehicle by "that person . . . such a policy of "insurance or such a security in "respect of third-party risks as com-"plies with the requirements . . . of "this Act".

S. 7 (4): "If any person who under "the provisions of this Part of this "Act is disqualified for holding or "obtaining a licence applies for or "obtains a licence while he is so dis-"qualified . . . that person shall be "liable on summary conviction to "imprisonment . . . and a licence "obtained by any person disqualified "as aforesaid shall be of no effect."

S. 9 (5): "A person prohibited by "this section by reason of his age "from driving a motor vehicle or a "motor vehicle of any class, shall, "for the purposes of this Part of this "Act, be deemed to be disqualified "under the provisions of this Part of "this Act for holding or obtaining "any licence. . . ."

first defendant drove the motor-car in question on the highway, being accompanied on the latter occasion by the second defendant, who was seated in the passenger seat beside him. The insurance corporation considered themselves as liable and at risk under the policy in respect of the driving of the first defendant.

On behalf of the prosecutors it was contended that the effect of sections 9 (5) and 7 (4) of the Road Traffic Act, 1930, was that the licence issued to the first defendant was of no effect and accordingly that the insurance policy did not cover the user of the motor-car by the first defendant.

The justices were of the opinion that the first defendant on April 23, and June 1, 1955, held a licence within the meaning of the policy although he was under age and had made a false statement as to his age; and that, accordingly, he was insured in respect of third party risks as required by section 35 of the Act. They dismissed the informations.

The prosecutor appealed.

W. M. Howard for the prosecutor.

The defendants did not appear and were not represented.

The only case cited in argument appears in the judgment.

LORD GODDARD C.J. This is a case stated by justices for the petty sessional division of Chelmsford, before whom the first defendant was charged with two offences of using a motor-vehicle on the road when there was no policy of insurance in force; and the second defendant, his father, was charged with permitting the use on one occasion.

This case raises a point of some importance. The first defendant was under age for obtaining a licence, though in fact he did obtain one by false pretences.

The Road Traffic Act, 1930, provides that a person under the appropriate age is disqualified from obtaining a licence, and the term "disqualified" is used. Section 7 (4) provides: "If any "person who under the provisions of this part of this Act is "disqualified for holding or obtaining a licence applies for or "obtains a licence while he is so disqualified", then the licence shall be of no effect: in other words, it shall be void.

At the hearing of the information a representative of the insurance company, the General Accident Fire and Life Assurance Corporation Ltd., told the justices that by reason of the decision of the court in *Edwards* v. *Griffiths*,[1] the corporation would have considered themselves liable if an accident had happened in this case. I inquired, therefore, when this case was opened, if the police authorities had communicated with the Insurance Bureau to find out whether this was a case in which

[1] [1953] 1 W.L.R. 1199; [1953] 2 All E.R. 874.

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liability would have been assumed, and the reason for my inquiry is shown in the first paragraph of my judgment in *Edwards* v. *Griffiths*,[1] that is, whether an arrangement had been made as approved by the Home Office. Mr. Howard has told us that the reason why this case is brought up is because it is desirable to have a ruling on how far the decision in *Edwards* v. *Griffiths* [1] goes. It is one thing for an insurance company to say: "We "would not insist upon the clause in our policy that the driver "must be a licensed driver if it is a mere matter of his having "forgotten to take out a licence". It is quite another thing if he is disqualified by an order of the court from driving, and at the time when this case came before the justices the driver had not been disqualified by an order of the court. In *Edwards* v. *Griffiths*,[1] this court decided that a provision in a policy providing that a driver must hold a licence, or that he must have held one and must not be disqualified from holding or obtaining a licence, meant disqualified by an order of the court. We were there not considering the case which we have before us today, that of a person being under age. We were considering a case where a man had been refused a licence on the grounds of health; he was not disqualified, but simply refused a licence on the grounds of health. We held that that made all the difference.

Mr. Howard has called our attention in this case to the fact that section 9 (5) of the Act provides: "A person prohibited "by this section"—and a person under 17 years of age is prohibited—"by reason of his age from driving a motor-vehicle "or a motor-vehicle of any class, shall, for the purposes of this "part of this Act, be deemed to be disqualified under the pro- "visions of this Part of this Act for holding or obtaining any "licence . . . "; and section 7 provides that if a licence is obtained by a person who is disqualified—as this young man was—the licence is void. Therefore, I think that quite different considerations apply to this case than applied in *Edwards* v. *Griffiths*,[1] and although the manager of the insurance company said that they would have considered themselves on risk, it is evident that they took that view because they thought that *Edwards* v. *Griffiths* [1] applied to this case, whereas it does not. Therefore, in my opinion, the case must go back to the justices with a direction that an offence was proved in all three cases.

STABLE J. I agree.

ASHWORTH J. I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for D. Emrys Morgan, Chelmsford.*

[1] [1953] 1 W.L.R. 1199; [1953] 2 All E.R. 874.

[QUEEN'S BENCH DIVISION.]

*TAYLOR *v.* THOMPSON.

1956 *Jan.* 26.

Lord Goddard C.J., Hilbery & Stable JJ.

Road Traffic — Licence — Goods vehicle — Estate car — Excise duty — Photographer using car for carriage of photographic equipment — "Goods" — Vehicles (Excise) Act, 1949 (12, 13 & 14 Geo. 6, c. 89), ss. 13 (1), 27 (1) — Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 33), s. 7 (2).

The defendant, the director of a firm of photographic printers and free lance photographers, used a motor vehicle, a Standard Vanguard shooting brake, to convey certain photographic equipment in connexion with his business. Excise duty had not been paid at the appropriate rate for a goods vehicle as required by section 13 (1) of the Vehicles (Excise) Act, 1949[1]:—

Held, that the vehicle was a goods vehicle within section 27 (1) of the Act of 1949; that on the facts it was being used for the carriage of goods in connexion with the defendants' trade or business; accordingly, it did not come within the exception provided by section 7 (2) of the Finance Act, 1952,[2] and, therefore, the defendant was guilty of an offence under section 13 (1) of the Act of 1949.

Quaere whether, if a doctor carried his instruments or a lawyer his legal books or robes in such a vehicle, he would be liable to pay duty appropriate to a goods vehicle.

Per curiam. If a person has one of these vehicles and carries in it nothing except his own luggage or his farm produce for his own use, and nothing which has to do with his trade or business, he commits no offence if he licenses it at the private car rate.

CASE STATED by Manchester justices.

On July 6 and 24, 1955, informations were preferred by the prosecutor against the defendant, William George Thompson,

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[Reported by D. T. OWEN, Esq., Barrister-at-Law.]

[1] Vehicles (Excise) Act, 1949, s. 13 (1): "... where a licence has been "taken out in respect of a mechanically propelled vehicle at any rate "under this Act and the vehicle is "at any time while the licence is in "force used in an altered condition "or in a manner or for a purpose "which brings it within, or which if "it was used solely in that condition or in that manner or for that "purpose would bring it within, a "class or description of vehicle to "which a higher rate of duty is "applicable under this Act, duty at "that higher rate shall become "chargeable in respect of the licence "for the vehicle."

S. 27 (1): "In this Act except "where the context otherwise requires, the following expressions "have the meanings hereby respectively assigned to them, that is to "say—. . .' goods vehicle ' means a "mechanically propelled vehicle . . . "constructed or adapted for use and "used for the conveyance of goods "or burden of any description, "whether in the course of trade or "otherwise."

[2] Finance Act, 1952, s. 7 (2): "From the beginning of the year "1953 a vehicle which is constructed or adapted for use for the "conveyance of goods or burden, but "is not used for the conveyance "thereof for hire or reward or for "or in connection with a trade or "business . . . shall not be treated "for the purposes of the Vehicles "(Excise) Act, 1949, as a goods "vehicle."

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that on or about March 23, 1955, at Old Trafford, in the County of Lancaster, he did unlawfully use on a road, called Chester Road, a motor vehicle (1) for the carriage of goods, the defendant at the time not being in possession of a licence to carry goods, contrary to section 1 of the Road Traffic Act, 1933; (2) when there was not in force in relation to the user of the vehicle the requisite policy of insurance or security in respect of third party risks, contrary to section 35 of the Road Traffic Act, 1930; (3) while there was in force in respect of the vehicle a certain licence at a certain rate of duty under the Vehicles (Excise) Act, 1949, when the vehicle was being used for a purpose for which a higher rate of duty was chargeable, such higher rate not having been paid, contrary to section 13 (1) of that Act.

On August 16, and 25, 1955, the justices heard the informations and found the following facts: The defendant was at all material times the owner of a Standard Vanguard shooting brake, registered number EDB 116, correctly described by the defendant in his evidence before the justices, as an estate car delivery van. In relation to the use of this vehicle for the carriage of goods, double doors were fitted at the rear, and the seats in the rear were capable of being folded forward. At the time and place referred to in the informations the defendant was using the vehicle on a road for the conveyance of two press cameras, a tripod, a box of flashlight bulbs, and a box containing miscellaneous photographic equipment for or in connection with the business of photographic printers and free lance photographers of which the defendant was a director. At no material time had duty been paid in respect of the vehicle at the rate appropriate to a goods vehicle of its weight, nor was there in force in respect of the vehicle any licence for the carriage of goods granted under Part I of the Road and Rail Traffic Act, 1933. Further, there was no policy of insurance affording cover against third party risks in respect of the user of the vehicle for the carriage of goods in connexion with trade or business, though there was such a policy covering its user for social, domestic, or pleasure purposes.

It was contended by the prosecutor that the cameras, bulbs, and other photographic equipment constituted goods, and that the vehicle was constructed for use for the carriage of goods. On behalf of the defendant it was contended that there was no evidence that the vehicle was constructed for carrying goods, and that no part of the vehicle had been adapted, altered or removed for any purpose. It was, therefore, contended that the vehicle was not a "goods vehicle" within the meaning of section 1 of the Road and Rail Traffic Act, 1933, or the Fourth Schedule to the Vehicles (Excise) Act, 1949, or section 27 (1) of the Act.

The justices were of opinion that the vehicle was neither essentially constructed nor adapted for use for the carriage of goods. The justices came to the conclusion that if the test was the nature of the "goods" irrespective of the type of vehicle,

then the carriage of a doctor's professional instruments or a lawyer's textbooks in a private car might result in the commission of these offences. They could not accept this view. Accordingly they dismissed the summonses.

The prosecutor appealed.

Rodger Winn for the prosecutor.

The defendant was not represented and did not appear.

The following cases were referred to in argument: *Clarke* v. *Cherry* [1]; *Hubbard* v. *Messenger*.[2]

LORD GODDARD C.J. stated the facts, and continued: This case has been put forward to us as a test case for the guidance of justices and their clerks. It is not suggested that there was a wilful (in the sense of a deliberate) intention of evading the payment of any duty, but it is desirable that uniform decisions should be given in different parts of the country in relation to vehicles of the type under consideration. Everyone knows that at the present time these shooting brakes, or dual purpose vans, as they are sometimes called, are in very common use. We have to decide, in the first place, whether or not these shooting brakes are capable of being regarded as goods vehicles. By section 27 (1) of the Vehicles (Excise) Act, 1949, a "goods vehicle" is defined as a "mechanically propelled vehicle . . . constructed or adapted "for use and used for the conveyance of goods or burden of any "description, whether in the course of trade or otherwise." All that we have to find, is, not whether this vehicle was constructed solely, but whether it was constructed or adapted for use for the conveyance of goods and that it was used for the conveyance of goods. It is impossible to argue and, indeed, it has not been argued, that these shooting brakes, are not constructed or adapted for use for the conveyance of goods.

Section 13 (1) of the Vehicles (Excise) Act, 1949, provides: "... where a licence has been taken out in respect of a mechani- "cally propelled vehicle at any rate under this Act and the vehicle "is at any time while the licence is in force used in an altered "condition or in a manner or for a purpose which brings it within, "or which if it was used solely in that condition or in that "manner or for that purpose would bring it within, a class or "description of vehicle to which a higher rate of duty is applic- "able under this Act, duty at that higher rate shall become "chargeable in respect of the licence for the vehicle."

Thus, if a person obtains a licence for one of these shooting brakes, and pays the duty required for a private vehicle, and then uses it for a purpose which brings it within the description of a goods vehicle, he must pay duty at the requisite rate, otherwise he commits an offence under that section.

[1] [1953] 1 W.L.R. 268; [1953] 1 All E.R. 267.

[2] [1938] 1 K.B. 300; 54 T.L.R. 1; [1937] 4 All E.R. 48.

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The hardship which was caused by that provision was mitigated by the Finance Act, 1952, which provides in section 7 (2): "From the beginning of the year 1953 a vehicle which is constructed or adapted for use for the conveyance of goods or burden, but is not used for the conveyance thereof for hire or reward or for or in connection with a trade or business . . . shall not be treated for the purposes of the Vehicles (Excise) Act, 1949, as a goods vehicle."

Therefore, the position is quite clear. These estate vans are constructed in such a manner that they can be goods vehicles. This being so, they attract a higher rate of duty if they are used for the conveyance of goods either for hire or reward, or in connexion with a trade or business. If a person has one of these vans, and he carries in it nothing except his own luggage, or his own farm produce for his own use, and nothing which has to do with his trade or business, he is committing no offence if he licenses it, and keeps it licensed, at what one may call the private car rate; but if he does carry goods, that is to say, as it seems to me, anything in connexion with his trade or business, at once it becomes a goods vehicle and it has to bear the higher rate.

The justices said that if this was the position, it would mean that if a doctor has one of these cars, and he drives about the country carrying with him his bag of instruments, that would make him liable. It is not necessary for us to say whether or not a doctor would be liable. We should have to consider whether or not he was carrying on a trade or business within the meaning of this section, and the same thing would apply in the case of a lawyer's books and professional robes. We need not decide that for the purposes of the present case.

What we are deciding, in this case, is that a press photographer, who is a director of a business which deals with photographic matters, and who carries in one of these vans his photographic apparatus, does come within section 13 (1) of the Act of 1949, and he cannot bring himself within the exemption which has been granted by the Finance Act, 1952, because to do so he must show that he was carrying goods which have no connexion with his trade or business.

For these reasons we think that the justices' decision cannot be supported. We are only asked to send back one of the summonses, that is to say, the one in respect of the Vehicles (Excise) Act, 1949. That must go back with a direction that an offence was proved. Mr. Winn does not ask us to send back the other summonses which are consequential summonses. In relation to the summons with regard to the policy of insurance, one is quite sure that no reputable insurance company would take the point. Therefore, there is no necessity to send that back. We will send back the one summons, and say that there must be a conviction under the Vehicles (Excise) Act, 1949, the justices

being at liberty under the Summary Jurisdiction Acts to mitigate the penalty if they think fit.

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HILBERY J. I agree.

STABLE J. I agree.

Appeal allowed

Solicitor: *Treasury Solicitor.*

[COURT OF APPEAL.]

*BULLOCK *v.* G. JOHN POWER (AGENCIES) LTD.

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1956 *Jan.* 20.

[1953 B. No. 3888.]

Denning, Morris and Parker L.JJ.

Factory — Dangerous machinery — Fencing — Material or article in machine — Wire-drawing machinery — End of wire causing fatal injury to workman—No statutory duty to fence material in machine unless expressly provided for—Whether wire performing pulling function "dangerous part of machine" — Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 14 (1) (3).

A workman in a factory was killed by being struck on the head by the end of a length of wire which was being reduced in diameter by being pulled through a die under pressure and wound round a revolving drum. The drum had a guard to prevent the wire from flapping out at the side. In an action by the widow for damages for negligence and breach of statutory duty to fence every dangerous part of any machinery under section 14 (1) of the Factories Act, 1937, the trial judge found that the end of the wire had in some way ridden up over the top of the guard and had struck the workman on the head. He held that there was no negligence at common law, but that there had been a breach of the statutory duty to fence since the receiving drum plus the wire constituted a dangerous part of machinery. On appeal by the employers:

Held, that the wire was material in the machine and not part of the machinery within section 14 (1), and inasmuch as it was not within subsection (3) of that section (requiring that a stock-bar in a lathe should be fenced) and no regulations had been made in respect of such material the employers were not liable.

Nicholls v. *Austin (Leyton) Ltd.* ([1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92) applied.

Decision of Stable J. reversed.

APPEAL from Stable J.

On July 23, 1952, Solomon Bullock was employed during the night shift on a wire drawing machine on the premises of the defendants, G. John Power (Agencies) Ltd., the premises being a factory within the Factories Acts, 1937 to 1948. The work involved drawing a long piece of wire over half an inch thick through a hole half an inch in diameter under electrically driven force in order to reduce it by pressure; and the pulling end of

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the wire was on a drum which revolved at between 24 and 50 revolutions a minute coiling the wire round itself. When the wire reached the end of the coil the end of the wire flapped loose and swung outwards from the drum. There was a guard or fence around the drum so that the end of the wire should not flap out at the side.

On the night in question, a workman working on a similar machine a few yards from Bullock heard the banging of the wire against the guard, looked round, and found Bullock on the ground in a pool of blood. He was taken to hospital and died shortly after without regaining consciousness. The police who were called examined the wire and the machine and found a piece of human hair on the end of the wire, and the medical report stated that the injuries suffered by the dead workman were consistent with his having been struck on the head by the end of a coil of wire.

The plaintiff, Margaretta Bullock, as widow and administratrix of his estate, brought an action for damages against the defendants under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, alleging that the accident which had caused the death of her husband was caused by breach of the defendants' statutory duty under section 14 of the Factories Act, 1937,[1] to fence the machine securely or at all; and, alternatively for negligence at common law. The defendants denied liability under both heads and pleaded alternatively that the dead workman had been contributorily negligent in placing his head too close to the block when the end of the wire coil was passing through the die, in breach of express instructions given to him by the employers or their servants.

On October 18, 1955, Stable J. dismissed the claim at common law alleging negligence. On the alleged breach of statutory duty under section 14, the defendants submitted that the parts of the machine, whether dangerous or not, had not caused the injury; that if the end of the wire had caused the injury that was not a part of the machine which had to be

[1] Factories Act, 1937, s. 14: "(1) "Every dangerous part of any "machinery, other than prime "movers and transmission machi- "nery, shall be securely fenced "unless it is in such a position or of "such construction as to be as safe "to every person employed or work- "ing on the premises as it would be "if securely fenced: Provided that, "in so far as the safety of a dan- "gerous part of any machinery can- "not by reason of the nature of the "operation be secured by means of "a fixed guard, the requirements of "this subsection shall be deemed to "have been complied with if a device "is provided which automatically "prevents the operator from coming "into contact with that part. . . . "(3) Any part of a stock-bar which "projects beyond the head-stock of "a lathe shall be securely fenced "unless it is in such a position as to "be as safe to every person employed "or working on the premises as it "would be if securely fenced. The "Secretary of State may, as respects "any machine or any process in "which a machine is used, make "regulations requiring the fencing of "materials or articles which are dan- "gerous while in motion in the "machine."

fenced; and that, apart from the provision in section 14 (3) in relation to a stock-bar projecting beyond the head-stock of a lathe, there was no duty under the statute to fence the material. Stable J. held that the proper approach to the question was: "Was this a dangerous part of the machine, or was there a "dangerous part of this particular machine?" and the answer was that this occurrence showed that the revolving drum was a dangerous part of the machine. As to whether it was securely fenced, his Lordship found that the workman met his death by his head coming into contact with the end of the wire while the drum was revolving, that the drum plus the wire was a dangerous part of the machine, and that the fence provided was inadequate to protect the workman from that danger. He awarded the plaintiff damages of £3,931 11s., being £3,800 under the Fatal Accidents Acts and £131 11s. under the Act of 1934.

The defendants appealed.

John Thompson Q.C. and *E. G. H. Beresford* for the defendants.

R. F. Levy Q.C. and *George Heron* for the plaintiff.

The following cases were referred to in the argument: *Hindle* v. *Birtwhistle* [2]; *Nicholls* v. *F. Austin (Leyton) Ltd.* [3]; *Dickson* v. *Flack* [4]; *Burns* v. *Joseph Terry & Sons Ltd.* [5]; *John Summers & Sons Ltd.* v. *Frost.* [6]

DENNING L.J. stated the facts, and continued: The inference which the judge drew (which must be accepted) was that one end of the wire, the loose end, had in some way ridden up over the guard and had struck Bullock on the head and killed him.

The claim at common law for negligence against the employers failed because the judge was satisfied that no one could have anticipated any accident from this machine and the wire as it then was. No such accident had been heard of before. The machine has been operated in just the same way ever since and no other accident has been known; and, indeed, the witnesses could not explain how this happened. The judge acquitted the employers of negligence and there is no appeal from that finding. The question in the case is on the Factories Act, 1937. It is said that this was a "dangerous part of machinery" and ought to have been securely fenced within section 14 (1) of the Act.

The House of Lords, in *Nicholls* v. *F. Austin (Leyton) Ltd.*,[1] pointed out that the section itself draws a distinction between parts of machinery, on the one hand, and materials or articles which are in motion in it on the other hand. In that case, where

[2] [1897] 1 Q.B. 192; 13 T.L.R. 129.
[3] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.
[4] [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840.
[5] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987.
[6] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.
[1] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.

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a splinter of wood came out of a woodworking machine which was securely fenced, it was held that the wood which was being worked was not a dangerous part. In the present case the judge has held that this revolving drum, plus the wire, was a dangerous part of machinery. On reading through the speeches in *Nicholls'* case [1] I find myself unable to agree with the judge. Lord Uthwatt pointed out [2] that it is not right to view the machine as a single operating unit. You have to look at the machinery by itself and the materials by themselves. That is borne out by subsection (3), which takes the instance of a lathe. The legislature have provided expressly that the piece of wood (or whatever material is in a lathe)—the piece which projects beyond the head-stock—must be securely fenced, thus indicating very forcibly that material which is in motion in the machine does not come within the section unless it is either brought expressly within it, as it is in subsection (3) in the case of a stock-bar, or regulations have been made by the Secretary of State to deal with it; and the Secretary of State has, I gather, made no such regulations.

Mr. Thompson, for the defendants, argued that the wire was material in motion in the machine, and therefore did not come within the obligations of the Act. Mr. Levy, in order to overcome that argument, sought to divide the wire into two parts: the pulling part which was pulling the wire through the hole which, he said, was temporarily part of the machinery—and the part on the other side which was being pulled into the hole—which he said was the material which was being worked upon. I am afraid that that is much too fine a distinction for the court to adopt. The truth is that the whole piece of wire was being worked upon in this machine. It had to be reduced by 1/32nd of an inch. It was material in the machine and not part of the machinery. The Act does not require material to be fenced. It is left to the common law.

If that be right, no further question arises. I would only say, though, that if this wire could be considered as part of the machine, I myself should have regarded it as a dangerous part. But we are bound by the House of Lords' decision to hold that it is not part of the machine. The only obligation is at common law; and, the plaintiff not having proved negligence at common law, the action must fail and she must be left her remedies under the industrial insurance provisions. I think that the appeal should be allowed.

MORRIS L.J. I have reached the same conclusion. The principal point that is involved in the case is one of construction of section 14 of the Act of 1937 and of the application of that section to the facts of this case as they have been found by the judge. I think that Mr. Thompson is right when he says that it

[1] [1946] A.C. 493. [2] [1946] A.C. 493, 506.

is helpful to look at section 14 as a whole, including the last paragraph of it, whether that paragraph be thought to be a part of subsection (3) or not. It seems to me that the decision in *Nicholls* v. *F. Austin (Leyton) Ltd.*[3] binds us in the present case. It is true that the facts were somewhat different, for the reason that what happened in *Nicholls'* case[3] was that when a circular saw was being used there was injury because a piece of wood flew out from the machine. In the course of his speech in that case Lord Simonds quoted the way in which one of the questions then arising had been posed, and said[4]: "The first "question is, I think, correctly stated in the appellant's case in "these words: 'Whether the words "every dangerous part" "'referred to in section 14 of the Factories Act, 1937, refer "'only to parts which are directly dangerous by reason that the "'part itself is liable to cause injury so that such parts only are "'required to be fenced by the said section, or whether the said "'words "every dangerous part" include parts which are "'indirectly dangerous in that they are liable to throw out "'material with such force that the material is liable to cause "'injury to the worker so that such parts also are required to "'be fenced by the said section.'"

Lord Simonds answered that question in these words[4]: "My "Lords, I have no doubt that this question should be answered "by saying that the words 'every dangerous part' in their "context refer only to parts which are directly dangerous by "reason that the part itself is liable to cause injury."

Later his Lordship made specific reference to the concluding words of section 14. He said[5]: "Finally, the concluding words "of section 14, which might well be in a separate section, "confirm this view. For the Secretary of State is thereby "authorized 'as respects any machine or any process in which "'a machine is used' to make regulations requiring the fencing "'of materials or articles which are dangerous while in motion "'in the machine.'" He proceeds: "Here a clear distinction "is drawn between dangerous parts of the machine and materials "or articles. The authority would be superfluous if the danger "apprehended by subsection (1) included danger not only from "contact with a dangerous part but also from the materials "which it might discharge."

Mr. Levy has sought to distinguish that case from the present by submitting that here there was not the discharge of a part of something that was passing through a machine; he submits that the wire itself became part of the machinery. Mr. Levy submitted that it was necessary to have force in order that the wire should be drawn through that part of the die where the reducing process took place; that it was necessary, therefore, to have some traction of the wire; and he submitted that the wire that

[3] [1946] A.C. 493.
[4] Ibid. 504.
[5] Ibid. 505.

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had passed through the die and was on the drum formed a part of the machine in that it was necessary that that wire should draw the wire that still remained to pass through the die. But it is difficult to know quite where that submission would stop, because wire near to the die but which has not passed through the die could be said to be performing the function of drawing the wire which is still further away from the die.

It seems to me, however, that the suggested distinction is unreal and artificial; it seems to me that the reasoning in *Nicholls'* case [6] cannot be distinguished, that reasoning being based on the construction of the words found in section 14. I think that the appeal succeeds. I agree with what my Lord has said as to the other part of the case and I do not find it necessary to add anything in regard to that.

PARKER L.J. I agree. I think that the reasoning of their Lordships in *Nicholls* v. *F. Austin (Leyton) Ltd.* [6] negatives any liability on the part of the defendants in the present case, unless the true view be that the wire in question—that is, the wire that caused the injury and the death—was itself part of the machine. Mr. Levy in his very able argument put the matter in two ways. He said, firstly, that this wire was firmly attached to the machine and, secondly, that not only was it attached but that when attached it performed part of the function of the machine itself.

Dealing with those two submissions, it seems to me that the mere fact that material is firmly attached to a machine cannot make it part of the machine. Indeed, if that were so, the provision in section 14 (3) in regard to the stock-bar would be quite unnecessary. So far as the second proposition is concerned, Mr. Levy puts the matter in this way, that so soon as any part of the length of wire has come through the die it performs the function of haulage, a function of the machine itself. I feel quite unable to divide up the wire in that way as partly raw material and partly as performing the function of the machine. It seems to me that the true view is that this machine is dealing with a length of wire, 50 feet, or whatever it may be; that the drum itself (which undoubtedly is part of the machine) is pulling that article, that 50-feet length of wire, through the die, and at the same time winding it into a coil, in which form it will be removed from the machine and stored. Reluctantly I feel that this appeal must be allowed.

Appeal allowed.

Solicitors: *E. P. Rugg & Co., for Buller, Jeffries & Kenshole, Birmingham; Rabnett, Conway & Co., Birmingham.*

M. M. H.

[6] [1946] A.C. 493.

[HOUSE OF LORDS.]

* MORRIS . . . . . APPELLANT;

AND

WEST HARTLEPOOL STEAM NAVIGATION CO. LTD. . . . . RESPONDENT.

H. L. (E.)†

1955 *Dec.* 5, 6, 7.

1956 *Jan.* 31.

Negligence—Safe system of work—General practice—Ship—Open hold —Guardrails not erected—Injury to seaman.

In a grain ship at sea, after each hold had been made ready to load, the upper deck hatches were battened down, completely isolating that section of the ship, but the 'tween deck hatch covers were left off and no guard-rail was erected round the hatchway. Timber was stored in the 'tween decks leaving a space about 12 feet broad beside the hatchway. A seaman sent down to fetch some timber from the 'tween decks fell 40 feet into the hold for some unexplained cause. There was evidence that on this ship it was quite usual for men to be sent down to the 'tween decks after the making ready of the holds had been completed and the deck hatches had been battened down. In an action by the seaman against the shipowners, alleging negligence on their part as the cause of his injury, they relied on evidence to suggest that there was a general practice in ships at sea not to erect guard-rails in similar circumstances.

Held (Lord Morton of Henryton and Lord Porter dissenting) that the shipowners had not been proved to be in breach of their common law duty to the seaman.

Test laid down by Lord Normand in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42 applied.

Decision of the Court of Appeal [1954] 2 Lloyd's Rep. 507 reversed.

APPEAL from the Court of Appeal (Denning and Parker L.JJ., Morris L.J. dissenting).

This was an appeal by leave of the Court of Appeal from a judgment of that court dated November 9, 1954, allowing the appeal of the respondent company, West Hartlepool Steam Navigation Co. Ltd., from a judgment of Streatfeild J. dated July 26, 1954, awarding the appellant, Robert Thomas Morris, £10,960 as damages for personal injuries alleged to have been caused by the negligence of the respondent company, with costs.

The facts are set out in their Lordships' opinions.

Sir Frank Soskice Q.C. and *Michael Lee* for the appellant.

R. H. Forrest Q.C. and *M. B. Summerskill* (*J. F. Donaldson* with him) for the respondent company.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *General Cleaning*

† *Present*: LORD MORTON OF HENRYTON, LORD PORTER, LORD REID, LORD TUCKER and LORD COHEN.

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Contractors Ltd. v. *Christmas* [1]; *Barkway* v. *South Wales Transport Co. Ltd.* [2] (as to general practice); *London Graving Dock Co. Ltd.* v. *Horton* [3]; *Bolton* v. *Stone* [4]; *Clifford* v. *Charles Challen & Son Ltd.* [5] (as to precautions against danger); *Watt (Thomas)* v. *Thomas* [6]; *Powell* v. *Streatham Manor Nursing Home* [7] (as to appeals on issues of fact).

Their Lordships took time for consideration.

Jan. 31, 1956. Lord Morton of Henryton. My Lords, about 9 a.m. on October 13, 1951, the appellant, Robert Thomas Morris, a seaman aged 18 years, fell down hatch No. 2 on the 'tween deck of a vessel called the *Daltonhall* belonging to the respondents. He fell some 30 or 40 feet into the hold and sustained serious injuries. At the time when the accident occurred the appellant was classified as an " efficient deck hand " and he had been at sea about six months. His experience had been mostly on " home trade " passenger ships, but he had been to sea in a deep sea ship four or five times, including a voyage to the Persian Gulf.

The following summary of the relevant facts is taken, in substance, from the judgment of Parker L.J. [8]: " When the " [appellant] met with his accident, the vessel was on her way, " light, from Avonmouth to Montreal to load grain in bulk." (She had left Avonmouth on October 3, and was due in Montreal in three days.) " She had carried grain on her previous voyage " and in accordance with the normal practice in grain-carrying " ships her holds were being made ready on the voyage, so that " she could load on arrival at Montreal. This involved cleaning " out the holds one by one, repairing the feeders and shifting " boards, making them fast in position and generally making the " holds grain tight. In the process of making each hold ready, " men had to work close to the 'tween deck hatch, which had a " coaming of only 10 inches in height so as not to interfere with " the operation of swinging loads between the decks. At times, " they would have to sit on the hatch beams in order to fix the " shifting boards in position. With a 40 ft. drop from the " 'tween deck to the bottom of the hold, the preparation of the " hold was necessarily somewhat a dangerous operation albeit " one which sailors take in their stride despite the movement of " the vessel. As each hold was made ready the upper deck " hatch was battened down while the 'tween deck hatch covers

[1] [1953] A.C. 180, 192; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.
[2] [1950] A.C. 185; 66 T.L.R. (Pt. 1) 597, 606; [1950] 1 All E.R. 392.
[3] [1951] A.C. 737, 752, 776; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.
[4] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.
[5] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.
[6] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 382.
[7] [1935] A.C. 243; 51 T.L.R. 289.
[8] [1954] 2 Lloyd's Rep. 507, 517.

" were left off ready for loading. This vessel, like other vessels, " carried stanchions which could be fitted round each hatch, and " a wire rope which could be fixed round the stanchions to form " a guard-rail. It was necessary to have these stanchions and " this wire in order to comply with the Docks Regulations while " in port, but this guard-rail could not be up while a hold was " being made ready, and was not in fact erected round the hold " after it had been made ready while at sea. Any timber not " required for repairs in a hold was stacked on the 'tween deck " beside the side of the ship, occupying 4 to 5 ft. of the 17 ft. " 3 in. space between the coaming round the hatch and the side.

" By October 13, 1951, holds Nos. 1, 2 and 3 had been made " ready, and work was in progress on No. 4 hold. The [appel- " lant] was one of those who had worked on all the holds. On " that day the [appellant] and two others, on the instructions " of the boatswain, went to fetch a piece of timber from the pile " of timber on the 'tween deck near No. 1 hold. Owing to there " being a bulkhead aft of No. 2 hold, it was necessary to open " part of the upper deck hatch covers and to descend to the " 'tween deck by means of a rope ladder. On the instructions " of the boatswain, these men opened about two sections on the " port side and descended. Not finding the desired piece of " timber in the pile by No. 1 hatch, they inspected two further " piles at and aft of No. 2 hatch. Still not having found the " desired piece, they were returning to the first pile in single " file, with the [appellant] last, when there was a scream and " the [appellant] fell down No. 2 hatch.

" Exactly how the accident happened will never be known. " The [appellant], who suffered grievous injuries, remembers " nothing, and the two men with him saw nothing of his fall. " It was alleged that the light was insufficient, but the evidence " did not bear this out, and the learned Judge did not so find. " It may be that the [appellant] lost his balance owing to the " movement of the ship, and this was the view taken by the " learned Judge, though it is only right to say that there was no " evidence of any unusual or sudden movement. As Mr. Burke, " one of the men with the [appellant], said: ' I do not know " ' how the sea was striking us; I do not remember. A bit of " ' sea was running, and a breeze, because she threw a small " ' amount of spray up. I do not recollect; I do not remember " ' that.' " The appellant was asked: " How was the ship " moving?" and replied: " She had a beam swell." He was then asked: " Was there any spray coming over the main deck " forward?" and replied: " I do not remember that."

The writ in the present action was not issued till January 15, 1954. Streafeild J. found that the respondents were negligent in failing to put a guard-rail round the open hatch, and awarded the appellant £10,960 damages, which included £960 agreed special damage. His judgment was set aside by the Court of Appeal (Denning and Parker L.JJ., Morris L.J. dissenting).

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My Lords, the nature of the evidence required to establish, as against an employer, that he has been guilty of negligence in failing to provide a safeguard for his workmen has recently been considered by this House in *Paris* v. *Stepney Borough Council.*[2] Lord Normand, in a passage which has often been cited since, said[3]: "The kind of evidence necessary to establish neglect of a "proper precaution was considered in *Morton* v. *William Dixon* "*Ltd.*[4] by Lord President Dunedin. That was an action by a "miner against his employers alleging negligence in failing to "take precautions against the fall of coal from the top of the "shaft into the space between the side of the shaft and the "edge of the cage. It was, of a course, a Scotch case, but in "my opinion there is no difference between the law of Scotland "and the law of England on this point. The Lord President "said[5]: 'Where the negligence of the employer consists of "'what I may call a fault of omission, I think it is absolutely "'necessary that the proof of that fault of omission should be "'one of two kinds, either to show that the thing which he did "'not do was a thing which was commonly done by other "'persons in like circumstances, or to show that it was a thing "'which was so obviously wanted that it would be folly in "'anyone to neglect to provide it.' The rule is stated with all "the Lord President's trenchant lucidity. It contains an "emphatic warning against a facile finding that a precaution is "necessary when there is no proof that it is one taken by other "persons in like circumstances. But it does not detract from "the test of the conduct and judgment of the reasonable and "prudent man. If there is proof that a precaution is usually "observed by other persons, a reasonable and prudent man will "follow the usual practice in the like circumstances. Failing "such proof the test is whether the precaution is one which the "reasonable and prudent man would think so obvious that it was "folly to omit it." In the same year, in the case of *Gallagher* v. *Balfour Beatty & Co. Ltd.*,[6] the Lord President (Lord Cooper) referred to Lord Normand's speech, just quoted, and observed: "The law . . . as epitomized in the Dunedin formula, "has been adopted in every textbook, and, as was observed in "*Carroll* v. *Andrew Barclay & Sons Ltd.*,[7] it has been used as a "proper direction to juries 'in scores of cases,' and also, may I "add, as a test of the relevancy of scores of cases of defective "system." The Lord President protested[8] against discarding "in favour of a milder version the formula which we have used "consistently for more than forty years, and which is sanctioned "by the highest authority." Later[9] he referred to Lord Normand's speech in the *Paris* case[10] as "the latest pronounce-

[2] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.
[3] [1951] A.C. 367, 382.
[4] 1909 S.C. 807.
[5] Ibid. 809.
[6] 1951 S.C. 712, 716.
[7] 1947 S.C. 411, 418.
[8] 1951 S.C. 712, 717.
[9] Ibid. 718.
[10] [1951] A.C. 367.

" ment on the subject," which " reverts to the forcible language " of the original formula."

My Lords, I refer to *Gallagher's* case [11] because I deprecate a tendency, manifested in the present and other cases, to substitute some other word for the word " folly " in Lord Dunedin's formula. Either the substituted word has the same meaning, in which case the substitution serves no useful purpose, or it has a different meaning, in which case the substitution is unjustified. The word " folly " was repeated by Lord Normand and myself in *Paris's* case [12] and there was no difference of opinion in the House as to the test to be applied, although there was a difference of opinion as to the result of applying it. In the present case attention was called, in the course of the argument, to the fact that in *Paris's* case [13] Lord Norman used the words " so " obvious," whereas Lord Dunedin in *Morton's* case [14] had used the words " so obviously wanted." I think it is clear that Lord Normand did not intend to introduce any qualification into Lord Dunedin's language. He merely desired to point out that in considering whether a precaution was " so obviously wanted " that it would be folly in anyone to neglect to provide it," the court must look at the matter from the standpoint of the reasonable and prudent man. I mention this matter because I can imagine contexts in which the word " obvious " might have a different meaning from " obviously wanted," but the word clearly bore the meaning " obviously wanted " in the context in which Lord Normand used it.

My Lords, I now return to the facts of the present case. It is manifest that the evidence, far from establishing that the erection of a guard-rail while the vessel was at sea was " a thing " which was commonly done by other persons in like circum- " stances " was all to the effect that for various periods up to 40 years it had never been done by persons in like circumstances. Your Lordships must therefore consider whether the appellant proved—for the onus was on him to prove negligence—that a reasonable and prudent owner or master of the *Daltonhall* would have thought, before the accident happened, that a guard-rail was " a thing which was so obviously wanted that it would be " folly in anyone to neglect to provide it."

My Lords, in my view the evidence falls very far short of proving this. In so saying I am differing from the view of the learned trial judge who heard the evidence, but in the present case there was no conflict between the witnesses, except possibly on the question whether men were " often " sent to fetch timber from the 'tween deck. On that question I accept the finding of Streatfeild J. that this was " quite usual." The case is therefore one in which the question is simply whether the facts proved do or do not give rise to the inference that the respondents were

[11] 1951 S.C. 712.
[12] [1951] A.C. 367, 382, 387.
[13] Ibid. 382.
[14] 1909 S.C. 807, 809.

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negligent. That question, as Lord Halsbury said in *Montgomerie & Co. Ltd.* v. *Wallace-James*,[15] "the original tribunal is in no "better position to decide than the judges of an appellate court." See also the observations of Viscount Simonds in *Benmax* v. *Austin Motor Co. Ltd.*[16]

To my mind, the appellant's allegation of negligence was disproved, to a large extent, by the only witness he called, the seaman Burke, who was with him when the accident occurred. Burke was an "able-bodied seaman" who had been four years at sea. I quote the following portion of his evidence:—

Mr. Lee: "Mr. Burke, while you were working down on the "'tween deck in No. 2 hold, and indeed No. 1 hold, had those "hatches on the 'tween deck ever been guarded by hatch-boards "or guard-rails while the ship was at sea?" (A.) "No, Sir, they "had never been covered; while we were working on that par-"ticular job they had never been covered."

Streatfeild J.: "Covered with what?" (A.) "Hatch-boards, "and there were no guard-rails."

Mr. Lee: "Mr. Burke, what was the practice in your four "years at sea; what is the practice with merchant shipping at "sea when there is work to be done getting the holds ready for a "cargo?" (A.) "In that case, when you are cleaning the hold "ready for grain, it is general to leave the hatches open in the "'tween deck; that is the usual thing; and as regards the safety "rails, for my part I have never seen safety rails erected in a "case like that. We had already swept and cleaned the 'tween "deck."

(Q.) "Once the work is finished, what happens then?" (A.) "When the work is finished you have no more reason to "enter the holds, if the work is finished, and the hatches are "still left uncovered."

Streatfeild J.: "But then if you had happened to go and do "some more work there, is there any reason why there should "not be any guard-rails?" (A.) "No reason, my Lord, no; but "there were no guard-rails, and I have never seen them used."

Later he said: "I have never heard of anyone asking or "demanding that guard-rails should be put round while at sea. "You would probably be laughed at, sir." I couple with that evidence the evidence of Mr. Clark, the chief officer (40 years at sea): "I have never seen guard-rails erected in my life"; of Mr. Barker, the boatswain (16 years at sea): "we never put "guard-rails up at sea"; and of Captain Lovegrove (35 years at sea): "in actual practice they are not put up at sea."

My Lords, in the face of this evidence, I would find it difficult to hold that a guard-rail round the hatch was a thing which was "so obviously wanted" that the owners and master of the *Daltonhall*, and inferentially the owners and masters of all the

[15] [1904] A.C. 73, 75.

[16] [1955] A.C. 370, 373; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

ships of a similar type on which these four experienced witnesses had sailed, were guilty of folly in failing to ensure that such a rail was erected. I agree with the observation of Denning L.J.[17] that "general practice weighs heavily in the scale, but it is not "conclusive," but, weighing all the circumstances of this case, I agree with Denning and Parker L.JJ. that the respondents are not proved to have been negligent. It must be borne in mind that once the work of cleaning and repairing hatches 1 and 2 had been finished, the portion of the 'tween deck which contained them was a completely enclosed space. The upper deck hatches were battened down and the bulkhead aft of No. 2 hatch cut off this portion of the 'tween deck. No one except members of the crew could go into this space while the ship was at sea, and there would appear to be no reason for any member of the crew to go there unless he was ordered, as the appellant was, to fetch timber from one of the three piles already mentioned.

I shall not detain your Lordships by travelling all through the evidence. No witness had heard of any similar accident occurring. The appellant was an active young man of 18 years who was training to be a heavy-weight boxer and had been at sea for six months, as he said, "more or less for the toughening up "process for boxing." The learned judge rejected the suggestion that the light was not good enough to enable him to see where he was going. He knew his way about and knew the exact position of the hatches as he had been working in the preparation of them. There is no evidence that the weather conditions were in any way exceptional. All that he had to do was to follow two other men past the hatch on a portion of the deck which was 12 feet wide at its narrowest point. Yet he fell through the open hatch. To my mind this was an extraordinary event which could not have been anticipated. I agree with Denning L.J.[17] that the words of Lord Thankerton in *Glasgow Corporation* v. *Muir* [18] are particularly appropriate: "The court must be careful to "place itself in the position of the person charged with the "duty . . . and not to give undue weight to the fact that a "distressing accident has happened."

Further, as Parker L.J. said,[19] the reasonable and prudent "employer is entitled to take into consideration the degree of "risk, if any, involved in taking precautionary measures . . . "If there was any real degree of risk in walking along the 12 ft. "gangway, then the risk of accident to a man putting up the "guard-rail by the edge of the coaming would be if anything "greater. Captain Lovegrove said: 'I think it'" (i.e. the erec- "'tion of a guard-rail) "'might be a degree more dangerous "'than doing a job a few feet away from the hatch . . . on the "'basis of movement of the ship.' The guard-rail would be only "a matter of a few inches from the coaming. And again: 'If I

[17] [1954] 2 Ll.L.Rep. 507, 510.
[18] [1943] A.C. 448, 454–5; 59 T.L.R. 266; [1943] 2 All E.R. 44.
[19] [1954] 2 Ll.L.Rep. 507, 518.

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" ' had a personal choice myself between sending the seamen to " ' get a piece of timber from the wing of the deck, and giving him " ' the job of putting up the guard-rail, and the ship was rolling, " ' I would choose the former.' It is true that other witnesses " said that the guard-rail could have been put up without danger " in a very few minutes, but it is clear that they all took the " view that there was equally no danger in walking along the " gangway."

I think that Streatfeild J. based his decision in favour of the appellant largely upon two answers by Captain Lovegrove. He was asked whether, as a matter of precaution, guard-rails should have been erected and he answered: " In practice it is not done; " I do not say that they should not be erected, but in practice " it is not done." At the end of his evidence come the following questions and answers:

(Q.) " Well, now you know it has been brought home to us " all what happens to a young man, a strong and fit young man, " who is cast 40 feet down to another deck? " (A.) " Yes, but " apart from that, the accident, I would go on for quite a con- " siderable time not having guard-rails put up because it is not " the usual practice to put them up at sea."

(Q.) " But is it not time the practice was altered? " (A.) " I " agree."

My Lords, I agree with the majority of the Court of Appeal in thinking that these answers are too slender a basis for finding negligence against the respondents. Captain Lovegrove was, I think, being wise after the event, being moved, no doubt by regret that so sad an accident had happened. These two answers must be read together with the rest of his evidence, and he had already said, in agreement with all the other witnesses, that guard-rails never were put and had added that " it would not " occur to anybody to put them up."

In my opinion the respondents are not proved to have been guilty of any negligence, and I would dismiss the appeal.

LORD PORTER. My Lords, the relevant facts in this matter are contained in a very small compass. For my purpose it is enough to say that the plaintiff (the appellant) was one of three men sent down to the 'tween deck above Nos. 1 and 2 deep hold of the s.s. *Daltonhall* when on a voyage from Avonmouth to Montreal unladen, but with the purpose of loading grain at the latter port. Their object and instructions were to find spare boards suitable for use in No. 4 hold which was being cleaned for the reception of cargo at Montreal. That hold was separated from Nos. 1 and 2 by the central structure of the ship and in order to reach the latter some of the hatch coverings of the upper deck above No. 1 lower hold had to be removed. From this opening a certain amount of light was provided for the 'tween deck. One of the plaintiff's allegations in his pleading was that not enough light was given through the aperture thus

provided to enable anyone engaged on a task in the 'tween decks to see his surroundings adequately. I refrain from discussing this point because there was little evidence that it had any effect upon the case and the learned judge who tried it thought a lack of light had no bearing upon the conclusion which he reached in favour of the plaintiff. Reliance was, however, placed upon the facts that the first two deep holds were open to the 'tween decks, were unprotected by any guard-rails fencing the open hatches and that the ship was rolling to an appreciable degree in a beam sea.

The boards on the 'tween decks in question were stacked in three positions—(1) against the skin of the ship opposite the aft end of No. 1 deep hold; (2) in a pile, again next to the skin of the ship opposite No. 2 hatchway; and (3) aft of No. 2 hatchway, and against a temporary bulkhead and some 12 feet inwards from the ship's port side. I ought to add that in each of the two former cases the pile of timber extended some 4 to 5 feet from the ship's side. In the direct line between the third pile and the second was a trimming hatch 11 feet behind No. 2 hatchway and 8 feet 8 inches from the ship's port side, so that anyone passing from the third to the second pile would have to go either to port or starboard of it.

The appellant was 18 years old at the relevant time, had been about 6 months at sea and four or five times in deep sea ships. He and Burke, an older and more experienced man, together with McCambridge, a boy of 17, were, on the day in question, the three persons sent to search for suitable timber in the 'tween deck; and it is clear that it was proper in performing this task that they should visit and search each of the three piles which have been mentioned. They did search all three piles, starting from that opposite No. 1 hold, proceeding thence to No. 2 and then to No. 3. In none of them did they find the type of material required, and by way of ensuring that they had not overlooked what they wanted they purposed to return to piles 2 and 1 in order to look again. All three men started to walk back from No. 3 to No. 2 pile, Burke and McCambridge leading and the appellant following. On their way a scream was heard and the appellant was found to have fallen into the deep hold No. 2 and to be very seriously injured.

The sole question for the consideration of your Lordships is whether the respondents were negligent in not fencing the hatchway into this hold.

There was at one time some suggestion that the hatches should have been replaced, but no great stress was laid upon this allegation as, admittedly, fencing round the hatch would have been an adequate safeguard, and the necessary stanchions and wire ropes were available and could easily have been erected in anything from 15 minutes to half an hour. Under Board of Trade Regulations it is obligatory to erect the fencing round open holds whilst the ship is in port unless work is actually being done

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at the hold in question. At sea there is no such requirement, and, indeed, the respondents claimed to have established in evidence a practice never to do so in a grain-carrying ship, as this one was, whilst at sea. The appellant, however, asserted that the practice had not been proved to be universal in all such ships and pointed out that in cross-examination Captain Lovegrove, the expert witness called on behalf of the respondents, acknowledged that he did not know the conditions in the *Daltonhall* or what the weather was like, or what work had been done or when and that he was just talking about general practice in saying that guard-rails were not put up at sea. Counsel for the appellants, not unnaturally, and perhaps wisely, did not pursue that matter with the witness any further. The witness was not, however, asked in what way this ship differed from other grain-carrying ships, and the weather and the work which had been done were established aliunde.

Apart from these matters Captain Lovegrove's evidence was that at sea the guard-rails were never erected; he "did not say "they should not be erected, but in practice it is not done." In cross-examination he was asked: "It is just really that it is not "done because seamen generally are expected to look after themselves," and replied: "They are not expected to look out for "themselves; it is their natural bent, and, being seamen, to be "able to handle themselves in all parts of ships in all weathers." The plaintiff had complained that he was apt to be seasick and therefore had not got his sea legs though the ship had been some 10 or 12 days at sea, and the witness was asked: "You have "seen, have you not, men who have not found their sea legs or "inexperienced deck hands staggering about the deck with a "sudden roll?" and replied: "Well, I must say that I have "noticed that the average young man to-day will gain his sea legs "very quickly; if for no other reason than to prove to his more "senior mates that he had got hold of the job." "Some," he added, "might find it more difficult, but not for very long after "leaving port; not in the case of the young men." It is only fair to add that he agreed that after the accident it was time that the practice of not putting up the guard-rails at sea was altered.

I have set out this evidence because it is, I think, the high water mark of the plaintiff's case on the question of the danger involved, and was claimed to give some support to the contention that the practice of never railing the 'tween deck hatchways when at sea had not been generally established. The rest of the evidence on behalf of either side did not accept the existence of any danger.

Burke, a plaintiff's witness, when asked in cross-examination: "If you had been sent down to the 'tween decks to carry out "some work and you knew it was going to take a little longer "than just looking for timber, you would have asked for a guard-"rail to go up," replied: "No, sir, I would not; it perhaps "would not have crossed my mind." As to guard-rails, his

general evidence was that they were never put up at sea, though they may sometimes have been left up if erected previously in port. One can perhaps best exemplify Burke's view as to guard-rails by quoting a further portion of his evidence in cross-examination by the defendants' counsel, Mr. Hughes:

(Q.) "Mr. Burke, when you had been at sea on the other "ships, do I understand you to say that you had never seen "guard-rails on those other ships when the hatch-covers are off "the 'tween decks?"—(A.) "I cannot recollect seeing any. "They did not strike me as being important enough to me, if I "had seen them, to remember them."

(Q.) "You cannot recollect?"—(A.) "I cannot recollect, but "I have never heard of anyone asking or demanding that guard-"rails should be put round while at sea. You would probably "be laughed at, sir."

One more matter as to danger may conveniently be disposed of at this point. Captain Lovegrove, in his evidence, said that in his opinion the putting up of stanchions involved greater danger than passing along the 'tween deck with the hold open. Mr. Burke would have none of it. In his view it would not involve any appreciable danger, and, indeed, this was the general view of the other witnesses and was accepted by the learned judge. There was ample evidence to justify this finding, and, in my opinion, it would be wrong for your Lordships to differ from him.

None of the other witnesses appear to have been asked directly whether in their opinion, as seamen, they would have looked upon the task set to the three men as involving any danger, though in answer to a question by Mr. Lee, on behalf of the plaintiff, Mr. Barker, the bo'sun, who sent the men down and was called on behalf of the defendants, agreed that the presence of either hatches or a guard-rail would have prevented an accident, but his general attitude was, I think, that seamen were safe without them. His attitude can be illustrated by certain questions asked and answers given in examination in chief to Mr. Hughes.

(Q.) "We know that there were sockets for guard-rail "stanchions but that no guard-rails were put up."—(A.) "That "is correct."

(Q.) "As bo'sun, did you ever require them to be put up?"—(A.) "Well, I had only joined the ship myself seven days, and we "were finding them in various places round the 'tween decks. "I did not see any complete."

(Q.) "Were they ever put up to your knowledge when you "were on the ship?"—(A.) "Not that voyage."

(Q.) "Did you ask for them to be put up?"—(A.) "I never "asked; we do not usually ask for them; we are usually asked "ourselves to put them up for other people. We do not ask to "put them up, as we do not need them normally ourselves."

(Q.) "Just tell me why"—(A.) "Well, it is a case that we

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" are used to the job more than other people, and we just do not " think of it, like the dockers; but I suppose if we had been " asked for them we would have had to put them up."

I have already dealt with Captain Lovegrove's evidence as to the practice of not putting up guard-rails round the hatches whilst at sea. The other witnesses without exception said that, although there was no difficulty in erecting them, it was in fact never done in this or any other ship so far as they knew. Mr. Clark, however, like Captain Lovegrove, accepted the view put to him in cross-examination that it might have been worth while to prevent this sort of thing happening if he and the bo'sun had put their minds to it, but here again he was speaking after the event.

One of the chief criticisms of this class of evidence was that the conditions in this ship might well be different from those in others, that the plaintiff was a young and inexperienced man, who had not got his sea legs, and that whereas some of the witnesses explained that the erection of guard-rails was unnecessary because members of the crew never, or at any rate seldom, entered the 'tween decks during the voyage, in fact in this ship and, indeed, in some others, men were not infrequently sent to them.

Though the plaintiff said he was constantly seasick, his fellows regarded him as a sufficiently experienced hand quite capable of looking after himself and thought that any seaman, after a few days out, would have gained his sea legs. Admittedly he had been working in the holds and knew of the open hatch, and it is not suggested that his seasickness was known to anyone. Nor was any evidence given or suggestion made as to the respects (if any) in which this ship differed from other grain-carrying ships.

As to the general practice of putting up guard-rails at sea, I can find no evidence that in this or any other grain ship they were ever erected. Moreover, there remains the fact that there are Board of Trade Regulations requiring their erection in port, whereas there are no regulations creating an obligation for their use at sea. It is possible, as was suggested, that the Board of Trade has no jurisdiction over ships outside the three-mile limit, but if it was a plain danger I should have expected it to be dealt with in some way.

Ultimately, the question is, would a reasonably prudent shipowner or seaman have foreseen the danger of this accident and guarded against it? Speaking for myself, I should not regard the passing along a 12-foot passage way, even in a moderate sea, as a danger to a seaman, nor should I have expected any seaman to have foreseen the likelihood of such an accident, especially after 40 years in which no accident was, at any rate, known to the witnesses to have occurred, nor was evidence of any such event having occurred forthcoming. Opinions differ, no doubt, and apparently the learned judge was impressed by the risk of an

open hold. The Court of Appeal, on the other hand, by a majority took the view that no appreciable danger had been established. Morris L.J., however, who agreed with the learned judge, thought that if the plaintiff's route from number 3 to number 2 pile had led him to pass the starboard side of the trimming hatch and he had then walked directly forward he might pass within 3 feet of the open hatchway. No doubt he might, but he was proceeding not directly parallel to the sides of the ship but to the second pile, and if he did so, whether he went to port or starboard of the trimming hatch, his route to the second pile would never be less than 9 or 10 feet from the hatchway to number 2 hold.

I, myself, am a good deal influenced, and, I think, rightly, by evidence which seems to establish that the existence of any such danger would never have occurred to a seaman.

Apart from these considerations, I am additionally strengthened in my view by the evidence of the practice prevailing on grain ships. To my mind it is amply proved, and though some witnesses thought that the reason was because it was unnecessary to go to the 'tween decks between ports, yet they cast no doubt upon the existence of the practice itself. The practice is established, though the reason given for it may be mistaken. As to the difference between the obligation in port and at sea, it may well be that with dockers working round a hold it is desirable to take precautions which are not necessary in the case of seamen who have at least 9 or 10 feet of space between them and the open hold. At any rate, the difference in obligation in fact exists.

It was suggested that the reason why the danger was not appreciated was that no one had brought their minds to bear upon it.

In *Bolton* v. *Stone* [20] I expressed the view that defendants would be in a stronger position if the risk was so small that they never thought about it than if they had considered it and decided the risks were very small. I adhere to that view. Men do not stop to consider whether each step they take is safe. They act upon what is generally regarded as a safe course until some untoward event shows that they may have been mistaken, and then, as Lord Thankerton pointed out in *Glasgow Corporation* v. *Muir*,[21] one must be careful not to impute negligence from ex post facto events.

If the practice is fully established, as I think it is, I am content to follow the words of Lord Dunedin in *Morton* v. *William Dixon Ltd.*[22] as restated in this House by Lord Normand in *Paris* v. *Stepney Borough Council.*[23] Lord Dunedin's words are: "Where the negligence of the employer consists of what I "may call a fault of omission, I think it is absolutely necessary

[20] [1951] A.C. 850, 859; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.
[21] [1943] A.C. 448, 455.
[22] 1909 S.C. 807, 809.
[23] [1951] A.C. 367, 382.

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" that the proof of that fault of omission should be one of two " kinds, either to show that the thing which he did not do was " a thing which was commonly done by other persons in like " circumstances, or to show that it was a thing which was so " obviously wanted that it would be folly in anyone to neglect to " provide it." Lord Normand put the same opinion in his own words in this way [23]: " the test is whether the precaution is one " which the reasonable and prudent man would think so obvious " that it was folly to omit it." I quote the words, though for the purpose of this case I am content, without expressing any opinion as to its exact meaning, to construe " folly " as Parker L.J. did,[24] to mean no more than " imprudent " or " unreason- " able." To my mind, having regard to the practice, the omission to fence was neither imprudent nor unreasonable, much less an act of folly. " It is true," the learned Lord Justice added,[24] " that other witnesses," (i.e., other than Captain Lovegrove) " said that the guard-rail could have been put up without " danger in a very few minutes, but it is clear that they all took " the view that there was equally no danger in walking along " the gangway," and with this view I agree.

Accordingly, I am of opinion that the appeal should be dismissed, both because the evidence, to my mind, establishes that to a seaman no such accident would have been looked for, especially since in an experience lasting up to 40 years such an accident was unknown, and because it was not the practice in grain ships to put guard-rails round the hatchways to the lower hold whilst at sea.

I should add that if I thought the arguments equally balanced, I should think it my duty to follow the decision of the Court of Appeal.

Finally, it was urged upon us that the learned judge had the witnesses before him and was therefore in a better position than an appellate court to evaluate the evidence. Where belief in the accuracy of witnesses or their demeanour comes in issue I agree, but as I have pointed out, there is little dispute as to the facts save in two cases, in both of which I have followed the findings of the court of first instance. Otherwise it is not fact but inference from facts with which your Lordships are concerned, and in such a case an appellate court is in as good a position to determine the issue as is the judge who tried the case.

I would dismiss the appeal.

LORD REID. My Lords, a seaman may encounter a variety of grave and inescapable perils, and in comparison the risk to which the appellant was subjected in this case was very small. But it has not been argued that a shipowner is under any less duty than an occupier of premises on land to eliminate unnecessary risks so far as that is reasonable and practicable.

[23] [1951] A.C. 367, 382. [24] [1954] 2 Ll.L.Rep. 507, 518.

In the present case the appellant had to walk along a space on the 'tween deck some twelve feet wide between a pile of dunnage and an open hatchway. He knew the place and, even allowing for a permissible degree of inattention, I find some difficulty in understanding how, without foolhardiness or negligence, he could have come to be so near the hatchway as to fall into it. In the defence of this action the respondents pleaded "the defendants will contend that the said accident was caused "or contributed to by the plaintiff's own negligence" but this defence was abandoned at an earlier stage of the case. As there is now no plea of contributory negligence the case must be dealt with on the footing that it cannot be inferred from the evidence that the accident could not have happened without the appellant being guilty of negligence. The case could not be decided in favour of the respondents on a ground which they do not now plead. If we must take it that the accident may have happened without the appellant being negligent it necessarily follows that there was some risk to a seaman who was not negligent if he was required to walk past this open hatchway, and the only question is whether that was a risk which the respondents ought to have foreseen and eliminated. The appellant's case is that a guard-rail should have been erected, and that this could have been done with very little trouble, and would have prevented the accident.

In some cases it may be open to an employer to say that, although the accident shows that there was in fact a risk to a man who was not negligent, the kind of risk was such that it could not reasonably have been foreseen before the accident. But I do not think that that can be said in this case. An open hatchway is an obvious danger and, if a man can without negligence come sufficiently near it to fall into it, I do not see how it can be said that this is not reasonably foreseeable or that there is no risk at all of his doing so. For a young and active seaman it may be that the risk is small even when the ship is rolling, but there are so many ways in which a man may slip or lose his balance without that being solely due to his negligence that I do not think that a prudent employer would be entitled to assume that there was no risk at all of an accident even in rough weather.

The respondents rely on a statement of the law by Lord Dunedin in *Morton* v. *William Dixon, Ltd.*,[25] which has often been approved. I need only refer to the speech of Lord Normand in *Paris* v. *Stepney Borough Council*,[26] and the opinion of Lord President Cooper in *Gallagher* v. *Balfour Beattie & Co., Ltd.*[27] Morton, a bottomer in a pit, was injured by a piece of coal which fell down the shaft, and it was alleged that there ought to have been some sort of shielding contrivance to prevent this. There was no evidence that this was a common expedient and it was

[25] 1909 S.C. 807, 809.
[26] [1951] A.C. 367, 382.
[27] 1951 S.C. 712.

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at least doubtful whether it was practicable in this particular shaft. Lord Dunedin said [28]: "Where the negligence of the "employer consists of what I may call a fault of omission, I "think it is absolutely necessary that the proof of that fault of "omission should be one of two kinds, either—to show that the "thing which he did not do was a thing which was commonly "done by other persons in like circumstances, or—to show that "it was a thing which was so obviously wanted that it would be "folly in anyone to neglect to provide it." Lord Normand having quoted this passage said [29]: "The rule is stated with all "the Lord President's trenchant lucidity. It contains an "emphatic warning against a facile finding that a precaution is "necessary when there is no proof that it is one taken by other "persons in like circumstances. But it does not detract from "the test of the conduct and judgment of the reasonable and "prudent man. If there is proof that a precaution is usually "observed by other persons, a reasonable and prudent man will "follow the usual practice in like circumstances. Failing such "proof the test is whether the precaution is one which the "reasonable and prudent man would think so obvious that it "was folly to omit it." In *Gallagher's* case [30] Lord Cooper, after expressing some apprehension that Lord Dunedin's test had been weakened by certain decisions, said that the passage which I have quoted from Lord Normand's speech "reverts to the forcible "language of the original formula, and in my view replaces it on "the pedestal from which it seemed to be dislodged."

Lord Dunedin's statement of the law must now be read with Lord Normand's gloss and it is important to see what it was that this House held to be "folly" in *Paris'* case.[31] A one-eyed garage hand, trying to remove from a vehicle a bolt which had rusted in, struck it with a hammer, and a metal chip flew off and injured his eye. He alleged fault in respect that his employer failed to provide him with and require him to wear suitable goggles. It was proved that it was not the practice to wear goggles at such work. It was not decided whether the employers were entitled to rely on this practice in the case of men with no disability, but it was in effect held that by reason of the more serious consequences to a one-eyed man if an accident causes him to lose the sight of an eye, goggles were for him "a thing "so obviously wanted that it would be folly in anyone to neglect "to provide it," or a precaution which "the reasonable and "prudent man would think so obvious that it was folly to "omit it."

I must now turn to the evidence in this case. This ship was one which carried grain in bulk and made the outward voyage in ballast. No. 2 'tween deck hatch, where the accident occurred, was partly open and partly occupied by a large wooden feeder which remained in position. Earlier in the outward voyage the

[28] 1909 S.C. 807, 809.
[29] [1951] A.C. 367, 382.
[30] 1951 S.C. 712, 718.
[31] [1951] A.C. 367.

hold had been cleaned out and the feeder and other woodwork repaired. There is evidence that a guard-rail could not have been put up while this work was going on because it would have impeded the work, and if there was negligence it was in failing to put up a guard-rail when the work was finished and before the men left that part of the 'tween deck. The only access to that part of the 'tween deck was by ladder from the upper deck where the hatches were battened down, and, if there was no likelihood of men being sent down to the 'tween deck during the remainder of the voyage, there was no point in guarding the open hatch and no obligation to do so. But the evidence in this case is that in this ship men were not infrequently sent down to the 'tween deck as the appellant was. He and two other men were sent down to look in the piles of dunnage for timber required for other work. So, when the cleaning and repair work at this hatch was finished, it ought to have been foreseen that men might well have to return to that part of the deck at some time during the remainder of the voyage, and the question is whether in that state of affairs it was negligent to leave unprotected that part of the open hatchway not occupied by the feeder.

There is evidence that the general practice was not to put guard rails round open hatches on the 'tween decks, but the evidence of some of the witnesses is that the reason for that practice was that no one was likely to go near the open hatches. Burke, an able seaman, said "You have no more reason to enter "the holds if the work is finished, and the hatches are still left "uncovered." Clark, the chief officer, said that there was no reason why guard-rails should not be put up, and when asked why it was not the practice to put them up, he said: "There is "really no necessity for them, because when the work is finished "in one hold there is no need for anybody to go down there;" and again: "Nobody goes down to the 'tween decks when there "is no work going on." He thought, wrongly, that the appellant ought not to have been in that part of the ship when the accident occurred.

Barker, the bosun, when asked why guard-rails were not put up, said: "The truth is that if the stanchions were there we "would have had a lot of trouble with the feeder: with that and "various other things." There is nothing to support this reason; the agreed plans do not support it and counsel were unable to explain how any such trouble could arise. This was, however, a good reason for not putting up guard-rails while cleaning operations were proceeding, and perhaps that is what the bo'sun had in mind.

The most important witness was Captain Lovegrove, who had many years' general experience. He said that in dock, when the regulations apply, guard-rails are put up at the beginning of the day by the ship's crew: I do not think that he meant that this was done every day but that it was done if the circumstances were such as to bring the regulations into operation. Then he

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explained that guard-rails are not put up at sea while cleaning and repairing is going on because they would impede the work, and when asked about putting up the guard-rails when that work is finished he said: "In practice it is not done; I do not say that "they should not be erected, but in practice it is not done." And when asked whether it would not be easy to put them up he said: "It would, yes, but it would not occur to anybody to "put them up." He said he had not personally known of an accident like this before; and then: (Q.) "If it had happened to "you would you have seen to it in future that guard-rails were "put up?" (A.) "I would, yes." (Q.) "Because you would "then realise the magnitude of the risk?" (A.) "Quite." Finally he said: "Apart from the accident I would go on for quite a con-"siderable time not having guard-rails put up because it is not "the usual practice to put them up at sea." (Q.) "But is it not "time the practice was altered?" (A.) "I agree."

I cannot find in Captain Lovegrove's evidence any indication whether or to what extent he thought that it was a general practice for men to go down to the 'tween deck during the voyage after the cleaning up is finished, but in giving his opinion that the practice of leaving 'tween deck hatches open was a bad practice I think he must have had in mind that the men are at least occasionally sent near these open hatches. Before leaving Captain Lovegrove's evidence I must note an answer which he gave about the danger of putting up guard-rails: he said: "If I "had a personal choice myself between sending the seamen to "get a piece of timber from the wing of the deck, and giving "him the job of putting up the guard-rail, and the ship was "rolling, I would choose the former." I think that he must have had in mind sending someone down specially to put up the rails. I can hardly think that he meant that there would have been any additional danger if the men who were cleaning and repairing at the open hatch stopped to put up rails before they left. If it had been right to leave the hatch open at that time because no one was likely to come near it again, and if later there had been some unexpected necessity for some men to go down there, then it would have been quite unreasonable to send someone down first to put up the rails. But, as I have said, the evidence shows that it ought to have been foreseen at the time of the cleaning operation that men might be sent down later in the voyage.

It was argued that, whether the practice of leaving the hatches unprotected was good or bad, the respondents were entitled to rely on it because it had gone on a long time and no one had heard of an accident arising from it. I would agree that, if a practice has been generally followed for a long time in similar circumstances and there has been no mishap, a reasonable and prudent man might well be influenced by that, and it might be difficult to say that the practice was so obviously wrong that to rely on it was folly. But an employer seeking to rely on a

practice which is admittedly a bad one must at least prove that it has been followed without mishap sufficiently widely in circumstances similar to those in his own case in all material respects. This part of this case has caused me considerable difficulty, but I do not think that it has been proved that the circumstances were similar where the practice prevailed. There was no evidence that it was the practice in other ships for men to be sent to the 'tween decks after cleaning and repairing was finished and two witnesses thought it was not; on the other hand, there is evidence, accepted by the trial judge, that that was "quite usual" in this ship. And if in other ships this happened very seldom, then it is not surprising that no one had heard of an accident. If it ought to have been foreseen in this case, as I hold it ought, that men might be sent near this hatchway during the remainder of the voyage, I do not think that the respondents can rely on this practice as having absolved them from the duty to consider whether guard-rails ought to be put up.

Apart from cases where he may be able to rely on an existing practice, it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.

Here the likelihood of an accident may have been small but at least it was sufficient to prevent the respondents from maintaining that the accident could not have happened without the appellant being negligent. And the consequences of any accident were almost certain to be serious. On the other hand, there was very little difficulty, no expense and no other disadvantage in taking an effective precaution. Once it is established that danger was foreseeable and therefore that the matter should have been considered before the accident, it appears to me that a reasonable man weighing these matters would have said that the precaution clearly ought to be taken. I am therefore of opinion that the appeal should be allowed.

LORD TUCKER. My Lords, this appeal turns almost entirely upon the evaluation to be placed upon the facts found by the trial judge which have been already referred to and as to which there has been very little dispute at any stage of the proceedings.

The open 'tween deck hatch with a drop of 40 feet was an obvious danger; the consequences of anyone falling to the bottom of the hold might well prove fatal and would almost inevitably be serious. The degree of danger would vary with the kind of weather encountered and with the skill and experience of the crew who were required from time to time to go to the 'tween deck to fetch pieces of timber which were stacked by the side of the ship, occupying some 4 or 5 feet of the 17 feet 3 inches

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space between the 9-inch coaming round the hatch and the ship's side, an operation which was performed in a subdued light.

The precise cause of the appellant's accident is unknown. The weather was not rough, but there was evidence that a "bit" of sea was running, and a breeze, because she threw a small "amount of spray up" and "she had a beam swell." The inference drawn by the trial judge and Morris L.J. that some movement of the ship was probably a contributing cause was, I think, fully justified.

What, then, was the explanation or justification for leaving this 'tween deck in that condition? It seems to have been accepted that in this particular type of ship it was not practicable to put the hatch covers on when the work of cleaning and repairing each hold was completed because a "feeder" used for loading grain was placed across the hatch. This being the position it was apparently not considered necessary to take the precaution of putting up the stanchions, which were available and carried on board in case they should be required in certain circumstances which may arise in the course of loading or unloading when in port, and using them with a rope to form a guard. The evidence clearly established that this could easily have been done in a very short time. I will return later to the possible danger involved in this operation.

The defence was that in doing as he did the master was merely following the invariable practice adopted at sea within the experience of witnesses, which covered a period of some 40 years, during which time no accident of this nature had occurred.

The value of this evidence as to the general practice is, I think, greatly diminished when it is closely examined. In the first place, in so far as it relates to all vessels without distinction, it is of no assistance because the use of guard-rails does not arise unless there are special reasons—as in the present case—why the hatch covers cannot be replaced, or where the circumstances do not require the crew to visit the 'tween deck in the ordinary course of their duties. So that it is only the practice of grain ships travelling in ballast that is relevant. The practice relied upon cannot, in my opinion, be justified. It was a practice which prevailed in all circumstances irrespective of weather conditions or the age and experience of the crew. It is said that in rough weather the upper deck hatches would not have been taken off and so access to the 'tween deck would not have been available, and that the bo'sun would use his discretion with regard to sending men to fetch these timbers in bad weather, even if it was possible to remove the upper deck hatch-covers.

My Lords, I cannot think that such a practice as this comes up to the standard required from a reasonably prudent employer whose duty it is to take reasonable steps to avoid exposing his servants to unnecessary risks. Sailors are, of course, necessarily exposed to many risks by the very nature of their calling, and

no one would suggest that the courts should be ready to interfere with the practice based upon past experience with regard to such occupational risks, but the risk in the present case was not of this nature. It was obvious, its consequences were likely to be calamitous, and the remedy was simple and available. I do not consider that it is imposing too high a standard of care upon a master to require that he should take the precaution suggested, notwithstanding that no such accident had occurred before in his experience.

Evidence of general practice is often of great value and sometimes decisive but in such cases as these it may require close examination, and for the reasons which I have endeavoured to state I do not consider the very general practice relied upon in the present case stands up to such examination, or that its more limited application in the case of grain ships can be justified by the standard of the reasonably prudent employer.

There was one factor in the case which weighed with Parker L.J. in the Court of Appeal, to which I should refer. He took the view that if there was any real degree of risk in walking along the 12-foot gangway, then the risk of accident to a man putting up the guard-rail by the edge of the coaming would be, if anything, greater, and in this connexion he referred to the evidence of Captain Lovegrove, a witness for the defence, who had said: "If I had a personal choice myself between sending the seamen "to get a piece of timber from the wing of the deck, and giving "him the job of putting up the guard-rail, and the ship was "rolling, I would choose the former." No other witness had suggested any danger in putting up the guard-rail, but I think the real answer is that the two operations cannot properly be compared. In the first case the man may well not realize that he is in any danger and some slight inattention or slip may precipitate him, and this is the very reason why a guard of some kind is required; in the second operation the danger is obvious and the man or men performing it will have to take the necessary precautions. Moreover, if it is considered to require any exceptional degree of care or skill, men with the necessary qualifications can be chosen. In the one case you have an operation which can be carried out in a few minutes by skilled men, if necessary, and in the other you have all the crew at different times for appreciable periods of the voyage exposed to risks, the degree of which they may very well not fully appreciate. I cannot accept the view that the risk involved in putting up the guard-rail is of such a nature as to justify the omission or that it should turn the scale in favour of the respondents.

My Lords, the degree of care and foresight required from an employer necessarily varies with the circumstances of each case and it is a matter upon which there is scope for much difference of judicial opinion, as this case has shown. I can only say that, in my opinion, Streatfeild J. was fully justified for the reasons stated by him and for those given by Morris L.J. in the Court

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of Appeal, in holding that the respondents had been proved to have been in breach of their common law duty to the appellant. I would accordingly allow the appeal and restore the judgment of Streatfeild J.

LORD COHEN. My Lords, I need not recapitulate all the facts. Suffice it to say that, as they strike me, the salient admitted facts appear to be, on the one hand, the size of the gaping hole in the 'tween decks when the hatch is opened, the risk of anyone in the vicinity falling down if he loses his balance, the obvious gravity of the injuries which were likely to be done to anyone who fell through that hole, the easiness of taking the precaution of fixing the stanchion and wire rope fence around the open hatch and the fact that the saving of time in not erecting it was negligible; on the other hand, the width of the passage, some 12 feet, between the stack of dunnage and the open hatch, the fact that only seamen would be passing along that passage, the fact that, according to the evidence, it was not the practice aboard grain ships to fence in open hatches 'tween decks or cover them up after the holds had been made ready for reloading, and the fact that no evidence was given of any occurrence of a similar accident by any of the witnesses, one of whose experience went back some 40 years. There was one disputed fact to which some importance attaches, and that is the frequency with which it was necessary for members of the crew to have access 'tween decks after the holds had been made ready. On that point I think it is clear that the learned judge accepted the evidence of the boatswain, Mr. Barker, to the effect that men were often sent down 'tween decks to collect pieces of timber for use in connexion with repair work, and I am not prepared to differ from him on that point.

What is the law to be applied to those facts? Mr. Forrest relied on the observations of Lord Dunedin in *Morton* v. *William Dixon Ltd.*[32] as approved and applied by Lord Norman in *Paris* v. *Stepney Borough Council*[33]: "Where the negligence of the "employer consists of what I may call a fault of omission, I "think it is absolutely necessary that the proof of that fault of "omission should be one of two kinds, either to show that the "thing which he did not do was a thing which was commonly "done by other persons in like circumstances, or to show that "it was a thing which was so obviously wanted that it would "be folly in anyone to neglect to provide it."

I agree with the view expressed by Parker L.J. in the Court of Appeal[34] that the use of the word "folly" may lead to misconception of what the law is if it is read in the sense of "ridiculous," but I do not think this was the sense in which Lord Dunedin used it. Lord Normand, after quoting Lord

[32] 1909 S.C. 807, 809.
[33] [1951] A.C. 367, 382.
[34] [1954] 2 Lloyd's Rep. 507, 518.

Dunedin, continued: "The rule is stated with all the Lord "President's trenchant lucidity. It contains an emphatic warn- "ing against a facile finding that a precaution is necessary when "there is no proof that it is one taken by other persons in like "circumstances. But it does not detract from the test of the "conduct and judgment of the reasonable and prudent man." I think that the effect of their Lordships' observations is that when the court finds a clearly established practice "in like cir- "cumstances" the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one.

In applying the law as laid down by Lord Normand to the present case the first question that arises is whether the circumstances existing on board the ships as to which evidence of practice was given are like those prevailing on board the s.s. *Daltonhall*. I share the doubt expressed by Morris L.J. as to whether that was proved to be the case, since both Mr. Burke and the chief officer, Mr. Clark, seemed to say that when any section of the 'tween deck had been swept and cleaned there was ordinarily no more reason to enter the hold, whereas Mr. Barker, as I have already said, deposed that it was often necessary to do so on the *Daltonhall*.

But even if the circumstances can be regarded as like, I should still be of opinion that the appellant is entitled to judgment. Applying the test laid down by Lord Normand, Parker L.J. says[34]: "What, then, is the reasonable and prudent "employer bound and entitled to take into consideration? He is "certainly (1) bound to take into consideration the degree of "injury likely to result; (2) bound to take into consideration the "degree of risk of accident; (3) entitled to take into consideration "the degree of risk, if any, involved in taking precautionary "measures."

Later on in his judgment he indicates that the decision of the matter in each case must depend on whether, balancing these considerations, (and, I would add, taking into account any other factors which may be relevant in a particular case) the plaintiff has proved that the omission of the precaution relied on by the plaintiff was a thing which the defendants, as reasonable and prudent employers, should have thought so obvious that it was unreasonable or imprudent to omit it.

My Lords, I agree with this approach, but, proceeding along those lines, I have arrived at the opposite conclusion to that reached by Parker L.J. There was an obvious risk in being near to the open hatch: it was one to which the plaintiff became exposed in carrying out the duty assigned to him; the consequences of an accident would obviously be very serious; the risk was an unnecessary risk in that it could easily have been avoided and no sort of advantage resulted from its existence. In these

[34] [1954] 2 Lloyd's Rep. 507, 518.

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circumstances it seems to me that on the evidence the trial judge and Morris L.J. were justified in holding that the appellant had established that the respondent had omitted a precaution which, in the sense in which I understand Lord Normand's words, it would be folly to neglect to take.

My Lords, the respondents, as I think wisely, did not press their contention that the damages were excessive, and for the reasons I have given I would allow the appeal and restore the judgment of the trial judge.

Appeal allowed.

Solicitors: *Neil Maclean & Co.; Holman, Fenwick & Willan.*

F. C.

[PROBATE, ETC., DIVISION.]

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Jan. 19.
Willmer J.

* LEWIS *v.* LEWIS.

Residence—Divorce—"Ordinarily resident" in England—Wife "ordinarily resident" while sailing to England—Matrimonial Causes Act, 1950 (14 & 15 *Geo.* 6, *c.* 25), *s.* 18 (1) (b).

Early in 1951 the parties, who had hitherto lived domiciled in England, left for Australia where the wife understood that the husband was to be employed for a temporary but indefinite period. They left the matrimonial home and furniture in possession of her parents as caretakers.

After the parties reached Australia circumstances arose as a result of which the wife returned to England, sailing from Sydney on September 11, 1951, and arriving at Southampton on November 4, 1951.

The husband remained in Australia, the parties never resumed cohabitation, and on October 5, 1954, the wife filed a petition for divorce alleging that the parties were domiciled in England. The husband, by his answer, claimed an Australian domicile and the wife thereupon amended her petition to allege that the court had jurisdiction, in the alternative, under section 18 (1) (b) of the Matrimonial Causes Act, 1950.

At the trial of an issue as to jurisdiction for the purpose of which it was assumed that the husband was domiciled in Australia:—

Held, (1) that, on the facts of the case there never was a real interruption of the ordinary residence of the wife in England.

Stransky v. *Stransky* [1954] P. 428; [1954] 3 W.L.R. 123; [1954] 2 All E.R. 536 and *Macrae* v. *Macrae* [1949] P. 397; 65 T.L.R. 547; [1949] 2 All E.R. 34 followed.

(2) That even if there had been such an interruption, the wife had become ordinarily resident in England when she boarded the ship on September 11, 1951; to take the view that a person such as the wife, who was no nomad but a woman accustomed to live in a permanent home, had during the period of her voyage no ordinary residence anywhere at all would be quite artificial. Having no

intention further to reside in Australia, the only ordinary residence that could be imputed to her during the period of the voyage was that of her previous home in England to which she was returning.

ISSUE as to jurisdiction.

The parties were married in England on October 24, 1942, and resided in England until the beginning of 1951, at an address stated to be 15, Addisland Court, Addisland Road, London. During the time they were in England they carried on together a business as hairdressers; but their business ran into difficulties and was given up some time in 1950. The flat at Addisland Court was taken in the wife's name and according to her evidence it was to a large extent furnished by her. During most of the time the wife's parents made their home with the parties and resided with them at the flat in Addisland Court. The wife stated in evidence, however, that it was her home and her husband's home, and that her parents were in effect merely guests.

At the end of 1950, having failed in his own business, the husband took employment with Elizabeth Arden, Ltd. For a short time he was sent to work for them in Paris, but early in 1951 it was decided that he should go to Australia, to work for them in Sydney. The firm paid his fare: the wife decided that she would go with her husband and take the one child of the marriage, a daughter born in 1944. The fare for the wife and the daughter was not paid by the firm; that had to be found by the parties themselves. On leaving, the parties did not dispose of the flat where they had lived. The wife left her furniture there and she left her parents still in occupation of the flat. The wife's mother died shortly after the departure of the parties.

According to the wife's evidence it was intended by Elizabeth Arden, Ltd. that the husband should sign a contract to work for them for two years in Australia. In fact he never did sign such a contract, and after a short time his employment with Elizabeth Arden, Ltd. terminated, although he did succeed in obtaining other employment in Sydney. The wife stated in evidence that until she was on the way to Australia she did not even know about the plan to sign a two years' contract. Her understanding of the venture was that it was only intended to be a temporary stay in Australia, and she contemplated that all three of them, the husband, wife and child, would be returning to England after about six months or, at any rate, within the year.

The wife stated that when they got to Australia they did not like it very much, and various circumstances arose to encourage her, at any rate, to change her mind. The parties discussed the possibility of the husband going to South Africa to get work where the wife had a number of relatives resident in Johannesburg. Another factor which had to be considered was the serious

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illness of the child of the marriage during the summer of 1951. The wife stated that it was decided, by agreement between the parties, that she should return to England, taking the child with her, partly for the purpose of treatment for the child, and partly because she wanted to look after her father who was left alone. In the meantime the husband was to pursue the plan, or at least investigate the plan, for obtaining employment in South Africa. The wife in fact sailed for England without him, on board a vessel called the "Largs Bay" belonging to the Aberdeen and Commonwealth Line, on September 11, 1951. It did not arrive in Southampton until November 4, 1951. On arrival in this country the wife went back to what had always previously been her home, namely, 15 Addisland Court, and since then had continuously resided at that address.

On October 5, 1954, the wife filed a petition for divorce on the ground of adultery in which she alleged that the parties were domiciled in England. By his answer of January 17, 1955, the husband claimed an Australian domicile, denied the adultery, and alleged that the wife had deserted him. The wife, by an amendment of February, 1955, alleged that if, which she did not admit, the parties were not domiciled in England the court had jurisdiction under section 18 (1) (*b*) of the Matrimonial Causes Act, 1950.[1] An issue as to jurisdiction was ordered to be tried as to whether the wife (the plaintiff) had been ordinarily resident in England for a period of three years preceding the commencement of her suit. It was assumed for the purpose of the issue that the husband was domiciled in Australia, without prejudice to the wife's contention that the parties were domiciled in England.

At the hearing of the issue the wife gave evidence and was cross-examined on behalf of the husband, but the husband who remained in Australia did not give evidence.

G. H. Crispin and *W. J. K. Millar* appeared for the wife.
H. V. Brandon appeared for the husband.

WILLMER J. stated the facts substantially as set out above, referred to section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, and said that for the purposes of argument at the hearing it had been assumed that the husband was domiciled in Australia. His Lordship continued: The petition was dated October 4, 1954,

[1] Matrimonial Causes Act, 1950, s. 18 (1): "Without prejudice to "any jurisdiction exercisable by the "court apart from this section, the "court shall by virtue of this section "have jurisdiction to entertain pro- "ceedings by a wife in any of the "following cases, notwithstanding "that the husband is not domiciled "in England, that is to say:—. . . "(*b*) in the case of proceedings for "divorce or nullity of marriage, if the "wife is resident in England and has "been ordinarily resident there for a "period of three years immediately "preceding the commencement of the "proceedings, and the husband is not "domiciled in any other part of the "United Kingdom or in the Channel "Islands or the Isle of Man."

and filed on October 5, 1954. In those circumstances it is clear that the wife had then in fact been continuously resident in this country only for a period of two years and eleven months. When I say continuously resident in this country I mean physically within the boundaries of this country. It is, however, contended on her behalf, as one of the ways in which her case is presented, that from the time the ship cast off her moorings in Australia the wife, who was bound for England, must be regarded as ordinarily resident in England. The burden of proof is upon the wife, who is asserting the jurisdiction of the court upon this ground of residence.

The wife puts her case in two ways. On the one hand, she contends that she was resident in this country at the moment of filing the petition and that she has always been ordinarily resident in this country. On that basis she contends that the relatively short period during which she and the child were physically in Australia, was not such a gap as could be regarded as terminating her ordinary residence in this country. In the alternative, should it be held against her that, on leaving for Australia, she ceased to be ordinarily resident in this country, it is contended on her behalf that she resumed ordinary residence in this country from the moment that her ship left Sydney. On that alternative basis, if the argument be acceded to, then she can get three years of ordinary residence preceding the presentation of the petition. But, as I have already said, she cannot get three years' ordinary residence if I have to take the date that the ship arrived in this country.

I have been referred to the judgment of Karminski J. in *Stransky* v. *Stransky*,[2] but the only part of it to which I think I need refer is that in which he quotes[3] the words of Somervell L.J. in *Macrae* v. *Macrae*.[4] It seems to me that the whole of the law which I have to administer in this case is summed up in one short passage from the judgment of Somervell L.J. where he says[5]: "Ordinary residence can be changed in a "day. A man is ordinarily resident in one place up till a "particular day: he then cuts the connexion he has with that "place—in this case" (that is *Macrae* v. *Macrae*[6]) "he left his "wife; in another case he might have disposed of his house or "anyhow left it and made arrangements to make his home some-"where else. Where there are indications that the place to which "he moves is the place which he intends to make his home for at "any rate an indefinite period, then as from that date in my "opinion he is ordinarily resident at the place to which he has "gone." I propose to endeavour to apply that statement of the law to both aspects of this case, i.e. to test both of the

[2] [1954] P. 428; [1954] 3 W.L.R. 123; [1954] 2 All E.R. 536.

[3] [1954] P. 428, 437.

[4] [1949] P. 397; 65 T.L.R. 547; [1949] 2 All E.R. 34.

[5] [1949] P. 397, 403.

[6] [1949] P. 397.

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Willmer J.

alternative contentions put forward on behalf of the wife by reference to that statement of the law.

For the husband it is the last sentence of that passage from the judgment of Somervell L.J.[7] which is particularly relied on. It is contended by Mr. Brandon that this is a case where there were all the indications that the place to which the parties moved in 1951, namely Australia, was a place where they intended to make their home "for at any rate an indefinite period." In those circumstances it is contended on behalf of the husband that from the time of arrival in Australia, namely March, 1951, the parties became ordinarily resident in Australia.

On behalf of the wife, on the other hand, it is the earlier sentence which is much relied on,[8] that in which Somervell L.J. refers to the case of a man—the same would apply to a woman—who "cuts the connexion" with the place where he has been resident. Somervell L.J. instances what was the fact of that case, namely, the case of a man deserting his wife; but he also instances the case of a man who has disposed of his house. It is pointed out that nothing like that happened in this case. On the contrary these parties had a settled matrimonial home at Addisland Court. That home was never disposed of. It was throughout retained as a place to which they could return and in the interim the wife's parents were left in residence there.

The wife's evidence with regard to what she knew about the proposed length of the stay in Australia was challenged by Mr. Brandon in cross-examination. I have, of course, heard no evidence on the other side. I do not think that it is necessary to form any concluded view as to the correctness or otherwise of the wife's evidence on this point, and if I can avoid doing so I should certainly wish to avoid it, as I do not want to say anything on this preliminary issue which might in any way prejudice hereafter the question of the credibility of the parties. I think that it is sufficient to say that she regarded it as a visit to Australia which was intended to be of limited duration, although what the precise limit was going to be was left indefinite. To that extent I think that the husband is well founded in saying that it was to be a residence in Australia for an indefinite period. On the other hand, I must confess that I am very impressed, in the wife's favour, by the other indications detailed in her evidence, namely the fact that this was her own flat in Addisland Court, where she had her own furniture, where she had left her household gods, and where she had left her parents, so to speak, as caretakers. That all goes to confirm her evidence that the stay in Australia was always intended to be of only temporary duration, and that at the date of departure, and indeed during the term of the wife's residence in Australia, there was always an intention at some time in the future to

[7] [1949] P. 397, 403. [8] Ibid.

return to the matrimonial home in England. In those circumstances, I think the proper view to take on the facts of this case is that, as in *Stransky* v. *Stransky*,[9] there never was any real interruption of the ordinary residence of the wife in England; that is to say, I find on the facts that during the temporary stay in Australia the wife remained ordinarily resident in England.

If I am wrong in that, however, I should like to add that I should in any case have come to the conclusion that this court has jurisdiction to entertain this case, on the basis that a period of ordinary residence of three years in this country has been established, having regard to the fact that the wife left Australia on September 11, 1951. Upon this alternative point the argument put forward—and a very persuasive argument, if I may say so—by Mr. Brandon was that the period before November 4, 1951, cannot be treated as though it were a gap in a current period of residence. When the statute requires that there should be a period of three years' ordinary residence (so the argument goes), you must find that at some time there was a beginning to that ordinary residence. It is not good enough to say that there has in any case been two years and eleven months, and that the other month can be treated as a gap like the gaps in *Stransky* v. *Stransky*.[9] Mr. Brandon says that you cannot find a gap until you have found that a period of the ordinary residence has already begun. If I am wrong in thinking that there was throughout ordinary residence in this case, then it becomes, I agree, necessary for me to fix the date when the wife did once again become ordinarily resident in this country; and the choice as I see it is between November 4, 1951, from which date it is conceded that she has been ordinarily resident in this country, and, on the other side, September 11, 1951. Mr. Brandon says that the wife cannot be taken as being ordinarily resident in this country until she arrives here, whereas it is said on the other side, that even if not ordinarily resident here before, she became ordinarily resident in this country when she, so to speak, burnt her boats in Australia and boarded the ship which was to take her to England.

I think myself that that is a matter which has to be viewed in the context of all the other circumstances of the case. I think that there may be a difference between the case of a person who boards a ship to go to a country where he or she has no roots and no immediate connexion, and a case like this where the party boards a ship to return to the place which has previously been that party's home and where that party has his or her roots. It is only to a case of the latter kind that I am applying my mind at the moment, and I do not wish it to be thought that I am deciding in this case what is the appropriate inference to be drawn in other cases from the fact of a party boarding a ship to travel from one country to another. In this case I have regard

[9] [1954] P. 428.

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to the fact that at the time when the wife left Australia there was, as appears from the evidence, and as is apparently corroborated by the letters received by the wife and put in evidence before me, no real intention further to reside or make the matrimonial home in Australia, and I have also regard to the fact that the wife had throughout maintained her flat in this country, where one of her parents was still residing and where she had her furniture. When she boarded the ship in Australia she was boarding it for the purpose of returning to what had previously been her home. In those circumstances it seems to me that, even if she had not been ordinarily resident in England throughout, then the fact of her setting foot on board the ship which was to bring her home from Australia was, in its context, to be interpreted as a resumption of ordinary residence in this country. I asked the question in argument, what would the wife have answered if she had been casually asked by someone else in the course of her voyage home "What is your ordinary "residence?" Certainly she would not have said Australia. I apprehend that she would have answered without hesitation: "15 Addisland Court, Addisland Road, London."

It is said that ordinary residence, unlike domicile, is not a thing that everyone is necessarily deemed to have at all. There are, of course, nomadic people who have no ordinary residence anywhere. I do not propose to deal with that class of case, except to remark that no one can suggest that either of the parties in this case was a nomad. I think one has got to approach the facts of this case on the basis that we are dealing with people who are accustomed to live in permanent homes of one sort or another. In those circumstances I think that it would be quite artificial to take the view that a person such as this wife, during the period of her voyage between Australia and England, had no ordinary residence anywhere at all. If she is to be regarded as having an ordinary residence during that period, the only ordinary residence that I can in the circumstances of this case impute to her is an ordinary residence in this country.

For those reasons, on both grounds which I have attempted to set out, I come to the conclusion that this wife was both resident in this country at the date of the presentation of the petition, and had been ordinarily resident, within the meaning of the statute, during a period exceeding three years prior to the presentation of the petition.

Order accordingly.

Solicitors: *Culross & Co.; Coleman & Co.*

E. J.

[PROBATE, ETC., DIVISION.]

NOTE.

* CUNDY *v.* CUNDY, SMITH AND FINCH.

1955
Dec. 6, 7, 8, 9, 12, 13.

Mr. Commissioner Blanco White Q.C.

Husband and wife — Divorce — Condonation — Revival of condoned offence—Conduct sufficient to revive.

DEFENDED PETITION for divorce.

The parties were married in 1921 and had five children, the parentage of a child born in 1932 being in dispute. In 1927, at the age of 24, the wife committed adultery with one man; in 1931 she committed adultery with another. The parties continued to live together, to share the same bed, and to have marital intercourse until 1949, although from 1941 there was no affection between them. The husband left the home in 1949. A charge of adultery brought by him in 1950 in a court of summary jurisdiction was dismissed without the wife being called on to give evidence.

The husband filed a petition for divorce on the grounds of (constructive) desertion and of adultery revived by subsequent misconduct; the wife by her answer cross-prayed for a divorce on the ground of desertion, admitting the adultery in 1927 and 1931, pleading that it had been condoned and denying that it had been revived.

During the course of his judgment the commissioner, rejecting other allegations as to the wife's behaviour, found that on one occasion in 1950 the wife had been kissed on the neck by a man, who had been helping her in the garden, without protest by her. The question was raised whether that incident was sufficient to revive the condoned adultery. The commissioner said that it was very hard to find authority as to what degree of impropriety in conduct revived adultery, and formulated his conclusions upon that question as follows:—

The question whether impropriety of conduct on the part of a wife is sufficient in gravity to revive condoned adultery is ultimately one of fact. There must be taken into consideration (1) the circumstances of the adultery and the light it throws on the character of the wife; (2) the time which has elapsed since the adultery; (3) the behaviour of the wife meanwhile; (4) the behaviour of the husband to the wife; (5) the seriousness of the conduct complained of and its circumstances, including the manners and customs of the grade of society to which the parties belong. The test is whether a jury of reasonable citizens guiding themselves by the foregoing considerations would be of opinion that the conduct complained of was of sufficient gravity and weight to exonerate the husband from his expressed or implied promise to forgive his wife and to entitle him to reassert the adultery as a ground for divorcing her. To say that something is a question of fact for the jury is much the same as to say it is a matter of discretion for the court to be exercised on proper principles. I have included among the things to be considered the behaviour of the husband to the wife, because I think it clear that that is a matter which must be taken into consideration. If a wife were found guilty of adultery and the husband had previously deserted her or had been guilty of conduct conducing to the adultery, then the ultimate decision would be in the discretion of the court. To revive adultery something less than adultery may be relied on and in considering whether a lesser offence revives the adultery, just as in considering whether a decree is to be granted on an actual finding of adultery, I think it clear that the husband's

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behaviour also must have been considered, and would have been considered in the ecclesiastical courts. That is the best formulation I can make.

Endeavouring to apply those principles to this case what does it come to? Here is a wife who twice committed adultery when she was in her twenties. So then, you may take it that in her twenties the husband had got a very great deal to complain about with regard to her fidelity. On the other hand, she was in her twenties; that was nineteen years before the occasion in 1950. For nineteen years she had led a respectable life. There was nothing against her. She had done well by the children and she had done well in the keeping of the house. After eighteen years she is deserted by her husband. After she is deserted by her husband she gets a friend in to do her gardening for her. When he has finished doing her gardening he goes up to her where she is standing, puts his arm round her and gives her a kiss. I do not believe that any reasonable jury in this world would consider that that was conduct exonerating the husband from his forgiveness in the circumstances, the wife having lived respectably for nineteen whole years. In fact, frankly, I am not certain that what took place was anything different from the customary kiss which a young man gives a young woman in certain circles on seeing her home after taking her out for the evening; he has given her a nice evening, he is entitled to give her a kiss. And I am not certain that what took place here was not that the man had done a good afternoon's gardening, digging up the wife's garden on an extremely hot day, and having done it, when he was going home to his tea he felt entitled to give her a kiss in the same way. I am quite satisfied that it would be totally unreasonable to regard that incident as reviving the adultery.

The commissioner then held that the husband was guilty of desertion and granted the wife a decree nisi of divorce.

Decree nisi on wife's answer.

Counsel: *Lionel Jellinek* for the husband.
Stanley Ibbotson for the wife.

Solicitors: *Alan, Edmunds & Phillips*; *R. H. Marcus, The Law Society, Divorce Department.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

* HERDMAN *v.* WALKER (TOOTING) LTD. AND OTHERS. CITY PLANT HIRERS LTD. (THIRD PARTY).

1956 *Jan.* 27.

Pearce J.

[1953 H. 4433.]

Contract—Exceptions clause—Negligence—Liability of hirers of equipment and driver for negligence of driver—Driver "shall be under "direction and supervision of the hirer who shall be responsible "for his action as though the driver were in the hirer's direct "employ."

Master and Servant—Employment of servant of another—Liability for servant's negligence.

A clause in a contract for the hire of a crane provided, "The "driver or operator (if any) supplied by owners shall be respon- "sible for driving or operating the plant but shall use it and be "under the direction and supervision of the hirer who shall be "responsible for his action as though the driver were in the hirer's "direct employ."

On a claim under the terms of the contract for indemnity from the hirer of the crane in respect of damages awarded against the owner for the negligence of their crane driver when driving the crane while on hire.

Held that, on the true construction of the clause, when the driver was using or working the plant under the direction and supervision of the hirer, as in the present case, the hirer was responsible for the driver's action (including his negligence) as though the driver were in the hirer's direct employ; the clause determined the liability of the two employers inter se and, accordingly, the owners of the crane were entitled to indemnity from the hirer.

Dictum of Lord Porter in *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ltd* [1947] A.C. 1, 15; 62 T.L.R. 533; [1946] 2 All E.R. 345, applied.

THIRD PARTY PROCEEDINGS.

The plaintiff, who was employed by the first defendants at a building site, was struck and injured by the jib of a crane owing to the negligence of the crane operator. The crane was owned by Chamberlain Industries Ltd., the second defendants, and was operated by one McManus their servant; but it had been hired to City Plant Hirers Ltd., the third party. They had in turn sublet the crane to the first defendants. The crane was hired to the third party under a contract which contained, inter alia, the following terms, which are usual in the building trade: "The "driver or operator (if any) supplied by owners shall be respon- "sible for driving or operating the plant but shall use it and be "under the direction and supervision of the hirer who shall be "responsible for his action as though the driver were in hirer's "direct employ."

There was also terms on re-hiring as follows:—"Hirer shall "not sub-let the plant or any part of it without first receiving

[Reported by E. J. BARTON, Esq., Barrister-at-Law.]

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"the written permission of owners". With regard to insurance the contract provided: "Drivers and operator where supplied by "owners. Liability under the Workmen's Compensation Act is "insured by a policy in the joint names of the owners and the "hirers. Where insurance is provided it is in accordance with "the usual conditions applicable in each case. In all cases the "hirer for the time being is jointly insured with the owners, and "must observe the conditions and take all reasonable precau-"tions for the safety of the plant and its safe use. All plant is "insured against fire, and where other insurance is provided it "will include indemnity for liability for injury to persons and "damage to property of third parties, (which does not include "persons in the employ of the hirer or property owned by him "or in his custody and control)."

In these proceedings the second defendants claimed indemnity against the third party under the terms of the hiring agreement in respect of a judgment given against them in the main action for £7,500, on the ground of their vicarious responsibility for the negligence of the crane driver.

F. W. Beney Q.C. and *G. R. F. Morris* for the second defendants.

Norman Wiggins for the third party.

The following cases were cited in argument: *Mersey Docks & Harbour Board* v. *Coggins and Griffith (Liverpool)*[1]; *Denham* v. *Midland Employers Mutual Assurance Ltd.*[2]

PEARCE J. stated the facts and continued: Mr. Wiggins, on behalf of the third party, argued that the printed terms are not part of the contract, first, because they were not signed, secondly, because there was no sufficient evidence of a course of practice to justify the printed conditions being embodied by implication in the hire, and, thirdly, that a fortiori did both those arguments apply in a case of re-hire to which the third party did not think that such terms were applicable.

But I am satisfied of these facts: The third party had regularly done business with the second defendants, always on the basis of the printed forms of general conditions of hire. These were sent by the second defendants to the third party on at least 17 occasions, and on 12 occasions they were sent back signed. On all or most of these occasions there was a re-hire of the machinery by the third party. I do not believe that they were merely signed for the purposes of reference. The third party were well aware of what those printed terms were, and they were aware that those were the terms on which the second defendants insisted on doing business. Never in any of the previous

[1] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[2] [1955] 2 Q.B. 437; [1955] 3 W.L.R. 84; [1955] 2 All E.R. 561.

transactions were those terms ever altered or was there any protest against them. The third party as well as the second defendants always understood that those terms were the basis on which the business was done over the telephone. I do not believe that the fact that there was a re-hire made the third party take the view that the terms were not applicable.

Mr. Wiggins argues that, even assuming the alleged terms are part of the contract, the material clause does not amount to an indemnity. It has, he says, two limbs dealing with two different situations and is not to be read as dealing with one general situation. The first limb is "the driver or operator "supplied by owners shall be responsible for driving or operating "the plant." The second limb is "but shall use it and be under "the direction and supervision of the hirer who shall be respon- "sible for his action as though the driver were in hirer's direct "employ." In other words, first, the driver shall be responsible for the driving, that is, how he drives, but, secondly, he shall be under the direction and supervision of the hirer as to what he is to do, and in respect of that, and that only, namely, when that direction or supervision causes disaster, the hirer is to be responsible for the driver's action.

Mr. Beney's answer to that is that the hirer would be liable anyhow in that respect, namely, if the driver properly followed a negligent instruction by the hirer, and there is no need to put the words in at all unless they are intended to apply to cases (as this) where a driver negligently follows a proper instruction by the hirer. Moreover he argues that, if Mr. Wiggins' argument is correct, the words "as though the driver were in the hirer's "direct employ" are otiose, since there is no need to import the notion of a vicarious responsibility in a matter in which the hirer has by his own direction, intervention and supervision caused the damage.

Mr. Wiggins claims that even if his construction is not correct it is at least sufficiently plausible to make the clause ambiguous; The fact of re-hire makes it still more ambiguous and inapplicable and, as the second defendants are the proferentes, the document should in case of doubt be construed against them.

In my opinion, the question of re-hire does not prevent the clause from being applicable. The terms themselves envisage the possibility of re-hire by imposing the necessity for written leave—leave which is by implication given by the second defendants typing the words "Less 10 per cent. re-hire dis- "count" in the column devoted to the hiring rates.

If any term is meaningless or absurd in relation to the position on re-hire, then it could not be applied, but in my view that is not the position in this case. There are various terms in which the hirer has duties and liabilities which, if he re-hires, he will in practice have to carry out vicariously through the sub-hirer. It is for him to see that his agreement with the sub-hirer

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provides for these and compels the sub-hirer to undertake them. Unfortunately, as we know, in this case the sub-hirer crossed out the clause relating to indemnity by him to the third party in the re-hire contract.

Lastly, Mr. Wiggins claims that the conditions say that insurance is provided, or indicate at least by inference that it covers any third party matters, and, therefore, it would be an improbable inconsistency for the agreement to provide an insurance while imposing an indemnity.

But the normal reading of the words relating to insurance does not bear this inference. The document does not say that complete third party insurance is provided, and I do not believe that the third parties were misled. They are not people who are ignorant of the nature of insurance in these transactions, seeing that they have carried on this business themselves for years. Nor do I think that the references to insurance affect the question of whether the disputed clause is an indemnity.

When I first read the words they seemed to me a clear expression of intention that when the driver is using or working the plant under the direction and supervision of the hirer, as McManus was in this case, the hirer shall be responsible for the driver's action (including, of course, his negligence) as though the driver were in his direct employ. In such a case the hirer, who is making use of his services, will be vicariously liable for them as a master is. I still think that that is its clear meaning. Any other reading of the clause is straining its meaning. This is an ordinary business document meant to be intelligible to businessmen; it is not an artistic document, and I think it has only one normal construction. That construction is consistent with the intention of the parties as collected from the whole agreement.

If it means what I understand it to mean, does it constitute an indemnity? In *Mersey Docks and Harbour Board* v. *Coggins*,[1] the facts were not dissimilar to the present case. The Harbour Board, who hired out cranes with drivers, laid down regulations that were binding on applicants for the use of such cranes. They provided that the drivers provided with the cranes "shall be the servants of the applicants." The issue in that case was whether this contractual condition could affect the Board's liability to a plaintiff who was injured, and it was held that it could not; but Lord Porter pointed out[2]: "A "contract of this kind may of course determine the liability of "the employers inter se, but it has only an indirect bearing "upon the question which of them is to be regarded as master "of the workman on a particular occasion."

In my view the contested clause does determine the liability

[1] [1947] A.C. 1; 62 T.L.R. 533; [1947] 2 All E.R. 345.

[2] [1947] A.C. 1, 15.

of the employers inter se, and the second defendants are entitled to the indemnity they claim.

Judgment for the second defendants

Solicitors: *Blount, Petre & Co.; Wildman, Millington & Co.*

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[CHANCERY DIVISION.]

* WILLOW WREN CANAL CARRYING CO. LTD. *v.* BRITISH TRANSPORT COMMISSION.

1956 Jan. 17, 18.

Upjohn J.

[1954 W. No. 3659.]

Practice and Procedure—Stay of proceedings—Bill before Parliament affecting issues—Court not concerned with pending legislation—Stay refused.

Parliament — Pending legislation — Bill before Parliament affecting issues.

The court will not take into consideration the effect of possible future legislation which, if passed in its present form, would affect the rights now in issue between the parties.

The plaintiffs, a canal carrying company, sued the British Transport Commission for breach of their statutory duties to keep open and navigable the Kennet and Avon Canal, which was vested in the commission. The commission admitted the breaches of duty, but asked for a stay of the proceedings (except insofar as they concerned an inquiry as to damages), on the ground that a Bill then before Parliament would, if passed in its existing form, relieve them of their statutory duties.

Held, that a plaintiff was entitled in the ordinary course of events to have his case tried, and that it would not be just to stay an action on the ground that there was a Bill before Parliament which, when passed, might affect the rights of the parties.

Attorney-General v. *Racecourse Betting Control Board* [1935] Ch. 34; 51 T.L.R. 36; 152 L.T. 146 and *British and Colonial Furniture Co. Ltd.* v. *William McIlroy Ltd.* [1951] 1 T.L.R. 295; [1951] 1 All E.R. 404; [1951] W.N. 87 followed.

PROCEDURE SUMMONS.

The defendants, the British Transport Commission, applied to stay an action brought against them by the plaintiffs, the Willow Wren Canal Carrying Co. Ltd., except for the purposes of an inquiry as to damages, until the defendants' Bill, 4 & 5 Eliz. 2, British Transport Commission (No. 2), which was before Parliament, had received the Royal Assent, with such amendments (if any) as might be made.

The nature of the action was as follows: The business of the plaintiff company was to operate vessels on canals in England for the purpose of carrying merchandise by water from one part of England to another. The canal here in question was the Kennet and Avon Canal, which was constructed under a number

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of Acts some 150 years ago, and ultimately vested in the Great Western Railway Company under the Great Western Railway Act, 1852 (No. 1). By section 27 of that Act and by section 17 of the Regulation of Railways Act, 1873, the company became bound to keep the canal and every part thereof at all times open and navigable.

Under the Transport Act, 1947, which came into force on January 1, 1948, the canal became vested in the defendants, the British Transport Commission, on the terms and obligations in which it had previously vested in the Great Western Railway Company.

The plaintiffs had asked the defendants to quote tolls for certain merchandise which they wished to carry along the canal from Reading to Bristol. The defendants had refused to give quotations.

The plaintiffs alleged that the canal was now not in a fit condition and was in fact incapable of bearing traffic, and that allegation was admitted by the defendants. The plaintiffs contended that this was not a misfortune of the defendants at all, but that the unfitness of the canal was the result of a deliberate process of neglect on their part; and that it was done with the object of preventing access to the canal as part of a scheme to discourage traffic on it so as to ensure that the canal would deteriorate through lack of use in order that they could then purport to justify the abandonment of the canal on the ground that it was not being used for the purposes of navigation, and that to restore it to good order would involve the expenditure of sums of money incommensurate with the financial return.

The plaintiffs alleged that the defendants had refused to comply with their statutory duties regarding the canal and had no intention of doing so unless compelled by an order of the court, and that they intended unless restrained by an order of the court to close and abandon the canal.

The plaintiffs claimed a declaration that the defendants were bound to keep and maintain the canal in good order and condition and asked for an injunction to restrain them from obstructing any part of the canal, from closing the canal, from failing to maintain a proper depth of water in the canal and from causing or permitting the canal to be and remain impassable.

The defendants' case was that the canal was admittedly unnavigable and that the defendants had not complied and were not complying with their statutory obligations; that they were willing to pay damages, and to submit to an inquiry as to the amount of such damages.

The defendants, however, denied that there had been any wilful default upon their part to maintain the canal, and they pleaded that the canal had been for over fifty years in some parts unnavigable, that the various ways in which it was alleged that the canal was out of repair were due to no fault or neglect of the Transport Commission.

J. G. Strangman Q.C. and *Michael Franks* for the plaintiff company.

Denys Buckley for the British Transport Commission.

Cases cited in argument and not referred to in the judgment: *In re Yates' Settlement Trusts* [1]; *In re J. B. Palmer's application.* [2]

UPJOHN J. having stated the facts continued: The defendants say that they are awaiting the passing of a Bill in Parliament, the effect of which they hope will be to relieve them from their statutory obligations, and therefore they submit that it is right that this action should be stayed, not permanently, but until the fate of that Bill in Parliament was known.

The writ in this action was issued on November 9, 1954; and it was somewhat faintly suggested that the action was intended to embarrass the Transport Commission in regard to their Bill for relief from their statutory duties. The dates do not bear that out, for the Bill was in fact deposited a year after the action had been started, and indeed more than six months after the defence in its original form had been delivered.

It is said that if this action comes on, much expense will be incurred, which will be thrown away, if the Bill goes through in the form in which its sponsors, the defendants, hope that it will go through. The pleadings are closed; discovery has been had; I do not know that it is yet finished, but it is said that the action would normally be fit for hearing in March or April of this year. I have no doubt that the action will be of a very heavy nature and will take many days to hear. The pleadings are of a most detailed character; I have given only a very brief outline of them and the particulars are very voluminous. Experts will no doubt be employed, and there is likely to be a great deal of correspondence, and I accept at once that it will be a most expensive action to try.

It is said that at the end of that action a judge would be bound to suspend an injunction, if he thought that the plaintiffs had established their right to one, until the fate of the Bill is known; the proper course is, therefore, to stay this action until the result of the Bill be known.

A preliminary objection is taken to that, which is fatal to that application; and it is that, sitting in this court, it is my duty to see that litigants have their cases tried, as they are entitled to, and that I cannot take into account the possible effect of some Bill now before Parliament which, if passed into law in its present form, may have some effect upon the rights of the parties. That seems to me to be a correct formulation of the law. This court is not concerned with what Parliament may think it wise to do in relation to the rights of the parties, but

[1] [1954] 1 W.L.R. 564; [1954] 1 All E.R. 619.

[2] (1882) 22 Ch.D. 88.

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the plaintiffs are entitled to come to this court and say, "In the "normal course of events our action will very soon be ripe for "hearing. We desire that the court should hear it."

Of course, if subsequently to that Parliament in its wisdom by some enactment affects the rights of the parties even to the extent of modifying or abrogating the effects of any judgment which the plaintiffs may be fortunate enough to obtain, no one doubts the right and power of Parliament to do so. But it is plain that it is not right for this court either now or at the hearing to take into account the possible effect of some Bill at present before Parliament which, so far as this court is concerned, may never be passed into law at all, or, if passed into law, may ultimately contain provisions which do not affect the rights of the parties before the court at all. In other words, it is a matter of speculation on which this court will not embark as to whether a Bill at present before Parliament will be passed into law in its present form.

Authority is not wanting for that proposition. In *Attorney-General* v. *Racecourse Betting Control Board* [1] a question arose with regard to the powers of the Racecourse Betting Control Board to make payments and so forth. It was held by Eve J. that certain payments which they had made were ultra vires, and that decision was affirmed by the Court of Appeal. At the conclusion of the hearing before the Court of Appeal the appellants, who had only been partly successful, asked for leave to appeal, and upon that matter Mr. Gavin Simonds, who appeared for the Racecourse Betting Control Board, said this [2]: "Upon "the question of appeal your Lordships may be aware that "there is now before the House of Commons a Bill, which has "already passed your Lordship's House [that, of course, was "referring to Lord Hanworth, then presiding in the Court of "Appeal], and is now in Committee in the House of Commons, "and I understand it is going to be taken immediately on the "floor of the whole House, which provides . . ." and he then read out the provisions of the Bill, and continued: "It is "interesting to observe that that exactly agrees with your Lord-"ships' judgment, legalising that which your Lordships have "held to be lawful, and I think not covering the payment which "your Lordships have held not to be lawful. With that Bill in "the state in which it is, I venture to submit to your Lordships "that it is not a case in which leave to appeal to the House of "Lords should be given, putting us to further expense." Lord Hanworth said [2]: "But, Mr. Gavin Simonds, I think you are "imputing to me cognisance, or at any rate knowledge, which, "seated here, I do not possess. The position here is that my "colleagues and I are seated here as a Court of Appeal. Does "not the point which you raise go to the question of whether "it would be wise, or whether it would be worth while, for the

[1] [1935] Ch. 34; 51 T.L.R. 36; [2] 152 L.T. 154.
152 L.T. 146.

" appellants to proceed with their appeal? They might be " minded to appeal, and if that clause were, for example, struck " out, they might wish to go on. On the other hand, if it was " incorporated in a Bill which received the Royal Assent, they " might desire not to go on with the appeal." Then Sir Stafford Cripps said [3]: " Quite obviously, if that provision passed into an " Act of Parliament there would be no point in anyone pro- " ceeding with an appeal; but there are many slips between " cup and the lip, and that clause may never be passed into an " Act of Parliament. Therefore, we do desire to have leave to " appeal in case it is necessary." Lord Hanworth said [3]: " I " think that is right," and leave to appeal was given.

That was, of course, a different case, but it illustrates very well the principle which the court adopts in these circumstances. There is the more recent case of *British and Colonial Furniture Co. Ltd.* v. *William McIlroy Ltd.*,[4] which came before the Court of Appeal on an interlocutory application. That was a case under the Landlord and Tenant Act, 1927, in which the court was asked to make an interim order under section 5 (13) of that Act, authorizing the tenants to stay in possession of the premises pending completion of proceedings taken for grant of a new lease. That again was, of course, quite a different case, but Jenkins L.J. said [5], " Counsel for the tenants say, however, that " in these two cases the orders ought to have been made because " certain pending legislation, namely, the Leasehold Property " (Temporary Provisions) Bill, if, and when, it comes into force, " and providing it comes into force in the form in which the Bill " now stands, will give some advantage to a tenant in occupation " under an interim order which would be denied to a tenant who " is in possession under an undertaking given to the court in lieu " of an actual order under subsection (13). To demonstrate " that this pending legislation would, or might have, that effect " we were invited to look at and to construe the print of the " Bill. We refused to do that. In my judgment, it is contrary " to all principles that we should decide these two cases not " simply on matters relevant to the particular landlord and " tenant legislation as it stands, but by reference to possible " alterations in the law which may be made under legislation " yet to be passed." That also illustrates this principle.

I cannot, therefore, possibly grant this application, and the plaintiffs are entitled to have their action heard in the ordinary course of events Without prejudice to the point which I have already considered, I was invited to and did look at the Bill. I do not propose to review it in any detail, but when it is seen that the principal object of that Bill, should it go through Parliament in its present form, is to prevent this action from ever coming to trial at all, and that is one of its admitted

[3] Ibid.

[4] [1951] 1 T.L.R. 295; [1951] 1 All E.R. 404; [1951] W.N. 87.

[5] [1951] 1 All E.R. 405.

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objects, it would be a grave injustice if I were to prevent the plaintiffs from obtaining from this court a judgment to which they may on the facts be entitled. If I stand this action over until the fate of the Bill be known and the Bill is passed by Parliament, this action could never come to trial.

The only other observation that I would make on the Bill is that it shows how sound is the rule of this court that it will not look at possible future legislation. During the course of argument much time has been taken up with a discussion as to the meaning of some obscure phrases in the Bill, and what their precise effect will be on the plaintiffs if they succeed. That shows that it is useless speculation to look at a Bill and try to formulate or guess what Parliament is going to do in the future.

No harm will be done to the defendants by the action proceeding. Parliament in its wisdom can put such provisions into the Act dealing with any judgment that the plaintiffs may obtain if it thinks proper so to do.

I therefore refuse this application, and I shall order that the costs thereof be paid by the defendants in any event.

Application dismissed; leave to appeal refused.

Solicitors: *Pothecary & Barratt; M. H. B. Gilmour.*

I. G. R. M.

[COURT OF APPEAL.]

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Singleton, Jenkins and Parker L.JJ.

*DYER *v.* ILFRACOMBE URBAN DISTRICT COUNCIL.

[1954 D. No. 39.]

Licensor and Licensee—Child—Unaccompanied by adult—Public recreation ground—Child injured by fall from chute—No concealed danger—Liability of authority.

A boy four and a half years old fell from the platform of a chute in a public recreation ground provided by the defendant council. He was unaccompanied by an adult in the recreation ground. The chute which was properly constructed, installed and maintained, was 12 feet high, with steps leading up one side and a slide down at the other, with a double line of rails along either side of the steps and also along the platform at the top. The boy was seen by another boy to fall between the upper and lower rails, but the reason for his fall was unexplained. In an action brought by his next friend he was awarded damages by the trial judge, who held that he was a licensee and that the council had been guilty of negligence and had failed in their duty as licensors. On appeal by the defendants:—

Held, that the chute being properly constructed, installed and maintained, and there being no concealed trap or danger which

would not be obvious to a boy of the plaintiff's age, the defendants could not be said to have been negligent or to have failed to perform their duty as licensors, and the appeal must be allowed.

Per Singleton L.J. It is in the public interest that recreational facilities and amenities should be provided, and in the case of small recreation grounds it is not the duty of the local authority to provide a groundsman, keeper or nurse, or to put up notices to warn young children. The parents still had some responsibility for their children's safety.

Latham v. *R. Johnson & Nephew Ltd.* [1913] 1 K.B. 398; *Purkis* v. *Walthamstow Borough Council* (1934) 151 L.T. 30, and *Donovan* v. *Union Cartage Co. Ltd.* [1933] 2 K.B. 71; 49 T.L.R. 125 applied.

Bates v. *Stone Parish Council* [1954] 1 W.L.R. 1249; [1954] 3 All E.R. 38 distinguished.

APPEAL from Pilcher J., sitting at Exeter Assizes.

The plaintiff, David Dyer, a boy, by his next friend, sued the defendants, the Ilfracombe Urban District Council, for damages for personal injuries which, it was alleged, were caused through the defendants' negligence. The council had for some years maintained a recreation ground in which they had placed a chute by which children could ascend steps to a height of 12 feet and then slide down on the other side, where, in the ordinary course, they came safely to rest upon their feet. No accident had happened upon it and no complaint had been made. Prior to the Coronation in 1953 the council decided to increase the number of the recreation grounds within their district, believing it to be in the best interests of the inhabitants and hoping that it would encourage children to go to them rather than to play on the roads and streets. They therefore made two or three more recreation grounds and installed a chute in each of them. Each chute had two lines of rails all the way up the steps and round the platform.

On June 26, 1953, the plaintiff, who was then four and a half years old, fell from the platform of the chute in the Slade Lane recreation ground and broke his arm. He was unaccompanied by an adult. There was no precise evidence of how the accident happened, but it appeared that in some way or other he got to the top of the chute, onto the platform, and climbed or fell between the lower and the upper rail and was seen to fall to the ground.

Pilcher J. held that the defendants had failed in their duty to the plaintiff, who was their licensee, and he awarded £100 damages to the boy and £12 out-of-pocket expenses to his mother.

The defendants appealed.

Neil Lawson Q.C. and *M. D. Van Oss* for the defendants.
Malcolm Wright Q.C. and *Thomas Dewar* for the plaintiff.

Cases cited in argument appear in the judgments.

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Singleton L.J. having stated the facts continued: There was little evidence given on behalf of the plaintiff. The mother of the boy gave evidence, mostly as to the boy's condition and as to his age. She was not asked whether she allowed the boy to go to the recreation ground nearby or whether she had warned him to be careful, or not to use any of the swings or other things provided for entertainment unless he had someone older with him. The boy was not called, and it is that which perhaps makes one say that no one knows precisely what happened. I am not suggesting that he ought to have been sworn of necessity. But if he had been asked he might quite well have been able to say what happened. Suffice it to say that he fell from the platform to the ground and he broke his arm.

On behalf of the defendants there was called only one witness, Mr. Jemmett, the chairman of the council, who said that the members of the council were anxious to increase the number of recreation grounds. I think that he said there had been a petition in regard to those matters, and the council accordingly made more recreation grounds and took advice as to what was the best form of chute for them to have. I suppose that everyone is familiar with a chute, and I suppose that everyone knows the kind of age of those who are meant to use a chute such as the one with which we are dealing: not babes in arms, nor yet grown persons.

The boy appears to have been by himself. There were other boys near by. The witness for the plaintiff, Terence Moss, said that there were other children going up the steps of the chute when the boy Dyer was at the top. But no one saw any jostling or pushing, or anything of that kind. The boy fell for no reason that can be given. There is nothing to show whether he had been up the chute before or not; no information whatever.

Pilcher J. was obviously impressed by some evidence given by Mr. Jemmett, the chairman of the council, who was asked by the judge: "Did it strike you that the accident might have been "caused because the child was too young to play on a thing "like this? (*A*) It struck me perhaps that the child was too young "to be there unaccompanied. (*Q*) But you did not put any "notice about that up? (*A*) No, because obviously the child "could not read it under five years old. (Mr. Dewar): No notice "or regulations of any kind saying: 'Parents are advised not "'to let children under five use this apparatus' were put up? "(*A*) No." Then he was referred to a photograph, and was asked by counsel: "Are you a parent? (*A*) Yes. (*Q*) Would you "let one of your toddlers go there and climb up there without "anybody there? (*A*) What age would you call a toddler? "(*Q*) 4 years. (*A*) My sons have been on there since they were "4. (*Q*) You take the view that you would let your children, "even though you were not there, to climb up there when they "were 4 years of age? (*A*) I said if I were there I would permit "them to do it." Then the judge asked: "Would you allow a

" child of 4 to go and climb on this thing unaccompanied by a " responsible adult? (*A*) No. (*Q*) Why not—because it is not " safe? (*A*) No, I do not agree. (*Q*) Then why? (*A*) Because " they do not appreciate always that the way to approach this " thing is up the steps in a proper manner. (*Q*) They may hurt " themselves? (*A*) They may misuse it. (*Q*) Are you afraid of " a 4-year-old damaging your slide? (*A*) No, I am suggesting " they may misuse it other than as a chute. (*Q*) Because they " may hurt themselves, is that what you say? They are not " going to hurt the chute? (*A*) No. (*Q*) Is it because they may " hurt themselves? (*A*) Yes." The judge, having referred to those answers, said in the course of his judgment: " That " qualification was, I think, added because it had been suggested " that if a child, even of four and a half years, bravely walked " up the steps of the chute, on to the platform and sat down on " the chute, it was unlikely that it would come to any harm, " and with that I wholeheartedly agree. But, unfortunately, " unattended children of four and a half years do not act in that " fashion; they do not perceive the dangers of playing, perhaps " swinging on the little guard rails provided, and it does not " want much of a push or jostle to cause a small body to go " through these rails, as happened in this case. That, no doubt, " is the reason why Mr. Jemmett said what he did. Mr. " Jemmett expressed a view which entirely coincides with my " own." Pilcher J. added: " As I said at an early stage in the " case, whilst this was no doubt a very excellently constructed " chute, the only point in the case was whether any condition " ought to have been applied to the licence regarding the use " of this chute by very small children. I do not propose to lay " down any age below which some conditions should be attached " to the licence granted to children to use this chute, but I am " satisfied that the chute was not safe for the use of an " unattended, small child of the infant plaintiff's age; and in face " of what Mr. Jemmett said in the witness-box, I find it quite " impossible to say that Mr. Jemmett did not appreciate that, " because he quite clearly did."

The judge found that the chute was brought from experienced manufacturers; that it was of excellent design; that it was of a perfectly sound construction, and that it was properly installed. Mr. Malcolm Wright on behalf of the plaintiff added that the judge found that the chute was not safe for an unattended small child, and that the defendants knew that.

A question of law arises which has been discussed in the courts frequently. It is agreed on both sides that the boy who was hurt was a licensee and that he had all the rights of one who was permitted by the defendants to go on their recreation ground. The duty towards a licensee is that the occupier (the defendants in this case) must warn him of any concealed danger or trap of which the occupier knows.

One question for consideration is: Is there a distinction for

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this purpose between the case of a grown licensee and one who is quite young? May there be a danger which is not a concealed danger in the ordinary sense, but which ought to be regarded as a concealed danger if the licensee is of tender years? That question was considered by Devlin J. lately in *Phipps* v. *Rochester Corporation* [1] where the judge reviewed the authorities, and towards the end of his judgment said: "A licensor who "tacitly permits the public to use his land without discriminating "between its members must assume that the public may include "little children. But as a general rule he will have discharged "his duty towards them if the dangers which they may encounter "are only those which are obvious to a guardian or of which he "has given a warning comprehensible by a guardian. To every "general rule there are, of course, exceptions. A licensor "cannot divest himself of the obligation of finding out something "about the sort of people who are availing themselves of his "permission and the sort of use they are making of it. He may "have to take into account the social habits of the neighbour-"hood. No doubt there are places where little children go to "play unaccompanied. If the licensor knows or ought to "anticipate that, he may have to take steps accordingly. But "the responsibility for the safety of little children must rest "primarily upon the parents; it is their duty to see that such "children are not allowed to wander about by themselves, or "at the least to satisfy themselves that the places to which they "do allow their children to go unaccompanied are safe for them "to go to. It would not be socially desirable if parents were, "as a matter of course, able to shift the burden of looking after "their children from their own shoulders to those of persons "who happen to have accessible bits of land. Different con-"siderations may well apply to public parks or to recognized "playing grounds where parents allow their children to go "unaccompanied in the reasonable belief that they are safe." When Mr. Malcolm Wright cited those words of Devlin J., it occurred to me to ask: "How is one to judge whether this is "a case in which the parents allowed the child to go unaccom-"panied in the reasonable belief that he would be safe, if there "was not one question asked of the mother by counsel who "called her or by counsel on the other side, and the boy was "not called?" Whether the mother had given the boy any instructions or whether she had any belief that the place was safe, I do not know. I should think it is quite likely that he had been there regularly since the place was opened, but I do not know.

It has generally been recognised that there are three classes—invitees, licensees and trespassers. Some parts of the judgment of Devlin J. would appear to point to a view that licensees may be divided up into licensees of age and licensees of tender years.

[1] [1955] 1 Q.B. 450, 472; [1955] 1 All E.R. 250.

It does not appear to be necessary to consider that in the present case, for on either view it seems to me that upon the facts the plaintiff ought not to succeed.

A boy four and a half years old who strikes a bigger boy knows what may come to him. A boy of that age knows that if he falls from a height he is likely to hurt himself: he knows that if he falls into deep water he may be drowned. He is old enough to appreciate those things. Children do fall about. Sometimes when one falls he cries. Why? Because he is hurt. He does not like it. That is something which occurs very early in his life. I refer to that because of the expressions in various authorities, to which I shall refer, such as "concealed danger" or "trap." If a boy of that age goes up the steps to a platform at the top of a chute and looks around him, he knows that if he falls he will be hurt. He knew that before he went up. He is old enough to know why the handrails are put there.

A case to which reference is often made is *Latham* v. *R. Johnson & Nephew Ltd.*[2] in which the defendants were owners of a plot of unfenced land from which some houses had been cleared. It was accessible by a path leading from the back of the house in which the plaintiff, a child between two and three years old, lived with her parents. The public were allowed by the defendants to traverse the land, and children of all ages were in the habit of playing upon heaps of sand, stone, and other materials which from time to time were deposited there by the defendants. The plaintiff went upon the land unaccompanied by any older person and was shortly afterwards found upon a heap of paving stones, one of which had fallen upon her hand and injured it. There was no evidence to show how the accident happened. In an action for negligence the jury found that children played upon the land with the knowledge and permission of the defendants; that there was no invitation to the plaintiff to use the land unaccompanied; that the defendants ought to have known that there was a likelihood of children being injured by the stones; and that the defendants did not take reasonable care to prevent children being injured thereby. Upon these findings Scrutton J. held that the case came within *Cooke* v. *Midland Great Western Railway of Ireland*[3] and gave judgment for the plaintiff with damages. On appeal it was held: "that, "there being neither allurement nor trap, nor invitation, nor "dangerous object placed upon the land, the defendants were "not liable," and the judgment was set aside. Farwell L.J. said[4]: "Now the law as to mere licensees is well settled. The "grant of the licence to go on the land creates no right, but "merely affords an answer to a charge of trespass: *Bolch* v. "*Smith*.[5] It is a mere permission, and those who take it must "take it with all chances of meeting with accidents." He

[2] [1913] 1 K.B. 398.
[3] [1909] A.C. 229; 25 T.L.R. 375.
[4] [1913] 1 K.B. 398, 404.
[5] (1862) 7 H. & N. 736.

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added [6]: "I am not aware of any case that imposes any greater "liability on the owner towards children than towards adults: "the exceptions apply to all alike and the adult is as much "entitled to protection as the child. If the child is too young "to understand danger, the licence ought not to be held to "extend to such a child unless accompanied by a competent "guardian." Hamilton L.J. said [7]: "The rule as to licensees, "too, is that they must take the premises as they find them, apart "from concealed sources of danger; where dangers are obvious "they run the risk of them." He added [8]: "Two other terms "must be alluded to—a 'trap' and 'attraction' or 'allurement.' "A trap is a figure of speech, not a formula. It involves the "idea of concealment and surprise of an appearance of safety "under circumstances cloaking a reality of danger. Owners and "occupiers alike expose licensees and visitors to traps on their "premises at their peril, but a trap is a relative term. In the "case of an infant, there are moral as well as physical traps. "There may accordingly be a duty towards infants not merely "not to dig pitfalls for them, but not to lead them into tempta-"tion. . . . Finally, what objects which attract infants to their "hurt are traps even to them? Not all objects with which "children hurt themselves simpliciter. A child can get into "mischief and hurt itself with anything if it is young enough. "In some cases the answer may rest with the jury, but it must "be matter of law to say whether a given object can be a trap "in the double sense of being fascinating and fatal. No strict "answer has been, or perhaps ever will be, given to the question, "but I am convinced that a heap of paving stones in broad "daylight in a private close cannot so combine the properties of "temptation and retribution as to be properly called a trap."

I come to two judgments of Scrutton L.J. The first, in March, 1934, is in *Purkis* v. *Walthamstow Borough Council*.[9] In that case a boy just over the age of twelve years entered a recreation ground provided by the defendant local authority "for "the use of children under twelve years only." He fell off a swing and was injured by the swing in motion hitting him twice before he could get away. In an action against the defendants he was awarded damages for these personal injuries on the ground that there being approximately two hundred children in the recreation ground and but one attendant provided by the defendants, the plaintiff's injuries were the result of lack of adequate supervision on the part of the defendants, and judgment was entered for him. The defendants did not contend that the plaintiff was a trespasser in the recreation ground. On appeal, judgment was entered for the defendants on the ground that the plaintiff's fall from the swing, as appeared from the evidence, was due to his sickness and fainting and that there was no

[6] [1913] 1 K.B. 398, 407.
[7] Ibid. 411.
[8] Ibid. 415, 416.
[9] (1934) 151 L.T. 30.

evidence on which the jury could find that the plaintiff's injuries were due to lack of supervision on the part of the defendants. Scrutton L.J. said [10]: "Taking this view, I do not think it "necessary to essay a complete exposition of the liability of local "authorities who provide recreation grounds, including play-"grounds for children. I have stated to the best of my ability "the grades of variety from trespassers to invitees for payment "in *Hayward* v. *Drury Lane Theatre*,[11] and Hamilton L.J. did "the same in *Latham* v. *Johnson*.[12] It is not easy to decide "in the case of a local authority providing a recreation ground "whether it licenses or invites. It has a power, but not a duty, "to provide, and may regulate by attendants and by-laws. The "cases appear to show that the authority is not liable for the "consequences of dangers obvious to children. It is not liable "if a child, even of four-and-a-half-years tumbles into either "natural or artificial water: see *Hastie* v. *Edinburgh Magis-"trates* [13] and *Stevenson* v. *Glasgow Corporation*.[14] The "authority is liable if it provides 'traps' accessible to children, "such as shrubs with attractive but poisonous berries: *Glasgow "Corporation* v. *Taylor* [15]). It would be liable for defective or "dangerous premises or implements for play. But, in my "opinion, the authority which has provided unobjectionable "structures or implements for play is under no duty to super-"vise their employment, still less to ascertain that each child "using them is physically fit to stand a swinging or revolving "motion."

In *Liddle* v. *Yorkshire* (*North Riding*) *County Council*,[16] a case in which a little boy fell off a wall, he having got upon the wall by means of a heap of stones which the defendants, the local authority, had put there, Scrutton L.J. said [17]: "In my opinion, "to make the landowner liable for injury to a child on his land, "it must be proved that he expressly or impliedly invited "children on to his land, and either did an act which caused "damage with knowledge that it might injure the children, or "knowingly permitted the existence on his land of a hidden "danger or trap. The invitation might be implied from know-"ledge that children frequented the land without interference. "For obvious dangers, such as unguarded water, natural or "artificial, he will not be liable."

I see no distinction in principle between the case of the chute in the recreation ground and an artificial lake or water in a recreation ground. Neither can properly be regarded as a concealed danger to a boy four and a half years old.

Again, *Donovan* v. *Union Cartage Co. Ltd.*,[18] shows the view of the Divisional Court, consisting of Acton J. and Talbot J., on

[10] Ibid. 32.
[11] [1917] 2 K.B. 899; 33 T.L.R. 557.
[12] [1913] 1 K.B. 398.
[13] 1907 S.C. 1102.
[14] 1908 S.C. 1034.
[15] [1922] 1 A.C. 44; 38 T.L.R. 102.
[16] [1934] 2 K.B. 101; 50 T.L.R. 377.
[17] [1934] 2 K.B. 112.
[18] [1933] 2 K.B. 71; 49 T.L.R. 125.

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the case of the unhorsed van belonging to the defendants left by them unattended in a public street outside their premises. The younger plaintiff, an infant, aged seven years, while playing in the street with other children, climbed on to the van, fell and was injured. It was held "that the defendants, the owners of "the van, were not liable, because (1) there was no inherent "danger in a sound, stationary and immobile vehicle, left "unattended in the street." Acton J. said [19]: "There is, how-"ever, a distinction between these cases and the present case, "which, in our opinion, is a valid distinction, and, as indicated "by Lord Atkinson, it is supported by authority. The cases in "which it has been held that liability arises appear to have one "common feature—namely, that the object left unattended and "accessible to children, and likely to be an allurement to them, "possessed some attribute which rendered it dangerous in itself, "and it was in consequence of its possession of this attribute "that the accident happened and the injury ensued. It may be "that the object is dangerous through being actually in motion, "or liable to be easily set in motion, or poisonous or deleterious "to eat or handle, or explosive, or so defective in some way as to "be inherently dangerous. There is, in our judgment, no such "element of inherent danger in a sound, stationary and immobile "vehicle, such as the van in the present case. To extend the "principle of *Lynch* v. *Nurdin* [20] to things in no way dangerous "in themselves, left unattended in a street (or in other places "open to the public, such as parks, pleasure grounds, or open "spaces), would be to impose burdens of responsibility so far-"reaching and incalculable as to be unreasonable and intolerable. "It cannot be said that, even if such things are likely to attract "children, there is in them anything in the nature of a trap or a "concealed peril." In that case the infant was able to climb up on to an unattended van left in the street. I suppose that some-one might have said that he did not appreciate that it was dangerous. True, he was seven years old. But it is the measure of duty stated by Acton J. to which I refer. The principles stated in that case cover the case before this court.

More recently, there has been *Bates* v. *Stone Parish Council*,[21] on which the plaintiff's counsel places great reliance. It is right that I should read the headnote (in the Law Reports) to make clear the facts of that case. "The plaintiff, then three "and a half years of age, was permitted by his mother to go to "the children's playground in a recreation ground provided by "the local parish council, accompanied only by another child of "six years. In the playground was provided a chute or slide, "the use of which necessitated ascending stairs to a platform "which was about 12 feet from the ground. After making "several descents with the other child the plaintiff went up by "himself and while sitting on the platform fell through a space

[19] [1933] 2 K.B. 74.
[20] (1841) 1 Q.B. 29.
[21] [1954] 1 W.L.R. 1249; [1954] 3 All E.R. 38.

" some 13½ inches square between the upright and horizontal " rails on the side of the platform, suffering injuries which " resulted in permanent blindness. Some thirteen years pre- " viously a boy of four years had fallen from the platform when " the rails were in the same condition. Additional rails had then " been added as a measure of safety, but in the interval the " additional rails had either rusted or broken away and had not " been replaced. At the trial of the action the jury found that " the plaintiff was a licensee and that the council, having know- " ledge of the danger, was liable. They awarded the plaintiff " £17,500 damages. On appeal the council contended that the " licence to use the playground did not apply to very young " children unless accompanied by a competent guardian; that " the plaintiff was in the circumstances a trespasser and the " council was not liable. *Held*, that although, in certain circum- " stances, a licence to young children to enter on property on " which there is a source of potential danger is assumed to be " conditional on their being accompanied by a competent guar- " dian, in the present case it was clear from the council's own " evidence that no restriction had been placed on the admission " to the playground of children, however young and whether " accompanied or not; that the plaintiff entered the playground " as a licensee and did not become a trespasser when he went on " to the chute; and that the council knowing of the dangerous " quality of the aperture through which the plaintiff fell were " liable in damages." There were a number of questions put to the jury in order to ascertain first whether the boy was a licensee or a trespasser. Upon the jury's answers it was clear that he was to be treated as a licensee. Much of the discussion in the Court of Appeal was on that subject, coupled with the fact that there had been a previous accident upon the same chute after which the parish council had put up new rails which in turn came into disrepair before the accident to the plaintiff. And it was contended that the direction given to the jury by Cassels J. was faulty. The appeal failed, except as to the amount of damages. It is interesting to notice question No. 6 and the answer thereto. It was: " If the answers to 4 and 5 [whether " the slide was dangerous equipment and whether the plaintiff " was allured by it] are ' Yes,' was the slide a danger to the " infant plaintiff which he would not appreciate? " and the jury answered " Yes." It does not appear that the question " Was " this a concealed danger or trap? " was put. Nor does it appear from the report that that question was argued. The arguments of counsel are not set out. The boy Bates was only three and a half years old. The judgments deal chiefly with the question of the alleged misdirection, but Romer L.J. said [22]: " On the question of liability I only desire to say in conclusion

[22] [1954] 1 W.L.R. 1264.

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" that had it not been for the accident in 1934 and the defendants' knowledge, or presumed knowledge of it, the plaintiff " would, in my judgment, have had no ground of action. The " evidence shows that the possibility of an accident happening " such as that which unfortunately did occur would not have " presented itself to the mind of any reasonably prudent person " who was unaware of the previous mishap. And it would, in " the long run, be disadvantageous in the extreme to the public " and to children in general if such a person, or body " of persons, were to be held liable for an accident of so " improbable and unforeseeable a nature as that which befell " the plaintiff; for the prospect of being sued for heavy " damages (insurable, perhaps, but only at considerable cost) " would in all probability result in the disappearance altogether of amenities which many local authorities and private " persons voluntarily provide for the entertainment and amusement of children. 'It is impossible,' said Farwell L.J. in " *Latham's* case.[23] ' to hold the defendants liable unless we are " ' prepared to say that they are bound to employ a ground- " ' keeper to look after the safety of their licensees, and the " ' result of such a finding would be disastrous, for it would " ' drive all landowners to discontinue the kindly treatment so " ' largely extended to children and others all over the country.' " Romer L.J. added: " That which the Lord Justice envisaged " as disastrous in 1913 would at least be equally so to-day when " the dangers of the streets, which in many cases would become " the substitutes for playgrounds, considerably exceed such perils " as exist in chutes and swings." I agree with the Lord Justice.

More and more as the years go on local authorities are encouraged to extend recreational facilities and amenities, and they do so. It is in the interest of the people. In the ordinary case of a small recreation ground such as this it is not their duty to provide a groundsman or keeper. If they did, they would have to provide two or three in the summer, for daylight lasts a long time. Nor do I think it is their duty to put up notices: " Children under " five "—or whatever the age may be—" not permitted upon the " chutes or swings." If they did so children would not take much notice, and if an accident happened it would be said: " What is the good of their putting up notices unless you see " that they are observed? " Nor is it the duty of the local authority to provide nurses for young children who go to recreation grounds. The parents of young children still have some responsibility.

There was no trap. There was no concealed danger. There was nothing which was not obvious to a child four and a half years old. My view of this case is that the danger (if that is the correct term) was the ordinary danger which is present to the mind of anyone if he or she climbs to a height. For these

[23] [1913] 1 K.B. 398.

reasons, it appears to me that the appeal should be allowed, and that the judgment of Pilcher J. should be set aside.

JENKINS L.J. I agree, and there is very little I can usefully add, but I might perhaps cite some passages from *Sutton* v. *Bootle Corporation*,[24] to which the judge referred in his judgment. That was a case of a girl of nine years of age who was injured in a children's playground while endeavouring to stop a swing. She was dragged off her legs and in attempting to save herself sustained an injury to one of her fingers. Stable J. held that the finger was caught and crushed between the unguarded lug and socket of a checking device designed to prevent the swing from going too far. The swing had been supplied to the corporation by a firm of repute who had supplied a very large number of such appliances all over the country and in connection with which no similar accident had happened. The corporation had no knowledge of the alleged defect in the swing. The judge decided in favour of the plaintiff and awarded her damages, but on appeal to this court it was held that the defendant corporation owed the plaintiff only the obligation of a licensor to a licensee; that as licensors they were under a duty to do no more than warn the plaintiff of dangers actually known to them; and that as they had no knowledge of any danger they were under no liability. The basis of the judge's decision appears from this passage in the Law Reports.[25] "He"—that is the judge—"held that the plaintiff was a licensee, and that the defendants "had no knowledge of the danger, but on the ground that it "was the duty of a local authority which provided implements "for children to play with in a public recreation ground main-"tained by them, to provide safe and proper implements so far "as care and skill could do so, he awarded the plaintiff damages." He was thus placing visitors to a recreation ground such as the ground in the present case in a better position, and the occupiers of such a ground in a more onerous position, than that ordinarily obtaining as between licensor and licensee. On appeal to this court that view was held to be erroneous, and the appeal was allowed. Asquith L.J. discussed the law at considerable length and said[26]: "The suggestion that persons entering on publicly "or municipally-owned parks or recreation grounds enjoy a "special privileged status superior to that of licensees would seem "to be ill founded. Text-book authority is opposed to the exist-"ence of such a separate class. (See Salmond on Torts, 10th ed., "pp. 485–487, Winfield, 2nd ed., pp. 616–620.) As to the "authorities, *Robert Addie & Sons (Collieries)* v. *Dumbreck*[27] "appears to decide that persons entering on premises in the "occupation of others (otherwise than under a contract) are "classifiable exhaustively as either trespassers, licensees, or

[24] [1947] K.B. 359; [1947] 1 All E.R. 92.
[25] [1947] K.B. 359, 360.
[26] Ibid. 366.
[27] [1929] A.C. 358; 45 T.L.R. 267.

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"invitees, and that there are no intermediate or hybrid classes, "such as that envisaged by Maugham L.J., as he then was, in "*Purkis* v. *Walthamstow Borough Council*.[28] *Coates* v. *Raw-* "*tenstall Corporation*[29] is a direct decision of this court that a "municipal authority owning or occupying a recreation ground— "in that case as in this, supplying thereon swings for children— "is a licensor and not an invitor. I know of no decision of the "Court of Appeal deciding the contrary." Later in his judgment, Asquith L.J. went on to consider a further ground on which it was alleged that the duty owed by the corporation in that case to the plaintiff was higher than that owed by a licensor to a licensee. He said[30]: "Before, however, passing to the issue of "knowledge . . . I must briefly deal with the issue raised by "the word 'allurement'—the other factor relied on as raising the "obligations of the defendants to a higher level than that of "licensors. The presence of this element, which is of course "only relevant when the entrant on the defendant's premises is "a child, would seem, where it exists, to affect the occupier's "duty to this extent, that a danger which is patent to an adult "may not be apparent to a child; to a child it may be a concealed "trap; accordingly that a warning or other preventive measure "may be called for in the case of a child, when it would not be "called for in the case of an adult, or a warning of a more "emphatic or coercive character than would suffice in the case "of an adult. What objects are and what are not in law "'allurements'? An exhaustive catalogue has not been laid "down. Turntables, escalators and paddling pools have been "held to 'allure.' Rivers, ponds and piles of paving stones have "been held 'insufficiently seductive.'" Then he goes on: "Clerk and Lindsell on Torts, 10th ed., pp. 545–546, place "*swings* in the unalluring class, citing as authority *Ellis* v. "*Fulham Borough Council*.[31] If this classification is right it "disposes of this branch of the argument. But I doubt if the "case goes so far. If a swing or this swing is an allurement it "is sufficient to say that no case would appear to exist in which "a plaintiff relying on allurement has succeeded, save where "there was actual knowledge by the defendants that the alluring "object was dangerous." After some further citations, he concludes that part of his judgment: "It would seem, then, that "the plaintiff was a mere licensee."

Accordingly, as it seems to me, the present case resolves itself into this. Was there a trap or concealed danger in this chute and if so was it known to the defendant council? Even if it would be right to treat the chute as an allurement, and accordingly judge from the standpoint of a child the question whether any danger there may have been was in the nature of a trap or concealed danger, in my view, any such danger in order to be

[28] (1934) 151 L.T. 30.
[29] (1937) 157 L.T. 415; [1937] 3 All E.R. 602.
[30] [1947] K.B. 359; 368.
[31] [1938] 1 K.B. 212; 53 T.L.R. 884; [1937] 3 All E.R. 454.

relevant here must be a danger of the kind referred to in the passage quoted by my Lord from the judgment of Acton J. in *Donovan* v. *Union Cartage Co., Ltd.*[32] In that passage the judge said: "The cases in which it has been held that liability "arises appear to have one common feature—namely, that the "object left unattended and accessible to children, and likely to "be an allurement to them, possessed some attribute which "rendered it dangerous in itself, and it was in consequence of "its possession of the attribute that the accident happened and "the injury ensued. It may be that the object is dangerous "through being actually in motion, or liable to be easily set in "motion, or poisonous or deleterious to eat or handle, or "explosive, or so defective in some way as to be inherently "dangerous. There is, in our judgment, no such element of "inherent danger in a sound, stationary and immobile vehicle." Similarly, it can be said here that there was no such element of inherent danger in a sound, stationary and immobile chute such as the chute installed by the council in the present case. There was, however, the possibility, as events proved, that some small child using this chute might in some way or other climb over or get through the railings and fall from the platform at the top of the chute. There was that possibility, and that, I suppose, might be looked on as a danger inherent in the design of the railings. But there is no ground, in my view, for holding that the council knew of that danger, that is to say, appreciated the possibility that some child would do that. There was, of course, an obvious danger in the general sense that anyone who has attained a height may somehow or other fall from it, but that was not an element of inherent danger due to any defect in the chute; it was simply a quality possessed in common by every building or erection or piece of apparatus which enables a person to climb to a height above the ground.

As to the actual danger, if it can be so called, which brought about the accident, that, as I have said, was a danger knowledge of which cannot in my view fairly be brought home to the council. Perhaps I might make yet another citation from the judgment of Asquith L.J. in *Sutton* v. *Bootle Corporation*. He said this about the swing which was then in question[33]: "Having regard "to its construction and working, the occurrence of an accident "to a small child with a very limited reach was in my view "extremely unlikely and there were ample materials on which "to base a finding that neither through the attendant nor other-"wise can knowledge of its dangerous character—if indeed it can "be held to have possessed any—be properly imputed to the "defendants." It seems to me equally here it would, on the face of it, be so extremely unlikely a happening that a child should get through between the top and the second bars of the railings on the platform and so fall to the ground that one cannot

[32] [1933] 2 K.B. 71, 74.

[33] [1947] K.B. 359, 369.

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fairly impute to the council knowledge of this risk in advance of the event.

Accordingly I am of opinion that this appeal should be allowed on the ground that when the relationship of licensor and licensee is applied in this case there has been no breach of duty on the part of the licensor council, because if there was anything in this chute amounting to a trap or concealed danger vis-à-vis the infant plaintiff it was not a trap or concealed danger of which the council can be held to have known; and, consequently, there was no danger of which they were under any duty to give warning to the infant plaintiff.

It is satisfactory that the result at which we have arrived accords, as I think, with the substantial justice of the case. It will be remembered that the judge found that the chute was acquired from reputable manufacturers, that it was of excellent design and sound construction, and had been properly installed. In other words, the defendant council, as it seems to me, had done all they could reasonably be expected to do to ensure that this piece of apparatus would be suitable and safe for children to use; and the unfortunate accident which occurred was certainly not due to anything which could reasonably be described as a dereliction of duty on their part. Accordingly, I agree that this appeal should be allowed.

Parker L.J. I so entirely agree with what my Lords have said that I can express my views very shortly.

The duty of an occupier of land to a licensee applies equally to children as to adults, and the occupier will not be liable for the consequences of dangers, in the case of adults obvious to the adults, and, in the case of children, obvious to the children. But the scope of the duty in the case of children is wider because what may not be an unusual danger or trap to an adult may be one to a child. And, again, a warning of the danger in question may be insufficient if the child were too young to take advantage of the warning. But this wider duty exists only when there is something on the premises, or in the present case in the implement provided, which amounts to a hidden danger or a trap, or where the implement is an allurement in the sense in which that word is used. Quite clearly, this implement—this chute—was an allurement in the sense that it was attractive to children and indeed was there for the use of children. But the fact that a child using it might injure itself does not make it an allurement in the sense in which that word is used. A child may hurt itself on anything.

Adopting the test laid down by Acton J. in *Donovan* v. *Union Cartage Co. Ltd.*[34] (to which my Lords have referred), I cannot persuade myself that this chute was an allurement in the sense that it was inherently dangerous, any more than was the van in that case.

[34] [1933] 2 K.B. 71.

I would only add this. The judge was clearly very much influenced by the evidence given by Mr. Jemmett, the chairman of the council, where he said that he would not allow his own child of four to play on this chute unaccompanied by a responsible adult, and when asked why, he said: "Because the child might "hurt himself." The judge, after referring to that, said: "That "no doubt is the reason why Mr. Jemmett said what he did. "Mr. Jemmett expressed a view which entirely coincides with "my own." Be it observed, Mr. Jemmett, in giving that evidence, was giving evidence as a reasonably prudent parent; not as an occupier of land. It may well be that the reasonably prudent parent would insist on the child being accompanied by an adult, not because there was any concealed danger, not because the danger was not obvious, but because the danger though obvious was not such as the child was old enough to protect himself against. That, as it seems to me, is not the consideration of the licensor, though it may well be the consideration and no doubt is the consideration of the reasonably prudent parent. Accordingly, for these and for the reasons given by my Lords, I would allow this appeal.

Appeal allowed.

Solicitors: *William Charles Crocker, for Bazeley, Barnes & Bazeley, Bideford; Gibson & Weldon, for S. A. Copp & Son, Barnstaple.*

A. W. G.

NOTE.

[QUEEN'S BENCH DIVISION.]

* DAVIE *v.* NEW MERTON BOARD MILLS LTD.

1956
Jan. 17.
Havers J.

Practice and Procedure—Pleadings—Negligence—Defence—Act of third party—Plaintiff injured by defective tool—Proposed defence that tool supplied by reputable firm—Defence to be pleaded—R.S.C. Ord. 19, *rr.* 4, 15.

ACTION.

The plaintiff, James Gibson Davie, who was employed by the defendants, was injured while using a drift and hammer when a splinter flew off from the drift and entered his left eye. By his statement of claim the plaintiff alleged that the accident was due to the negligence of the defendants in failing to supply him with a drift which could be hammered safely without the risk of pieces flying off. By their defence the defendants denied all the allegations of negligence in the statement of claim. During the opening of the plaintiff's case, counsel for the defendants indicated that the defendants would call evidence to show that the drift was bought by them from a firm of reputable manufacturers and

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that therefore the defendants were not negligent. Counsel for the plaintiff contended that he was taken by surprise because no indication had been given on discovery that the drift had been manufactured by persons other than the defendants.

Martin Jukes Q.C. and *M. J. Morris* for the plaintiff.
H. Tudor Evans for the defendants.

Tudor Evans. The defendants when setting up a defence of this sort are not obliged to say to the plaintiff, in addition to denying negligence, that the appliance or plant in question was purchased from some third party. The allegation which is set out in the statement of claim is that the particular tool was unsuitable in the respects there set out. Those are denied. The defendants do not have to go further and indicate, what is really a matter of evidence, that the drift was purchased from some third party. It is open to the defendants to say: "We were not "negligent, because as a matter of evidence we did not make the "thing. We bought it from a reputable supplier with whom we "have dealt for many years."

[Havers J. That leaves the plaintiff in a very unfortunate position, because supposing you succeeded on that defence he has had no opportunity of joining any other person.]

Tudor Evans. Where a defendant is charged with negligence it must be sufficient if he simply denies the negligence and denies each of the allegations of negligence which are set against him in the statement of claim.

[Havers J. When it is a denial of a failure to provide a suitable drift, what does your denial mean exactly?]

Tudor Evans. If you have a case of plant provided for the use of a workman where the plant has some latent defect not discoverable on reasonable examination, that is a matter which the defendants are obliged specifically to plead. But I know of no authority where it has been held that, where a denial of negligence involves the assertion that there may or may not have been negligence on the part of a third party, one is obliged positively to aver that in one's defence.

[Havers J. There may be a great deal of time wasted and money spent on the issue whether or not this is a suitable drift, whereas in fact your case may be: "It is not a suitable drift, "but I bought it from reputable suppliers."]

Tudor Evans. That is my defence. It often happens, particularly under the new R.S.C. Ord. 30, that the plaintiff serves a notice on the defendants to admit facts. One way in which

this matter could have been settled was for the plaintiff to have delivered such a notice to the defendants and ask them to admit that the drift was manufactured by us.

Martin Jukes Q.C. This is a genuine surprise. If the defendants are going to rely on a set of facts which excuse their prima facie liability, they must plead it. It is in the nature of a confession and avoidance. We still do not know who is supposed to have supplied this particular drift. The makers ought to be here. I shall have to object at the appropriate stage to any evidence being adduced to suggest that this was made by any firm outside the defendants themselves. It would be unfair to the plaintiff to go on and perhaps lose his case, if one view of the law is that the defendants escape if they bought the drift from a reputable manufacturer, pay all the costs and then have to sue the manufacturers. He would have two actions and two sets of costs, one of which he would have to pay himself.

[HAVERS J. This raises an important point on pleadings in cases of this kind. The defendants had better put into writing the proposition upon which they are going to rely. Then I may have to rule whether or not it is open to them to raise that on their pleadings.]

Tudor Evans. The proposition is: That the defendants purchased the drift from a reputable supplier and were not negligent in failing to subject the drift to any test or examination before it was put into use.

[HAVERS J. I find that very difficult to extract from your pleading, because it leaves it open for you to say: "We did not "fail to provide you with a suitable drift." R.S.C. Ord. 19, r. 4, provides: "Pleading to state material facts and not evidence. "Every pleading shall contain, and contain only, a statement "in a summary form of the material facts on which the party "pleading relies for his claim or defence, as the case may be." Under the notes to that rule there appears this passage: "All "material facts. The general rule is thus stated by Cotton L.J. "in *Philipps* v. *Philipps* [1]:—'In my opinion it is absolutely "'essential that the pleading, not to be embarrassing to the "'defendants, should state those facts which will put the defen-"'dants on their guard, and tell them what they have to meet "'when the case comes on for trial.'"

R.S.C. Ord. 19, r. 15, provides: "The defendant or plaintiff "(as the case may be) must raise by his pleading all matters "which show the action or counterclaim not to be maintainable, "or that the transaction is either void or voidable in point of "law, and all such grounds of defence or reply, as the case may

[1] (1878) 4 Q.B.D. 127, 139.

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"be, as if not raised would be likely to take the opposite party "by surprise, or would raise issues of fact not arising out of the "preceding pleadings, as, for instance, fraud, Statute of Limita- "tions, release, payment, performance, facts showing illegality "either by statute or common law, or Statute of Frauds." The notes to Order 19, r. 15, say: "The office of a traverse is to "contradict, not to excuse or justify, the act complained of; its "object is to compel the plaintiff to prove the truth of the "allegation traversed, not to dispute its sufficiency in point of "law. All matters justifying or excusing the act complained of "must be specially and separately pleaded. . . . And no "evidence of such matters can, as a rule, be given at the trial "if they be not expressly pleaded."]

Tudor Evans. I would submit that it is sufficient that the defendants deny the negligence. If your Lordship rules against me on that, then I must apply for leave to amend.

Havers J. I feel bound to rule against you, basing myself on the orders to which I have referred and the notes. I think this clearly takes the plaintiff by surprise. I shall give leave to amend. The defendants to deliver their amended defence within ten days from today. The conditions of the leave will be that the defendants pay the costs of and occasioned by the amendment, including the costs thrown away today.

Solicitors: *W. H. Thompson; E. P. Rugg & Co.*

J. D. P.

[court of criminal appeal.]

C. C. A.

1956
Feb. 13.

* REGINA *v.* DEVINE.

Practice Note.

Lord Goddard C.J., Hilbery and Byrne JJ.

Criminal Law—Probation order—Breach—Charge of—Procedure on arraignment — Desirability of putting breach to defendant and asking if facts admitted.

Application for leave to appeal.

The applicant, James Devine, was convicted at Portsmouth Quarter Sessions of larceny in a dwelling-house and was sentenced to eight years' preventive detention. He applied for leave to appeal against sentence.

The applicant did not appear and was not represented.

Byrne J. There is nothing in this application for leave to appeal against sentence, and it is dismissed; but the court desires

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notice to be taken with regard to a point of procedure which it has observed as the result of considering this case, and it is this: Where a defendant is brought before a court for breach of a probation order, when he is arraigned before the court the breach should be put to him in the clearest possible terms and he should be asked to say whether he admits it or not. The way in which it should be put to him is as follows: he should be told the court at which he was convicted; the offence of which he was convicted and the terms of the probation order. He should then be told the grounds upon which it is alleged that he has broken the terms of the probation order. If the order has been broken by the commission of a further offence, he should be told the court at which he appeared, the offence with which he was charged and the adjudication of the court. If he admits the matters put to him, the court can then proceed to deal with him. If he denies those matters they must be proved and it being a trial albeit without a jury the defendant must be asked if he desires to give evidence and call witnesses. After all the evidence has been heard the court must pronounce whether it finds the breach proved. It is, therefore, desirable that the proceedings should begin by the matter being put clearly to the defendant and for him to be asked whether he admits the allegation.

J. F. L.

[CHANCERY DIVISION.]

* GOVERNMENTS STOCK AND OTHER SECURITIES INVESTMENT CO. LTD. *v.* CHRISTOPHER AND OTHERS.

1955
Nov. 29, 30; *Dec.* 1, 2, 6, 7, 9.

Wynn-Parry J.

[1955 G. 2643.]

Company—Amalgamation—Scheme for acquisition of shares by transferee company—Proposed merger of two shipping companies—Circular containing offer by new company to acquire shareholdings and stockholdings of both companies and issue its own shares in exchange—"Form of application and transfer" sent with circular—Whether circular a "prospectus"—Meaning of "subscription"—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 37, 38 (3), 55 (2), 455 (1).

Company—Prospectus.

By a circular dated November 12, 1955, and issued by the British and Commonwealth Shipping Co. Ltd. (hereinafter called "the "new company") the new company offered to acquire the whole of each class of preference and ordinary shares and stock in the issued capitals of the Union-Castle Mail Steamship Co. Ltd. (hereinafter called "Union-Castle") and the Clan Line Steamers, Ltd. (hereinafter called "Clan") and to issue its own shares in exchange therefor. The circular was sent to all members of Union-Castle and of Clan together with a form headed "Form "of acceptance and transfer." The offer was expressed to be conditional on acceptance on or before December 30, 1955, or such later

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date, not after February 29, 1956, as the new company might allow, by the holders of not less than 90 per cent. of every class of issued capital of Clan and of Union-Castle, or such less percentage, in the case of any such class or classes, as the new company might elect to accept, and on permission to deal and to quote being granted by the council of the Stock Exchange before the dispatch of letters of allotment. The plaintiff company contended (inter alia) that the circular was a "prospectus" to which section 38 [1] of the Companies Act, 1948, applied, and that as such it did not comply with the requirements of the Act:—

Held, (1) that a "prospectus" within the meaning of section 38 (3) was a document as defined in section 455 (1).

(2) That the circular did not involve an offer (i) for the purchase of shares, the shares in question being the unissued shares of the new company, and, as such, not the subject-matter of such an offer;

In re V. G. M. Holdings Ltd. [1942] Ch. 235; 58 T.L.R. 131; [1942] 1 All E.R. 224 applied;

or (ii) for the subscription of shares, which expression meant taking or agreeing to take shares for cash;

Arnison v. *Smith* (1889) 41 Ch.D. 348; 5 T.L.R. 413; *Chicago Railway Terminal Elevator Co.* v. *Inland Revenue Commissioners*

[1] Companies Act, 1948, s. 37: "A prospectus issued by or on behalf of a company or in relation to an intended company shall be dated, and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus."

Section 38 (3): "Subject to the provisions of the next following section, it shall not be lawful to issue any form of application for shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of this section: Provided that this subsection shall not apply if it is shown that the form of application was issued either—(*a*) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or (*b*) in relation to shares or debentures which were not offered to the public. . . ."

Section 55 (1): "Any reference in this Act to offering shares or debentures to the public shall, subject to any provision to the contrary contained therein, be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner, and references in this Act or in a company's articles to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be similarly construed."

(2) "The foregoing subsection shall not be taken as requiring any offer or invitation to be treated as made to the public if it can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a domestic concern of the persons making and receiving it, and in particular—(*a*) a provision in a company's articles prohibiting invitations to the public to subscribe for shares or debentures shall not be taken as prohibiting the making to members or debenture holders of an invitation which can properly be regarded as aforesaid; and (*b*) the provisions of this Act relating to private companies shall be construed accordingly."

Section 455 (1): "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say) . . . 'prospectus' means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company. . . ."

(1896) 75 L.T. 157 and *Brown* v. *Inland Revenue Commissioners* (1900) 84 L.T. 71; 17 T.L.R. 177 applied.

(3) Further, that the circular was not an offer of shares "to "the public," as the offer could be accepted only by the shareholders of Union-Castle or Clan, the case falling within section 55 (2).

(4) Further, that the "form of acceptance and transfer" issued with the circular was not a "form of application for "shares" within the meaning of section 38 (3), but an acceptance of the offer of the new company and of the shares therein, and a transfer of the existing shareholding to the new company.

MOTION.

The plaintiff company, on behalf of itself and other shareholders and stockholders of Union-Castle, moved for an injunction against seven directors of Union-Castle and against Union-Castle. The motion arose out of the proposed merger between Union-Castle and Clan and sought, in effect, to restrain the carrying out of a scheme proposed by the directors of Union-Castle for the acquisition by the new company of the shares and stock in the issued capital of Union-Castle and Clan, in the terms of a circular dated November 12, 1955, and approved and recommended by Union-Castle. The circular was sent to all members of Union-Castle and of Clan, together with a form headed "Form "of acceptance and transfer."

Union-Castle was an independent company, its constitution providing that it should be a cardinal principle that it should remain in British control, and there being a number of safeguards to ensure that that should be so. The plaintiff company contended that the offer made no reference to that cardinal principle and that the provisions dealing with the preservation of British control and contained in the proposed articles of the new company were illusory.

By this motion, the plaintiff company asked (1) that the directors of Union-Castle be restrained until trial or further order from accepting or registering any transfer of shares of stock in Union-Castle to the new company or its assignees; (2) that the directors and Union-Castle be likewise restrained from (a) taking any step to effectuate the arrangements set out in the circular or those set out in the accompanying form; (b) issuing or distributing any further copies of the circular or the form or from acting as directors of the new company or from being concerned in any allotment of shares therein pursuant to the arrangements, or any of them, embodied in the form or circular; (c) making or undertaking to make out of Union-Castle's funds any payment in or towards the costs or expenses of or incidental to the promotion formation and registration of the new company or giving any financial assistance for the purpose of or in connexion with any purchase to be made of shares or stock in Union-Castle pursuant to the arrangements, or continuing to act agent for the new company for the purpose of or in connexion with any such purchase; (d) disclosing to the

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new company or to Clan or to any company for the time being a subsidiary of Clan or to respective directors, servants or agents any information relating to Union-Castle's affairs for the purpose of or in connexion with any offer by the new company or any other company, firm or person for the purchase of shares or stock in Union-Castle; (e) parting with any of Union-Castle's property to the new company or to Clan or to any company for the time being a subsidiary of Clan; (3) for such further or other order as to the court should seem fit.

J. B. Lindon Q.C. and *K. B. Suenson-Taylor* for the plaintiff company.

Sir Andrew Clark Q.C. and *Michael M. Wheeler* for the defendant directors.

Peter Foster for Union-Castle.

The following cases; besides those referred to in the judgment, were cited in argument: *In re Kent County Gas Light and Coke Co. Ltd., Ex parte Brown* [2]; *With* v. *O'Flanagan* [3]; *In re South of England Natural Gas and Petroleum Co.* [4]

Cur. adv. vult.

1955. Dec. 9. Wynn-Parry J. This is a motion for interlocutory relief by way of injunction in an action brought by the plaintiff company on behalf of itself and all other shareholders and stockholders of Union-Castle other than the seven individual defendants who are the present directors of Union-Castle and other than Union-Castle itself. In substance what the plaintiff company seeks is a series of injunctions to prevent the defendants from taking any further step of any kind in connexion with an offer in writing dated November 12, 1955, made by the new company, to acquire the whole of each class of preference and ordinary shares and stock in the issued capitals of Union-Castle and Clan in exchange for preference and ordinary shares in the new company as set out in the circular. The offer is expressed to be conditional in these terms: "This offer is conditional upon "(i) acceptance on or before Friday, December 30, 1955, or "such later date if any (not being after February 29, 1954) as "the new company may allow, by the holders of not less than "90 per cent. of every class of issued capital of Clan and of "Union-Castle, or such less percentage in the case of any such "class or classes as the new company may elect to accept, and "(ii) permission to deal and quotation being granted by the "Council of The Stock Exchange, London, prior to the despatch "of letters of allotment."

I am not concerned on this motion with the merits or demerits of the terms of the offer from the point of view of the holders

[2] (1906) 95 L.T. 756.

[3] [1936] Ch. 575; [1936] 1 All E.R. 727.

[4] [1911] 1 Ch. 573.

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of shares and stock in Union-Castle. That is primarily a matter for each shareholder to consider for himself, but I am asked to intervene in this action upon a variety of grounds, which I shall proceed to examine.

[Dealing with the allegation that the provisions in the proposed articles of the new company directed to the preservation of British control were illusory, his Lordship considered the circular, the articles of Union-Castle and the proposed articles of the new company, and continued:]

If, as I hold to be the case, the safeguards in the case of the new company are as effective as in the case of Union-Castle, the risk cannot be greater in one than in the other. I therefore conclude that the plaintiff company fails to show that I ought to intervene on the ground that the safeguards for the preservation of British control of the new company are illusory.

The plaintiff company then attacked the circular, alleging that it contained representations which are misleading, and omissions which had the effect of making what was stated misleading. I should say at once that Mr. Lindon for the plaintiff company, expressly disclaimed any suggestion that the individual defendants were acting otherwise than perfectly bona fide throughout the matter. I think that in order to understand and consider the attacks which the plaintiff company makes on the circular, I should first consider its nature. It is alleged by the plaintiff company that it is a prospectus to which section 38 of the Companies Act, 1948, applies, and that as such it does not comply with the requirements of that Act. It is not disputed that if it is such a prospectus, it does in fact fail to comply with the requirements of the Act.

The word "prospectus" is defined in section 455 of the Companies Act, 1948. Subsection (1) of this section opens with the words: "In this Act, unless the context otherwise requires, "the following expressions have the meanings hereby assigned "to them (that is to say) . . . 'prospectus' means any "prospectus, notice, circular, advertisement, or other invitation, "offering to the public for subscription or purchase any shares "or debentures of a company. . . ." It is argued that "pros-"pectus" in section 38 of the Companies Act, 1948, has a wider meaning than in section 455, the reason put forward being that in subsection (3) reference is made to the issue of "A form of "application", and that there being nothing in the subsection to limit the issue of the form of application to an allotment and issue for cash, it must apply where the consideration is a consideration other than cash. This, it is said, constitutes a context requiring the word "prospectus" to cover documents not included in the definition in section 455. I do not accept this view. Section 38 follows section 37, which appears under the heading "prospectus." There is no ground whatsoever for giving the word "prospectus" in section 37 any more extended meaning than it has in section 455, and it would be strange if

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in the very next section "prospectus" were to be found to have a wider meaning. I can see no need to attribute any other meaning to "prospectus" in section 38 than that given in section 455. The reference in subsection (3) to a form of application means only a form of application in connexion with a prospectus offering shares for subscription or purchase.

It is clear that the circular does not involve an offer for the purchase of any shares. The shares in question are unissued shares of the new company, so they cannot be the subject of an offer for purchase (see *In re V.G.M. Holdings Ltd.*[1]).

It becomes necessary, therefore, to consider the word "subscription" in the definition of "prospectus." In my view the word means: taking or agreeing to take shares for cash. It imports that the person agreeing to take the shares puts himself under a liability to pay the nominal amount thereof in cash. I think that this necessarily follows from the reasoning of Kekewich J. and the Court of Appeal in *Arnison* v. *Smith*,[2] and the judgments in *Chicago Railway Terminal Elevator Company* v. *Commissioners of Inland Revenue*[3] and *Brown* v. *Commissioners of Inland Revenue*.[4]

In Murray's Oxford Dictionary, one of the meanings attributed to "subscription" is: "A promise over one's signature to pay "a sum of money for shares in an undertaking." I can find no secondary meaning attributed to "subscription" in the Companies Act, 1948. On the contrary, paras. 4, 5, 6 and 7 of Part I of Sch. 4 to the Act clearly require that "subscription" and "subscribe" involve the notion of payment in cash. The circular in this case does not invite subscription for shares for cash. For these reasons I am of opinion that the circular is not a prospectus within the meaning of that word as used in the Companies Act, 1948. I would add that it would be somewhat strange if the circular were in fact a prospectus in view of the circumstance that the permission of the Board of Trade was obtained under section 13 of the Prevention of Fraud (Investments) Act, 1939, on the basis that it was not a prospectus. I am further of opinion that the circular was not distributed to the public. I accept the proposition put forward by Sir Andrew Clark, namely, that the test is not who receives the circular, but who can accept the offer put forward. In this case it can only be persons legally or equitably interested as shareholders in the shares of Union-Castle or Clan. In the case of those who accept non-renounceable letters of allotment will be issued. In these circumstances the case appears to me to fall within section 55 (2) of the Companies Act, 1948.

With the circular was sent out a document headed "Form "of Acceptance and Transfer." Mr. Lindon, for the plaintiffs.

[1] [1942] Ch. 235; [1942] 1 All E.R. 224.
[2] (1889) 41 Ch.D. 348; 5 T.L.R. 413.
[3] (1896) 75 L.T. 157.
[4] (1901) 84 L.T. 71.

argued that, when examined, the document was in reality a form of application for shares in the new company, and in support of his proposition cited two cases decided under the Stamp Act, 1891, *Coats* v. *Commissioners of Inland Revenue* [5] and *Chesterfield Brewery Company* v. *Commissioners of Inland Revenue*.[6] Both those cases turned on the construction and scope of the phrase "conveyance on sale" as used in the Stamp Act, 1891, and I do not find them of assistance in this case. I can find no reason whatever for not giving to this form the meaning so clearly intended by its author. It opens with the words: "If "you wish to accept the accompanying offer you should sign "this form and forward it, together with your share certificate(s) "to the Union-Castle Mail Steamship Company Limited . . . "in the pre-paid envelope provided, so as to be received not "later than the close of business on Friday, December 30, 1955." Then follows the heading: "Form of Acceptance and Transfer." It is addressed to Union-Castle as agents for the new company, and it then states: "I/We", a blank being left for the name of the shareholder or stockholder to be inserted, "hereby "irrevocably accept the offer made to me/us by the British and "Commonwealth Shipping Company Limited (hereinafter called "'The new company') and contained in the new company's "circular letter (hereinafter called 'the offer') dated Novem-"ber 12, 1955, to acquire my/our holding of (blank) ordinary "stock in the Union-Castle Mail Steamship Company Limited "(hereinafter called 'the stock') upon the terms and subject to "the conditions set out therein." Paragraph (2) states that the stockholder encloses his stock certificate which is to be held by Union-Castle upon the terms of the offer. Paragraph (3) provides that, subject to the offer becoming unconditional, the signature of the stockholder to the form of acceptance and transfer shall constitute for Union-Castle an execution by the stockholder of an instrument of transfer of the stock to the new company, and the stockholder further undertakes to execute any further assurances that may be necessary in connexion with such transfer. The stockholder then authorizes and requests Union-Castle to forward to him a fully paid non-renounceable letter of allotment, and in due course a dividend certificate in respect of the shares of the new company to be allotted to the stockholder pursuant to the offer. There is then a dividend request, and a provision that in the event of the offer not becoming unconditional, Union-Castle is to return the certificate. Then follows provision for the signatures and the witnessing of the signatures of the stockholder or stockholders. To my mind nothing could be clearer. It is to operate as an acceptance of the offer made by the new company and of the shares in the new company, and as a transfer of the acceptor's holding in Union-Castle or Clan

[5] [1897] 2 Q.B. 423; 13 T.L.R. 548.

[6] [1899] 2 Q.B. 7; 15 T.L.R. 123.

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as the case may be. Why then should the court be astute to turn this form upside down or inside out in an attempt to give it some other meaning, particularly in view of the circumstance that I have held that the circular is not a prospectus, but what it purports to be, namely, the communication of an offer to exchange shares in the new company for shares in Union-Castle or Clan as the case may be.

It is against the background provided by the construction which I place on the circular, and the form accompanying it, that I turn to consider the allegations that the circular contains such material misrepresentations and omissions that I should intervene at this stage in a representative shareholders' action. In this regard it is, I think, necessary to bear in mind the proposition that a mere omission to state facts in the circular does not amount to a misrepresentation which would give rise to any cause of action, unless the effect of the omission is to render untrue or at least misleading some positive statement therein.

[His Lordship then dealt with the circular, referred to the pronouncement in the judgment of Sir George Jessel M.R. in *Smith* v. *Chadwick* [7] to the effect that, in circumstances such as those of the present case, the omission to state even material facts would not give rise to any cause of action unless the effect of the omission was to render untrue or at least misleading some positive statement, and held that the circular was not false or misleading. His Lordship then continued:] In the result, in my judgment, the plaintiff company is not entitled to any of the injunctions for which it asks, and consequently the motion must be dismissed with costs.

Motion dismissed.

Solicitors: *Barnett, Tuson & Co.; Slaughter and May.*

K. R. A. H.

[7] (1884) 9 App.Cas. 187.

[Queen's Bench Division.]

1955
Dec. 8, 9, 19, 20.
1956
Jan. 13.

His Honour W. K. Carter Q.C., Official Referee.

*HALL & CO. LTD. *v.* PEARLBERG.

[1955 H. No. 572.]

Damages — Tax element — Loss of rent — Trespass and conversion — Whether income and profits tax which would have been payable on it to be taken into account.

The defendant unlawfully entered into possession of two farms, the property of the plaintiffs, a gravel company, and remained in

[Reported by Niul Hogg, Esq., Barrister-at-Law.]

occupation thereof for some 10 months during which time she paid no rent. The farm land and the buildings and equipment were depreciated by the bad husbandry and lack of care and attention of the defendant who also converted to her own use a portion of the hay which was stacked on the land. The plaintiffs recovered damages under the heads of both trespass and conversion. The damages for the former included a sum equal to one year's rent which the plaintiffs would have received but for the defendant's trespass:—

Held, (1) that, as the rent if it had been received would, on the evidence before the court, have been taxable in the hands of the plaintiffs, while the damages awarded under this head would not, the damages must be reduced by the amount of income tax and profits tax to which the rent would have been liable.

British Transport Commission v. *Gourley* [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796 applied.

(2) That as none of the other items would, on the evidence, have been taxable in the hands of the plaintiffs the tax element must be disregarded in the award of damages under these heads.

REFERENCE OF ISSUES OF DAMAGES FOR TRIAL.

The following statement of facts is taken from the judgment: The plaintiffs were a gravel company, and in 1954 they purchased about 165 acres of land at Chertsey. The land consisted of two farms, Abbey Chase Farm of 97 acres, and Abbey Bridge Farm of 65 acres, which were described in the sale particulars as overlying valuable sand and gravel deposits. The plaintiffs had no intention of farming the land themselves. They intended to let it upon terms that they could take it back as and when they required it for their business of extracting and selling sand and gravel. Abbey Chase Farm had been let but the tenant had agreed with the vendors to go out on September 29, 1954. Abbey Bridge Farm was in hand, and both farms were offered for sale with vacant possession. On September 29, 1954, the defendant entered into possession of both farms, and remained in occupation of the Bridge Farm until July 25, 1955, and of the Chase Farm until August 15, 1955. A draft lease, which she refused to sign, was put in evidence by the defendant. On February 21, 1955, the plaintiffs issued their writ and the statement of claim indorsed on it alleged that the defendant, in or about October, 1954, wrongfully and without any right or title so to do, entered and seized and took possession of the farm. It also alleged that the defendant had converted certain hay which was upon the farm at the time of her entry. On July 18, 1955, the action came on for trial before Pearce J., when the defendant did not contest the plaintiffs' claim, and an order was made that the issues as to damages raised in paragraphs 2 and 3 of the prayer be referred to an official referee for trial.

At the hearing before the official referee the damages were assessed by him upon the basis that the allegations made in the statement of claim were admitted and, so far as the damages for trespass were concerned, by contrasting the position in which the plaintiffs would have found themselves, had there been no

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trespass, with the actual events as they occurred. The following is a summary of the assessments:—

Trespass.

(i) One year's rent—£650.

(ii) Crops of kale and wheat straw eaten by the defendant's cattle—£7 8s. 4d.

(iii) Difference in value between the stacks of manure when the defendant entered into possession and when she quitted—£39 1s.

(iv) Depreciation in value of the unconverted hay due to the defendant's failure to cover it up—£160. (This sum was awarded notwithstanding the tenant to whom the land was subsequently let paid £239 16s. for this hay. The official referee regarded that payment as res inter alios acta.)

(v) Depreciation in unexhausted manurial values—£125.

(vi) Depreciation in value of fixtures—£26 5s.

(vii) Loss of interest on capital through the defendant's not paying tenant right moneys, whereby the plaintiffs could not, for one year, recover from an incoming tenant the moneys they had had to pay the outgoing tenant—£30.

(viii) Money spent by the plaintiffs in repairing fences broken by the defendant's cattle—£70.

(ix) No damages were awarded in respect of the defendant's failure to hedge and ditch, to clean the land or to repair the buildings since there was no evidence that the plaintiffs had suffered loss thereby.

(x) No allowance was made for the manurial values left by the defendant's cattle, since there was no evidence that they were fed on concentrates, or for the crop of hay left behind by the defendant, since the ownership of this was uncertain.

Conversion.

Conversion to her own use by the defendant of part of the hay stacked on the land when she entered into possession—£544.

G. G. Baker Q.C. and *L. A. Blundell* for the plaintiffs.

Lord Hailsham Q.C. and *E. Dennis Smith* for the defendant.

The following cases were cited: *Stow Bardolph Gravel Co. Ltd.* v. *Poole* [1]; *Wiseburgh* v. *Domville* [2]; *British Transport Commission* v. *Gourley*.[3]

Cur. adv. vult.

Jan. 13. His Honour W. K. Carter, Q.C., stated the facts and assessed the damages as set out above, and continued: In these circumstances I should have awarded to the plaintiffs £1,170 damages for trespass and £544 damages for conversion.

[1] [1954] 1 W.L.R. 1058, 1503; [1954] 3 All E.R. 637.

[2] [1955] 1 W.L.R. 1287; [1955] 3 All E.R. 548.

[3] [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

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but on the second day of the hearing the decision of the House of Lords in *British Transport Commission* v. *Gourley*[1] became known, and I adjourned in order that the parties might consider the position and call further evidence as to the tax position of the plaintiffs if they so desired.

It appears to me that the principles of *Gourley's* case[1] apply to claims for damages for trespass and conversion in the same way as they do to claim for damages for personal injuries. I am faced, however, with two problems which did not arise in *Gourley's* case.[1] There counsel agreed that the damages recovered by the plaintiff would not be taxable in his hands, here counsel have not been so accommodating. There the position of an individual partner was being considered, here I have to consider a trading company, assessed to tax under Schedule D, Case I, and a gravel company to boot, to whom unusual rules apply, see *Stow Bardolph Gravel Co. Ltd.* v. *Poole.*[2]

It seems to me that I must endeavour to find the answers to two questions. Whether any sums I award to the plaintiffs by way of damages will be subject to income tax or profits tax? If not, whether the plaintiffs would have been liable for income tax and profits tax if they had received the sums in respect of the loss of which I award them damages? Having regard to the difficulties which face me in attempting to answer these questions it is important to see where the onus of proof lies. Is it for the plaintiff to prove that the damages awarded will be taxable or that the sums in lieu would not have been taxable or is it for the defendant? I can find no direct statement on this matter in *Gourley's* case, but the opinion of Lord Jowitt[3] does not indicate that there is any shifting of the onus which in matters relating to damages normally rests on a plaintiff. I must therefore, with the inadequate materials put before me by Mr. Higham, the plaintiffs' accountant, do my best to answer the two questions I have propounded.

I must, I think, consider separately (*a*) the damages for conversion of the hay, (*b*) the damages of £650 in lieu of rent, and (*c*) the damages representing the difference between the outgoing and incoming valuations. It was a condition of the sale of the land that the plaintiffs should take and pay for the hay and the outgoing valuations. The purchase by a gravel company of potential sources of supply is treated by the Revenue as a dealing in capital not in income: see the *Stow Bardolph* case.[4] True Mr. Higham did not tell me whether the sums paid out for the hay and the outgoing valuations were taken into account in arriving at their profits for the year 1954–1955. But I think that the plaintiffs are entitled to say that, if the damages under (*a*) and (*c*) are capital receipts so are the sums in lieu, and if the

[1] [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.
[2] [1954] 1 W.L.R. 1503.
[3] [1956] 2 W.L.R. 41, 48.
[4] [1954] 1 W.L.R. 1503.

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damages are income receipts they are subject to tax: see *Wiseburgh* v. *Domville*.[5] In spite of the paucity of evidence adduced by the plaintiffs I feel that I ought to allow headings (*a*) and (*c*) in full. All that Mr. Higham told me was that the plaintiffs intended to pay tax on such receipts as were taxable, that for the year 1954–1955 they had only distributed one-seventh of their taxable profit, and that it was their policy to reimburse tenants who have had to incur unusual expenses. His evidence gave me very little assistance. He did not even tell me the amount of the Schedule A assessment.

I feel, however, that the correct conclusion for me to reach is that the plaintiffs have satisfied me that what lies ahead of them is a battle with the Revenue the result of which is very uncertain, and that so far as headings (*a*) and (*c*) are concerned the balance of the probabilities is that they will not obtain any tax advantage by receiving an award of damages, instead of receiving the sale price of the hay and the incoming valuations in 1954.

So far as heading (*b*) is concerned I see no reason why this sum of £650 should be taxable in the hands of the plaintiffs. Having considered the operation of section 175 of the Income Tax Act, 1952,[6] I cannot see how it can be said that the plaintiffs are liable for tax in respect of this award of £650 as damages for trespass. On the other hand, if it had been received as rent it would have been taxable. As the plaintiffs have given no evidence as to the amount of the Schedule A assessment I must, I think, assume it is so small as to be negligible. In the result the plaintiffs will, unless I make a deduction, recover £650 tax free instead of £650 less tax and profits tax. I propose to deduct 50 per cent. from the damages I award in lieu of rent. I arrive at the figure of 50 per cent. as follows:

If one assumes that the plaintiffs make a profit of	£1,000
Income tax at the standard rate would be	£425
2½ per cent. profits tax on £1,000	25
25 per cent. profits tax on £143 viz. 1/7th of the taxable profit	35
Tax on £1,000 equals	£485

From the damages of £650 awarded in lieu of rent I therefore deduct £325.

Judgment for the plaintiffs for £1,390.

Solicitors: *Wilkinson, Howlett & Moorhouse; Warren & Warren.*

[5] [1955] 1 W.L.R. 1287; [1955] 3 All E.R. 548.

[6] Income Tax Act, 1952, s. 175. The sidenote to this section, which adequately summarizes its provisions for the purposes of this report, reads: "Taxation of excess rents of immediate lessors arising under certain short leases."

* LIEBRICH *v.* CASSELL & CO. LTD.

1956
Feb. 21.

Slade J.

[1955 L. No. 2462.]

PRACTICE NOTE.

Libel and Slander—Practice—Statement in open court—Settlement of libel action—Statement to be approved by judge in chambers—R.S.C., Ord. 22, *r.* 2 (4).

STATEMENT IN OPEN COURT.

On November 3, 1955, the plaintiff issued a writ claiming, inter alia, damages for libel contained in a book published by the defendants. A statement of claim was delivered, but before delivery of a defence terms of settlement were arrived at on the defendants agreeing, inter alia, to pay a sum of money to the plaintiff and to the reading of an agreed statement in open court. No money was paid into court.

On February 13, 1956, on a summons for directions taken out under R.S.C. Ord. 30, Master Burnand ordered "that the "action be tried at Middlesex by a judge alone and be set down "within seven days for the purpose of making an agreed state-"ment in a libel action." Thereupon the action was set down and on February 21, 1956, was listed for hearing before Slade J. as a "statement in open court." The agreed statement had not been submitted to Slade J. or to any judge for approval.

Philip Goodenday for the plaintiff.
A. T. Hoolahan for the defendants.

SLADE J. Although the statement to be read in this case is unexceptionable and I will allow it to be read, it should first have been approved by a judge. Whenever it is desired, upon the settlement of an action for libel or slander, to make a statement in open court, the agreed statement should (1) be approved by a judge, and (2) normally be made before the judge who has approved it. This practice should be followed whether the reading of the statement follows the acceptance and taking out of money which has been paid into court, so as to fall within the precise terms of R.S.C., Ord. 22, r. 2 (4),[1] or whether the statement is a term of a settlement which includes an agreement to pay money (or costs) which has not been paid into court, and whether the money so payable has actually been paid or is to be paid in the future. I say that the statement should "normally" be made before the judge who has approved it because one can envisage circumstances where it is essential that the plaintiff's

[1] R.S.C. Ord. 22, r. 2 (4): "A "plaintiff in an action for libel or "slander who takes money out of "court may apply by summons to a "judge in chambers for leave to make "in open court a statement in terms "approved by the judge."

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Slade J.

reputation should be vindicated at the earliest possible moment, and the judge may, for example, have gone on circuit and not be readily accessible. In those circumstances it would be perfectly proper to obtain the permission of some other judge for the statement to be made before him, and he should then, of course, be shown the statement which it is desired to make and which will already have been approved by his brother judge.

Solicitors: *Buckeridge & Braune; Oswald Hickson Collier & Co.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1956
Feb. 14, 22.

Lord Goddard C.J.

* HARE and Another *v.* BRITISH TRANSPORT COMMISSION.

[1955 H. No. 1185.]

Railway—Negligence—Guard's duty—Person struck by door of guard's van—Door still open after train had travelled 60 yards—Rules for the working of the railway—Contributory negligence.

While standing on a station platform seeing her husband off in a train, the plaintiff was struck from behind by the open door of the guard's van, which the guard was just closing, after the train had moved about 60 yards along the platform. In an action for damages for personal injuries the plaintiff alleged negligence against the British Transport Commission, and the commission alleged contributory negligence by the plaintiff:—

Held that, although the ordinary practice whereby the guard gave the signal to start while standing on the platform and boarded the train as it began to move was one which worked for safety, there was a duty owed to persons allowed to be on the platform and the door of the guard's van ought not to have been still open at the distance which the train had travelled when the plaintiff was struck; that, in view of that distance, the plaintiff was not bound to anticipate an open door coming up behind her; and that, therefore, the plea of contributory negligence failed and the commission were liable in negligence for the injuries sustained by the plaintiff.

Thatcher v. *Great Western Railway Company* (1893) 10 T.L.R. 13 applied.

Action.

On June 8, 1954, the second plaintiff, Mrs. Edith Wilhemina Joan Hare, went to Euston Station to see her husband, Albert Cyril Hare, the first plaintiff, off by the 4.15 p.m. train to Chester. She stood on the platform about 60 yards from the rear of the train and, as it began to move was waving to her husband when she was struck from behind by the open door of the guard's van at the rear of the train, and was thrown off the platform on to the permanent way, sustaining injuries. The plaintiffs sued the British Transport Commission for damages arising out of the

second plaintiff's injuries, alleging that they had been caused by the negligence of the defendants, their servants or agents.

The defendants denied negligence; alternatively they alleged that the accident was solely caused, or, alternatively, contributed to, by the negligence of the second plaintiff in placing herself too close to the train and the permanent way at the side of the platform as the train was moving out of the station and the door of the guard's van on the train was still open and likely to knock her down.

The facts are more fully stated in the judgment.

Leonard Caplan Q.C. and *Thomas Whipam* for the plaintiffs.
John Stephenson for the defendants.

The following case, in addition to those mentioned in the judgment, was cited in argument: *Burns* v. *North British Railway Co.*[1]

Cur. adv. vult.

Feb. 22. LORD GODDARD C.J. On June 8, 1954, the plaintiff, Mrs. Hare, went to Euston Station to see her husband off to Chester by the 4.15 p.m. train. She was carrying a baby and was accompanied by her mother-in-law. The train, apparently one of the important expresses, was made up of 10 coaches and filled the length of No. 13 platform. No one was at all sure as to the coach in which Mr. Hare took a seat, but it is clear, I think, that it was well to the rear of the train and was either the first or second coach in front of the guard's van. He stood at the window talking to his wife until the train started; then she continued to wave to him as the train drew away, and while doing so she received a sudden blow on the back of the shoulder which caused her to fall from the platform. There is no doubt what hit her; it was the door of the guard's van which he was just closing, as I will later describe.

Mrs. Hare, as she fell, managed to throw her baby on to the platform. She lay between the inner rail and the wall of the platform and I think must have fallen in the space between the end of the van and the front of the pushing engine which followed the train to assist it up the steep incline outside the station. It must indeed have been a terrifying experience and little short of a miracle that she was not killed. As it was, she was for 12 weeks in hospital and was more or less of an invalid for a considerable time, as there were certain complications and injury undetected at first. She still has some small measure of permanent disablement, but after what was doubtless a trying and occasionally painful period she is now happily substantially recovered.

Fortunately, there was no great pecuniary loss, and I think

[1] 1914 S.C. 754.

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a fair sum to award her, if the defendants are liable for her injuries, is £750 in addition to £26 special damage and £58 special damage to the husband. There is a claim by the husband for loss of consortium. No doubt he had to fend for himself while the wife was in hospital and during periods of her incapacity at home. Loss of consortium still survives as a cause of action, but it is not one, I think, for which the courts should give generous compensation in addition to such legitimate expenses as a husband has had to incur on account of his wife's absence. In addition to his special damage, I award him £20.

As I have said, there is no doubt that Mrs. Hare was struck by the door of the guard's van and reliance is naturally placed on the rules for the working of the railway which provide that doors are to be closed before the train starts. The particular rules are rule 25 (*a*) and rule 130, paragraph (ii).[1]

The facts of this case appear to me to be indistinguishable from those in *Thatcher* v. *Great Western Railway*.[2] In that case no doubt Lopes L.J. attached importance to similar rules as supplying evidence of negligence when it was shown that a door was open. For myself, I should not regard this as conclusive, because, in my opinion, these rules are designed for the protection of passengers in the train, so that they should not be exposed to the risk of an open or insecurely fastened door. I cannot think that these rules compel the guard of a passenger train to be in his van with the door closed the moment the train starts. It is common knowledge that the guard gives the signal to start standing on the platform and, as a rule, boards the train as it begins to move, and this seems to me not only an ordinary practice, but one which works for safety, as he can see that all is well as the train actually starts.

It would, however, be another thing if the train were allowed to go some distance along the platform with the door open. The principal difficulty I have had in this case, and I readily admit I have not found the question of fact easy of determination, is to come to a conclusion as to how far the train had moved before Mrs. Hare was struck. I have said that no one is sure of where

[1] British Railways. Rules for Observance by Employees. January 1, 1950. Rule 25 (*a*): "The doors of "vehicles must be fastened before the "train leaves the station, and no door "must be opened to allow a passenger "to alight from or enter a train "before it has come to a stand or "after it has started."

Rule 130: "Every guard when in "charge of a passenger train MUST— ". . . (ii) see that the doors of the "carriages and other vehicles are "properly closed and fastened, and "assist the station staff in this duty; "also in the case of any unusual stop- "page, request the passengers not to "alight except when it is necessary "for them to do so."

Rule 141 (*b*): "The signal for "starting a passenger train must be "given by the guard, where provided, "after obtaining an intimation from "the person in charge of the platform "that all is right for the train to "proceed. . . . In the daytime the "guard's signal to start must be a "green flag waved above the head; at "night . . . when a lamp is used, the "signal must be a green light held "steadily above the head. In addi- "tion, the guard must use his whistle "when necessary."

[2] (1893) 10 T.L.R. 13.

on the train Mr. Hare had taken a seat; his recollection is only that he was somewhere near the bookstall. I can only say, as indeed I have said earlier, that I think that he was somewhere either in the first or second coach in front of the van, and I also think more probably in the second, which would be nearer the bookstall.

I had no evidence from the defendants as to where Mrs. Hare was picked up beyond what the fireman of the banking engine could tell me. I have no doubt that when Mrs. Hare was struck she was spun round, as a witness, Mr. Wright, described, and that she fell between the end of the van and the banking engine. The latter was evidently not of the tank or shunting type, but had a tender attached, and according to the fireman's evidence it must have come into the station tender-first as it was that which was against the buffers. His evidence was that the engine was an engine-length beyond the bridge which crosses the platform when Mrs. Hare fell.

To try to get a clearer picture of the place than that which is conveyed by plans or photographs, I visited the station and went to the platform to take particular notice of the distance from the buffers to the bridge, and of the position of the bookstall, and I am satisfied that the train must have travelled at least 60 yards by the time Mrs. Hare was struck.

In these circumstances, I am bound to hold, on the authority of *Thatcher's* case,[3] which was followed with approval by the Court of Session in *Tough* v. *North British Railway Co.*,[4] that the plaintiffs have established a cause of action. Mr. Stephenson cited *Toal* v. *North British Railway Co.*[5] and contended that from that case it appeared that there was not an absolute rule to be derived from *Thatcher's* case,[6] which was there cited, but that each case must be decided on its own facts.

While there may be cases of open doors causing injury which can be distinguished, the facts here are identical, so it seems to me, with those in *Thatcher's* case; moreover, in *Toal's* case[7] the Court of Session had rejected a proof and the House of Lords sent the case back for trial, saying that it was for the jury to consider whether there was a duty and whether it was broken.

In the present case I feel obliged to find that, considering the distance the train had travelled before Mrs. Hare was struck, the van door ought not to have been open. The case for the defendants really was, in my opinion, that Mrs. Hare had been guilty of contributory negligence, or rather that it was her negligence that was wholly the cause of the accident. But as it is established that a duty is owed to persons allowed to be on the platform, Mrs. Hare was entitled to assume that the doors would be closed. She was looking, not to the back of the train, but in the direction in which it was travelling, and was not bound to

[3] 10 T.L.R. 13.
[4] 1914 S.C. 291.
[5] [1908] A.C. 352; 24 T.L.R. 673.
[6] 10 T.L.R. 13.
[7] [1908] A.C. 352.

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anticipate an open door coming up behind her. I think she did take a step back, as Mr. Wright described, but I cannot hold that that of itself was negligent.

I have ascertained from the Record Office, where the pleadings in *Thatcher's* case [8] are still preserved, that there was in that case a plea of contributory negligence which must have been found against the railway company and was not even mentioned in the Court of Appeal. The facts in that case seem to be at least as strong to support a plea of contributory negligence as in the present case. but it did not avail the defendants. I must accordingly give judgment for the sums I have mentioned, namely, £776 for Mrs. Hare and £78 for her husband, with costs.

Judgment for the plaintiffs.

Solicitors: *S. M. Fruitman; M. H. B. Gilmour.*

J. F. L.

[8] 10 T.L.R. 13.

[QUEEN'S BENCH DIVISION.]

1956
Feb. 15.

Lord Goddard C.J., Hilbery and Devlin JJ.

*REGINA *v.* STOKESLEY, YORKSHIRE, JUSTICES. *Ex parte* BARTRAM.

Crown Practice—Certiorari—Practice—Affidavits—Cross-examination of deponents—Power of the court to allow cross-examination—Circumstances in which cross-examination allowed—R.S.C., Ord. 38, *Ord.* 59, *r.* 47.

On March 12, 1947, justices made an order whereby the applicant was adjudged to be the putative father of a bastard child and ordered to pay 12s. 6d. a week maintenance. The complainant did not seek to enforce the order for eight years, but in 1955 she applied to the collecting officer, and in September, 1955, a summons was served on the applicant in respect of arrears due under the order. On January 25, 1956, the applicant applied for an order of certiorari to bring up and quash the order of March 12, 1947, on the grounds that no summons had been served on him to appear before the justices on that date, that having no knowledge that proceedings were taking place he had not appeared, and that the justices had no jurisdiction to make the order; and he denied that he was the father of the child. There was before the court an affidavit sworn by the applicant in support of his case, an affidavit by a police constable to the effect that he had served the summons on the applicant on March 7, 1947 (although he could not remember handing it personally to the applicant), and an affidavit by the justices to the effect that they had satisfied themselves that the summons had been served and had seen the certificate of service endorsed on a copy of the summons before adjudicating. There was also before the court the original of the order made by the justices on March 12, 1947, on which the printed words "[the "appearance of the defendant]" had been struck out so that it read "On proof of service . . ." The court, relying to some extent on the order, was satisfied that the summons had been served and

dismissed the application. Subsequently, before the order of the court was drawn up, it was made known to the court that the order had been altered in that the words "[the appearance of the "defendant]" had not been struck out when it was originally drawn up but had been deleted between the time when it had been inspected by the applicant's solicitor for the purposes of the application and the time when it was put before the court. The court ordered that the application be reheard and that the deponents should attend. At the rehearing, on applications by both sides for leave to cross-examine on affidavits:—

Held, that by virtue of R.S.C., Ord. 59, r. 47, and Ord. 38 the court had power to allow cross-examination of a deponent in Crown proceedings, and that, although the power would only be exercised in very special circumstances, the case was of such an exceptional and remarkable character that leave should be given in order to enable the court to get to the bottom of the matter.

APPLICATION for an order of certiorari.

On January 25, 1956, the applicant, Thomas Edward Bartram, a farmer, having obtained leave, applied to the court for an order of certiorari to bring up and quash an order made by Stokesley justices on March 12, 1947, whereby he was adjudged to be the putative father of a bastard child and was ordered to pay 12s. 6d. per week for the maintenance and education of the child until it should attain 16 years of age, £4 18s. 6d. for expenses incidental to the birth of the child and 10s. 6d. costs. The grounds of the application were that no summons had been served on the applicant to appear before the justices' court on March 12, 1947, or at any time, on complaint that he was the putative father of a bastard child; that, having no knowledge that proceedings were taking place, he did not appear at the justices' court on the day that the complaint was heard and the order made; and that, in the premises, the justices had no jurisdiction to make the order. Further grounds were that the order made on March 12, 1947, was at no time served on him; that he was not the father of any child of the complainant; and that the first that he had heard of the order was over eight years later on September 7, 1955, when a summons dated August 24, 1955, was served upon him to appear before the justices on complaint that payments under the order had not been made and that there were arrears of £275 12s. 6d. and £4 18s. 6d. expenses and 10s. 6d. costs.

The applicant also sought an order of certiorari to bring up and quash an order made by the justices on September 14, 1955, ordering him to pay the sum of £5 in respect of arrears under the order of March 12, 1947.

At the hearing of the application there were before the court, amongst others, affidavits sworn by the applicant, a police officer, and the justices. The applicant in his affidavit stated that he had at no time been served with any summons in connexion with the complaint until the summons dated August 24, 1955, was served upon him, and that that was the first intimation that he received that any proceedings had taken place affecting him as

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being allegedly the putative father of a bastard child, and he denied that he was the father of any child of the complainant. The police constable, in his affidavit, stated that on March 7, 1947, at about 11 a.m. he had visited the farm of the applicant to serve a summons upon him; so far as he remembered he handed the summons to the applicant personally; he remembered that at that time the weather was unusually severe with deep snow but recollected that he had no difficulty in reaching the farm and visiting it; he said that he could not clearly remember the particular act of handing the summons to the applicant but that it was his practice at that time to endorse a copy of the summons with the usual certificate of service stating the time, date, place and manner of service, and to return the summons to the police division where it was issued; he had inspected the record of charges for the relevant period kept by the petty sessional division in question of the North Riding Constabulary, and had observed an entry in which it appeared that the summons had been served by him on March 7, 1947, at 11 a.m. The justices, in their affidavit, stated that they recalled adjudicating upon the complaint on March 12, 1947; they also recalled that the applicant had not appeared, as a result of which they had ascertained by reference to the endorsement of the certificate of service on the back of the copy of the summons produced to them that it had been duly served before they proceeded to hear the case in his absence. It appeared from an affidavit sworn by the complainant that she had not pressed for payment under the order because at the time of the birth of the child she was living with her mother, and had continued to live with her until her death in January, 1955, but that since then she could not manage to maintain the child out of her earnings without the help of her mother.

There was also before the court, exhibited to the justices' affidavit, the original of the order made by the justices on March 12, 1947; it was the ordinary printed form ("A. 11," under the Affiliation Orders Act, 1914, s. 6 (1), and Bastardy (Forms) Order, 1915) in use for such order, and the words in square brackets "[the appearance of the defendant]," "[left "at the defendant's last place of abode]," and "[and also the "evidence tendered [by] [on behalf of] the defendant]" had been struck out so that it read: "On [. . .] proof that a "summons to answer the said complaint was duly served on "the defendant. . . ." It appeared that the copy of the summons which was before the justices could not be traced; it also appeared that no notice to pay had ever been served on the applicant.

The court (Lord Goddard C.J., Hilbery and Stable JJ.), having read the affidavits and heard counsel on both sides, and having examined the original order, was satisfied that the summons had been duly served on the applicant on March 7, 1947, and on January 25, 1956, gave judgment dismissing the

application; in reaching that conclusion the court was to a certain extent impressed by the order of March 12, 1947. Later, on the same day, it was made known to the court that the order placed before it had been altered in that the words " [the " appearance of the defendant] " had not been struck out at the time when it was originally drawn up but had been struck out between the time when it had been inspected by the applicant's solicitor for the purposes of the application and the time when it was placed before the court. The court thereupon directed that its order dismissing the application should not be drawn up and that the case should be re-heard, and the presence of the deponents was required.

A. J. Irvine for the applicant.

Alan Garfitt for the justices.

Counsel on either side, at the invitation of the court, applied for leave to cross-examine on affidavits.

No cases were cited in argument.

LORD GODDARD C.J.: This is probably the first case in recent history in which application has been made in Crown proceedings for leave to cross-examine on affidavits. Leave has never been given, or at least not for a great number of years. In *Rex* v. *Kent Justices, Ex parte Smith*,[1] Lord Hewart C.J., sitting with Avory and Shearman JJ., said: " For something like fifty or " sixty years no order had been made on the Crown side for the " cross-examination of a deponent. It was enough to add that " such an order was not likely to be made except in very special " circumstances, and that no such special circumstances had " been shown in the present case."

I have no doubt that the court has power to allow cross-examination because Order 59, which was passed in 1938,[2] takes the place of the old Crown Office Rules and is the rule under which the court deals with Crown matters, it expressly provides by rule 47 that all the Rules of the Supreme Court apply to Crown proceedings. Rule 47 provides: " Subject to the " provisions of this Order, the Rules of the Supreme Court, 1883, " shall apply, so far as applicable, to proceedings to which this " Order relates, in like manner as they apply to other proceedings " in the Supreme Court," and it is well known that there is another order, Order 38, which provides for cross-examination upon affidavits.

This is an exceptional case. The applicant is seeking to set aside an order which was obtained eight years ago and on which the complainant who had obtained the order had never acted. It is a very remarkable and a very exceptional case, and there

[1] [1928] W.N. 137.

[2] Rules of the Supreme Court (Divisional Courts), 1938, S.R. & O., 1938, No. 1577/L.30.

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are other matters which have given the court a great deal of anxiety and some displeasure, and this court must get to the bottom of this matter.

We think, therefore, that cross-examination should be allowed.

Application allowed.

The applicant's affidavit was then put in, and he was cross-examined on it and re-examined; and, their affidavits having been put in, the police constable and the chairman of the justices were cross-examined.

Counsel then addressed the court.

Lord Goddard C.J., in the course of his judgment dismissing the application, said: As it was such a remarkable case, and there was this unfortunate incident of an altered order having been put before the court, upon which, at any rate to some extent, the court had relied, we ordered that the deponents should attend in court today. They have attended and they have been cross-examined. I desire to say that it is the first time in my experience, and I think the first time in anyone else's experience, in Crown proceedings for prerogative writs, that cross-examination has ever taken place. I do not want this to be thought to be an easy precedent. We allowed cross-examination in this case because it is a case of a very remarkable character.

Hilbery J. I agree.

Devlin J. I agree.

Application dismissed.

Solicitors: *R. A. Rotherham & Co. for Pearsons & Ward, Helmsley, Yorkshire; Torr & Co. for W. Lowther, Carrick & Co., Stokesley, Yorkshire.*

J. F. L.

[probate, etc., division.]

1956
Jan. 26.

* GUINESS *v.* GUINESS.

Lord Merriman P. and Collingwood J.

Husband and Wife—Justices—Non-cohabitation clause—Possibility of reconciliation—Revocation of clause—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 5 (*a*), 7.

A wife who was married in October, 1953, obtained in November, 1954, when she was pregnant, an order of the justices against her husband on the grounds of persistent cruelty, desertion, and neglect to maintain. The parties had cohabited since the last act

of the alleged cruelty (which to a large extent consisted of physical violence), but the justices had held that it had been revived by desertion. The order contained a non-cohabitation clause. The husband made certain overtures to effect a reconciliation, which were resisted; and he applied in September, 1955, to have the order discharged or alternatively to have it varied by the revocation of the non-cohabitation clause. There had been no question of physical violence during the separation.

The justices, while stating that the marriage could be saved if the husband were to approach his wife in the proper way, and that the wife was ready for a reconciliation if the correct approach were made, dismissed the applications on the basis that the husband had not learned his lesson, and had not shown his regret for his past conduct, and that the wife should accordingly still have the protection of the non-cohabitation clause:—

Held, (1) that, by reason of the non-cohabitation clause, the wife had been justified in resisting such overtures as had been made, for the clause itself effectively precluded the making of any overtures at all; and the application to have the whole order discharged had therefore rightly been dismissed.

(2) That the justices had misdirected themselves by stating that the wife should still have the protection of the non-cohabitation clause; the protection to which she would be entitled in the circumstances was her right to resist any overtures in which the husband did not show that he had realised the error of his ways. It was undesirable to retain that which militated against a possible reconciliation.

(3) That the non-cohabitation clause should accordingly be removed.

Haynes v. *Haynes* [1952] P. 272; [1952] 2 T.L.R. 313; [1952] 2 All E.R. 439 applied.

APPEAL by husband from the refusal to discharge an order of the justices for the Wimbledon petty sessional division made on the grounds of cruelty, desertion and neglect to maintain, or, alternatively, to vary that order by the revocation of a non-cohabitation clause.

The parties were married in October, 1953, and evidence had been accepted when the original order was made on November 18, 1954, that the husband had been guilty of physical cruelty towards the wife. The last act of physical ill-treatment had taken place about Whitsuntide, 1954; but although cohabitation had temporarily been resumed, the justices in making their order held that the cruelty had been revived by subsequent desertion. A child was born to the wife in February, 1955.

Thereafter the husband made certain overtures for a reconciliation which the wife rejected, although the justices found that she was ready for a reconciliation if the husband were to show, "by his conduct and attitude towards her, that he was sorry for "his past actions and would assure her by his words and conduct "that he wished to make amends and that he would treat her "with reasonableness in the future."

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Stanislaus Seuffert and *M. A. Gregory* for the husband appellant.

D. R. Ellison for the wife respondent.

The following cases were cited in argument: *Haynes* v. *Haynes* [1]; *Hutchison* v. *Hutchison*.[2]

LORD MERRIMAN P. This is a husband's appeal from a decision of the justices for the Wimbledon petty sessional division of Surrey, who, on September 1, 1955, had before them two complaints of the husband. The first was an application to discharge an order which had been made against him on November 18, 1954, and which, apart from maintenance, also contained a non-cohabitation clause, which has the effect of a separation order, and the second was to vary that order by eliminating for the future the non-cohabitation clause. In fact they dismissed both complaints. On this appeal no attempt, very rightly, in my opinion, has been made to challenge the propriety of their dismissing the application to set the whole order aside. The appeal is limited solely to the question whether or not the non-cohabitation clause had better come out of the order.

As in one respect—though I think it is a vital respect, as I shall try to show—I differ from the justices, I wish to say this without the slightest reservation of any kind: I have absolutely nothing but praise for the scrupulous care and attention which they have obviously given to this matter. The statement of their reasons and the notes of the evidence are models of what such things should be, and in saying that I include also the note of the earlier hearing, at which the original order was made.

As there is no challenge (it is of course much too late now) to the validity of the original order, and as the history of that is so clearly set out in the reasons which the justices give in connection with the present application, the accuracy of which is not challenged in any particular at all, I am really absolved from going in great detail into this matter.

Suffice it to say that this is a young couple who were only married in October, 1953. They are still, therefore—and this is an important factor in the case—in relation to the Matrimonial Causes Act, 1950, under the statutory bar to bringing proceedings—either of them—for divorce. Another important factor which I think should be mentioned, and one which Mr. Ellison in his very clear argument did not dispute, though he did not expressly admit it, and which, as I see it, is now common ground, is that the last act of ill-treatment of a physical nature occurred at or about Whitsuntide, 1954. It is also a curious circumstance that the justices held at the time of making the original order, on

[1] [1952] P. 272; [1952] 2 T.L.R. 313; [1952] 2 All E.R. 439.

[2] [1951] W.N. 296.

the grounds of persistent cruelty, desertion and wilful neglect to maintain, that although the cruelty had been condoned and there had been a resumption of cohabitation, so that for either of those two reasons it was out of the picture, it had been revived by desertion. From this it follows that we are really dealing with what would be a continuous charge of desertion, albeit coupled, in the background, with a finding of conduct which amounted to persistent cruelty, and that the desertion would have been running all this time in favour of the wife had it not been that there was this non-cohabitation clause in the order. I think one other circumstance is worth referring to, and that is that at the time when the matter was first dealt with, in November, 1954, the wife, in whose favour the finding of persistent cruelty was made, was still an expectant mother. The child was born in February, 1955. I mention this because quite plainly that was one valid reason, if there were no other, for holding that it was necessary to protect the wife, who had been treated with cruelty which consisted to a very large extent of physical violence, from any possible repetition of that conduct at a time when she was an expectant mother.

As I have already said, there is no challenge whatever against the validity or propriety of the original order and the inclusion in it of the non-cohabitation clause, and we are concerned solely to deal with the question whether that clause should now be retained.

The justices have realised one aspect of the matter quite correctly, and in this respect they are supported by a passage in my own judgment in the case to which they were referred by their clerk, *Haynes* v. *Haynes*,[1] in which I said[2]: "I recognize "that so long as this non-cohabitation clause stands the wife can "resist any overtures"—that is, overtures by the husband to effect a reconciliation. They state in their reasons that they recognise that. They go on to say that they are satisfied that the wife, who was, of course, the defendant to this particular summons, "really wanted a reconciliation if only the husband "would, by his conduct and attitude towards her, show that he "was sorry for his past actions and assure her by his words and "conduct that he wished to make amends and that he would "treat her with reasonableness in the future." In the next paragraph they set out the facts, which I think are very important. They say that there was no question, during the separation, that the husband had shown any signs of physical violence towards the wife, and the defendant had not been frightened of any physical violence from him during that period. She expressly said that in her evidence. "However," they go on: "the husband had not either by his words or conduct shown "the defendant that he had learned his lesson and realised the

[1] [1952] P. 272; [1952] 2 T.L.R. 313; [1952] 2 All E.R. 439.

[2] [1952] P. 272, 275.

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" error of his ways and he had not shown his regret for his past " conduct." He had not spoken to her in a proper tone, and, in the wife's words, had treated her " like a bit of dirt." They add: " His general attitude is also shown by the fact that he " visited her with his brother, with whom the wife was not on " friendly terms."

Now, the whole of that paragraph can be summed up, apart from the statement that the wife was not frightened of any violence, and had not been during this period, in the sentence that he had not learned his lesson and that, in effect, he cannot ask to be taken back until he shows that he has done so. The justices come back to that again in what I think is a perfectly unimpeachable statement of the position in paragraph 10. They say, after dealing with the preceding paragraph, with which I will deal in a moment: " The justices felt, however, that this " marriage could be saved and there could be a reconciliation, " if only the husband would approach the wife with an entirely " different attitude, showing her that he recognised the error " of his ways, that he regretted his past conduct and that such " conduct would not recur," and then, more specifically, they say " and that he would provide a suitable home for the wife " away from his or her relations," and with this in mind they add that they have informed both parties that they could, if they so wished, invoke the assistance of the probation officer. Now, with every word of that paragraph I agree. It exactly sums up the position of this husband. Unless he proves that he has recognised the error of his ways, does regret his past conduct, and gives his wife assurance that such conduct will not recur, and so forth, he will not get very far with any overtures for a reconciliation. And he has got to satisfy the court before whom he goes that that really is his attitude.

But let it be recalled that earlier on in their reasons the justices rightly said: " As there was a non-cohabitation clause in " the order the defendant was entitled to resist any overtures " made by the husband for reconciliation," and that is why, quite rightly, they dismissed his application to revoke the whole order based as it was on the ground that he had made such overtures, which she was entitled, by the very existence of the non-cohabitation clause, to resist.

I now come to the one statement in their reasons with which I differ. In the paragraph immediately preceding paragraph 10, which I read a moment ago, they say: " In view of the above " facts and conclusions the justices felt that the defendant should " still have the protection of the non-cohabitation clause, and, " therefore, they dismissed the second complaint applying for " variation of the order by striking out the said clause." And then it is that they say they felt that the marriage could be saved, and they set out the handicap under which the husband still laboured. In my opinion they have made an error of judgment in the way in which they have justified the retention of the

non-cohabitation clause. The wife's protection to which she is entitled is that which was set out in clause 10. She is entitled to resist any overtures in which the husband does not recognise the error of his ways, in which, to put it shortly, he does not show that he has learned his lesson; and if he shows them that is the position, or does not succeed in showing them the contrary, there is an end to any overtures for reconciliation on his part. But it is not necessary, in order to achieve that purpose, to maintain a clause in the order which effectually precludes the making of any overtures at all, because the wife is entitled to resist them by virtue of the very existence of the clause.

I think that this is a case in which we must differ from the justices in that respect, and allow the appeal, and order that the non-cohabitation clause be eliminated from the earlier order.

COLLINGWOOD J. I agree. Counsel for the appellant does not suggest for a moment that it was not perfectly proper that this non-cohabitation clause should have been inserted in the original order of November, 1954. But the subsequent history, the relationship which has arisen between these parties since then, gives rise to considerable hope that they may be reconciled.

The marriage only took place in October, 1953, and, without going into details, the parties have been meeting, and the circumstances in which they have been meeting indicate that there is a good chance of their becoming reconciled. One only has to look at one or two sentences in the evidence of the wife. She says "I think if my husband encouraged me, and did not treat me "like a bit of dirt, we would get on fine"; and later, "It is only "my husband's attitude towards me. I am not frightened of "him at all. I would probably go back if he would encourage "me more." Then follows a very significant phrase:—"If my "husband changed his attitude and the way he spoke to me, "and courted me again, most probably I would go back. I "would then consider going to a new town", the suggestion having been that in no circumstances would she leave the district in which her parents were.

That being so, in my opinion anything which militates against that possible reconciliation is undesirable, and quite clearly this clause is an impediment to the very overtures which the wife says might very well be successful were they made in the right way.

This young man seems to be somewhat uncouth in his manners, but possibly, now that the respect in which his previous efforts and advances leave much to be desired has been brought home to him, as it clearly is brought home to him in paragraph 10 of the justices' reasons, he will see the manner in which he ought to mend his ways with regard to his future advances towards his wife.

But the presence of this clause does handicap him in the making of those advances, and I agree that having regard to what

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has happened since the order was made it is now desirable that the non-cohabitation clause should be removed.

Appeal allowed.
Non-cohabitation clause revoked.

Solicitors: *R. W. Platt; Sowman, Wells & Potter.*

J. B. G.

[MANCHESTER ASSIZES.]

1955
Dec. 12, 13, 14, 20.

Glyn-Jones J.

*QUINN *v.* HORSFALL AND BICKHAM LTD.

[1954 Q. No. 2394.]

Factory—Dangerous machinery—Fencing—Horizontal milling machine—Machine used on process exempt from duty to fence under regulations—Whether exemption under regulations supersedes statutory duty to fence—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1)—*Horizontal Milling Machines Regulations*, 1928 (*S.R. & O.*, 1928, *No.* 548), *reg.* 3, *exemptions, proviso.*
Factory—Common law duty—Relevance of regulations.

The plaintiff, a highly skilled miller, was working on a metal milling machine which consisted of an unguarded cutting wheel revolving rapidly in a vertical plane and bearing upon the metal bar to be machined which was fixed by a clamp at each end, the clamps being mounted upon a turn-table underneath the cutter. The machine was set so that the cutter automatically rose and fell as it cut while traversing across the bar, a process called profiling. When the plaintiff had in this way automatically profiled a metal bar at one end he swivelled the turn-table preparatory to carrying out the same process upon the other end, and found it necessary to readjust the bar in the clamps. He pressed the button to stop the cutting wheel, but unknown to him he failed to push it in far enough to operate the switch, and the very little noise made by the still revolving cutter was inaudible to him because of the noise from the other machinery. The plaintiff moved to a position opposite the centre of the turn-table and as he did so he looked towards another man working another machine and to whom he wanted to give a message. While still looking at the other man, he put both hands over the bar with the result that two fingers of his left hand were injured by the unguarded revolving cutter:—

Held, (1) that, on the facts, the machine in question was a horizontal milling machine to which the Horizontal Milling Machine Regulations, 1928, applied; that as the machine was being used for automatic profiling it was exempted from the requirements of regulation 3, requiring cutters of such machines to be fenced; and that the proviso to the exemptions only ensured that the provisions of section 14 of the Factories Act, 1937,[1] were applied

[1] Factories Act, 1937, s. 14: "(1) "Every dangerous part of any machinery, other than prime movers and "transmission machinery, shall be "securely fenced unless it is in such "a position or of such construction

[Reported by JOHN WARD, Esq., Barrister-at-Law.]

in respect of any dangerous part of the machine other than the cutter; accordingly, the defendant company were relieved from their statutory duty to fence the cutter.

Benn v. *Kamm & Co. Ltd.* [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833 applied.

(2) That although the regulations exhaustively defined the statutory duties of an employer concerning a particular machine and under these regulations he was not in breach of duty, the employer was still under a duty at common law to use reasonable care for the safety of his employee using the machine.

ACTION.

On May 23, 1952, the plaintiff, who was employed by the defendant company as a fitter and miller at their factory, was working at a metal milling machine, reconditioning carding flats or bars used in the cotton spinning industry, when he was injured.

The machine had a cutter which revolved at a fast speed in a vertical plane and was mounted at the end of a horizontal spindle. The bar to be trued was held at each end in a clamp set upon a turn-table and each clamp had an adjustable jaw, controlled by a screw. The bar was placed upon the clamps and the clamps and the position of the bar upon them was so adjusted as to bring the surface to be milled precisely under the cutter, and when the work upon one end of the bar was done the turn-table was revolved so as to bring the other end of the bar under the cutter.

The movements of the cutter were controlled by two press buttons which were in a switch-box let into the front of the machine, and also by a knob in front of the machine above the switch-box.

The plaintiff had milled the surface at one end of a bar and when he swung the turn-table to bring the other end of the bar into position the bar did not swing into proper place and needed re-setting. He pressed the right hand button, intending to stop the cutter revolving, and moved to a position opposite the centre of the turn-table. As he did so he looked towards another man working another machine, and to whom he wanted to give a message. While he was still looking at the other man, the plaintiff put both hands over the bar. Unknown to him, the cutter was still revolving for he had not pushed the press button far enough in to operate the switch, and in reaching towards the screw with his left hand he put his fingers in the cutter. As a result the little and ring fingers of his left hand were so severely injured that the two end joints of each finger had to be amputated.

The plaintiff brought this action against the defendant

" as to be as safe to every person em- " ployed or working on the premises " as it would be if securely fenced: " Provided that, in so far as the safety " of a dangerous part of any machi- " nery cannot by reason of the nature " of the operation be secured by means " of a fixed guard, the requirements " of this subsection shall be deemed to " have been complied with if a device " is provided which automatically " prevents the operator from coming " into contact with that part."

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company claiming damages for breach of statutory duty and at common law.

J. R. Crichton Q.C. and *Robert Lambert* for the plaintiff.
J. D. Cantley Q.C. and *W. D. T. Hodgson* for the defendants.

In addition to the cases referred to in the judgment the following case was cited in argument: *Franklin* v. *Gramophone Co. Ltd.*[2]

GLYN-JONES J. delivered a considered judgment in which after setting out the facts he continued: Mr. Crichton, for the plaintiff, contends that the revolving cutter was a dangerous part of the machine and that there was a statutory duty laid upon the defendant company by section 14 of the Factories Act, 1937, to keep it securely fenced. Mr. Cantley, for the defendants, says that this machine was a horizontal milling machine and that the obligation securely to fence the cutter has been modified by the Horizontal Milling Machine Regulations, 1928, and that compliance with the regulations relieves the defendant company from any obligation imposed by section 14 of the Factories Act, 1937, in respect of the fencing or guarding of the cutter. He relies on the decision of the Court of Appeal in *Miller* v. *Wm. Boothman & Sons Ltd.*,[1] which concerned a woodworking machine with a circular saw. [His Lordship found that the machine was a horizontal milling machine and continued:]

There is a resemblance between the cutter of a horizontal milling machine and a circular saw, which was the subject matter in *Miller* v. *Boothman*.[1] The resemblance lies in this: that in respect of most of the work to be done there must be a gap in any guard through which the component to be milled can reach the cutter, and if the gap is large enough for the component to pass through it will also be large enough to admit the fingers of the operator. If this is so then it is in practice impossible to use a horizontal milling machine for most of the work for which it is designed without committing a breach of section 14 and there is, therefore, as good a ground for modifying the absolute obligation imposed by statute in the case of a cutter of a horizontal milling machine as there is in the case of a circular saw.

Regulation 3 of the Horizontal Milling Machine Regulations, 1928 (S.R. & O., 1928, No. 548), reads as follows: "The cutter or "cutters of every horizontal milling machine shall be fenced by "a strong guard, properly adjusted to the work, which shall "enclose the whole cutting surface except such part as is neces-"sarily exposed for the milling operations." I call attention to the words: "except such part as is necessarily exposed for the "milling operations". A definition of the shape and dimensions

[2] [1948] 1 K.B. 542; 64 T.L.R. 186; [1948] 1 All E.R. 353.

[1] [1944] K.B. 337; 60 T.L.R 218; [1944] 1 All E.R. 333.

of a guard follows. Regulation 6 provides: "The guards or other "appliances required by these Regulations shall be maintained "in an efficient state and shall be constantly kept in position "while the milling cutter is in motion, except when the tool "setter is setting up the machine." To regulation 3 there is the following exemption: "Nothing in Regulation 3 shall apply to "any milling cutter used on (i) a spindle which exceeds $2\frac{1}{2}$ "inches in diameter, or arbor which exceeds 2 inches in diameter "at the place where the cutter is mounted: or when used for "(ii) (a) making tools, jigs, or gauges for use in the factory, or "(b) similarly accurate operations where, during the actual "cutting process, all those parts of the machine which control "the relative positions of the work and the cutter can be "manipulated by the operator at his unrestricted discretion." There follow descriptions of a number of other processes, one of which, under (vii), is automatic profiling, which is the process being carried on in this case and therefore is one of the processes to which the exemption applies.

Mr. Cantley says that the regulations taken as a whole define exhaustively the duty of the occupier of a factory in respect of the fencing of the cutter, but Mr. Crichton contends that a horizontal milling machine used for automatic profiling, being exempted from the regulations, continues to be governed by section 14 of the Factories Act, 1937. He says that regulation 3 grants to the occupier of a factory some modification of the stringency of the duty imposed by section 14, but in respect of the exempted processes the same privilege or modification is not conceded; and he says that his contention is expressly supported by a proviso to the exemption which reads as follows: "Provided "that these exemptions shall not prejudice the application of "section 10 of the Factory and Workshop Act, 1901, [now "section 14 of the Factories Act, 1937] in regard to fencing of "such machinery."

I was given descriptions of most of these processes and it is quite clear that the process described under exemption (ii), for example, is one which cannot possibly be carried on if the whole of the cutter must be securely fenced or guarded so as to satisfy the requirements of section 14, and I think it would be odd if the effect of exempting the occupier from the requirements of regulation 3 had the effect of prohibiting the use of horizontal milling machines for one or more—perhaps all—of the exempted processes. That is what the effect would be if Mr. Crichton is right.

I think that some clue to the purpose of the regulations can be afforded if one supposes that regulations 3 and 6 are intended to apply to repetition work. The machine is set, when the cutters are unguarded, by a skilled toolsetter, and after the machine has been set the guard is put into position and the machine operator, not necessarily highly skilled, carries on with the repetition work until the next occasion when the machine

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wants setting. To that end the only modification of the absolute duty imposed by section 14—and it is the modification which makes it practicable to work the machine—is that such part of the cutter as is necessarily exposed to the milling operation may be left unguarded and the whole of the rest of the cutter must be securely and properly fenced or covered.

Of the processes described in the exemptions some are obviously processes which have to be carried on by highly skilled men. That would be true of the process described in exemption (ii), and I think myself that it is also true of the process that was being carried on in this case, namely automatic profiling. It is quite obvious, I think, that, in the carrying on of that process, it is necessary for the machine to be very frequently readjusted and reset and for the operator to use a high degree of skill. I think that, while there may have been other reasons why some of these exemptions have been made, in respect at any rate of the process described in exemptions (ii) and (vii), and probably in respect of some of the other processes also it may well be that the reason for the exemption is that the skilled man may more safely be given a freedom which is not given to the more or less unskilled machine operator employed on repetition work. I think that the meaning to be given to the proviso is that it ensures that the requirements of section 14 of the Factories Act, 1937, are applied in respect of any dangerous part of the machine other than the cutter.

That seems to me to follow from the conclusion reached by the Court of Appeal in *Benn* v. *Kamm & Co. Ltd.*[2] It is true that that case differs from this one in that the process being carried on there was one, I think, to which regulation 3 applied: it was not one of the exempted processes. There the operator was adjusting or setting the machine when he was injured, not by the cutter, but by another part of the machine altogether, and the argument there was that the regulations are an exhaustive definition of the obligation imposed on an occupier to fence the machine or any part of it: in other words, if an occupier complied with the regulations by fencing the cutter to the extent required by the regulations he was under no obligation to fence anything else. The Court of Appeal did not agree with that view and held that the operation of these regulations was limited to the cutter of the machine, and that for any other dangerous part the duty of the occupier must be sought in section 14 of the Factories Act, 1937. It is perhaps worthy of note that the operator in that case was an apprentice of 19 who could certainly not be said to be a highly skilled man, whereas the kind of process being done in the present case by the plaintiff was being done by a man of a very high degree of skill.

In *Benn* v. *Kamm*[2] the Court of Appeal reached the conclusion that the provisions of section 14 applied to dangerous parts

[2] [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833.

of the machine other than the cutter, although there is no proviso to regulation 3 of the regulations which expressly deals with the matter. One might well reach the same conclusion concerning an exempted process even if no proviso were there. In a sense, therefore, to give this meaning to the proviso deprives it of much, if any, effect, but I prefer to construe it as inserted for the removal of doubt rather than as a devious method of prohibiting such a process as that described in exemption (ii). I have come to the conclusion that there was no statutory duty upon the defendant company to fence this cutter. I think that the effect of the regulations is to relieve them from the statutory obligation to fence it.

[His Lordship considered alleged breaches of other statutory obligations and held that want of suitable lighting was not a cause of the accident; that the stopping appliance was efficient and in a proper position; and as regarded the first allegation of negligence at common law, that the clamping screw was placed dangerously near the cutter, he held that the defendants were negligent. The second allegation, which his Lordship allowed by amendment of the particulars of negligence, was that the defendant company, being well aware that their employees were using the machine with the hinged guard up, should have insisted that they used the guard wherever possible. His Lordship continued:] The question raised by the other allegation is, I think, a more difficult one. Mr. Cantley says that it would be harsh indeed and quite unjust to say that an employer notwithstanding that he has performed the duty imposed upon him by Parliament—by regulations made by statutory power granted by Parliament—should have imposed upon him by common law a duty to do something which Parliament has said he need not do. Mr. Cantley's argument is that once Parliament makes regulations concerning the circumstances in which a particular machine must be fenced, these regulations are an exhaustive definition of the employer's duty and supersede, as it were, the common law.

I have come to the conclusion that that is not the right view. Supposing that the Factory Act and its regulations had not been passed, the common law, in my opinion, would have required the employer to take reasonable care to protect his servants from unnecessary danger by fencing or guarding any part of the machine at which the employee was required to work—any part which was dangerous and which it was reasonably practicable to fence. The common law never imposed an absolute obligation, but may well impose an obligation to fence where it is reasonably practicable to do so. I think the truth is that the common law obligation to fence is masked by the wider obligations imposed by statute, and that if for any reason the wider statutory obligation disappears then the common law duty once more becomes visible resting where it always has done—on the shoulders of the employer. I think that notwithstanding these regulations, if a reasonable employer in the circumstances would have thought it

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was his duty, by giving directions to his workpeople or perhaps merely by exhortation, to encourage the use of a guard so as to diminish the risk, then there is a breach of common law duty if he fails to do so.

Therefore I have to consider whether a reasonable employer would have taken any steps beyond those actually taken by the defendant company in the present case to discourage the men from working with the guard up. Although, as I say, I do not think the existence of the regulations relieves the occupier from any common law duty to fence, the fact that the regulations exist is a fact to be considered in assessing whether or not a reasonable employer would think it necessary to interfere. [His Lordship reviewed the evidence and found that the employers were not guilty of negligence.]

Judgment for the defendants.

Solicitors: *W. H. Thompson; A. W. Mawer & Co., Manchester.*

[PROBATE, ETC., DIVISION.]

1955
Nov. 21.

Karminski J.

* PARROCK *v.* PARROCK.

Husband and Wife—Desertion—Termination—Petitioner's adultery during period of desertion—Previous objection by respondent to association—Association broken until after inception of desertion—Respondent aware of adultery—Respondent's conduct not affected by adultery.

A husband presented a petition for divorce on the ground that his wife, whom he had married in 1920, had deserted him in February, 1951, when she left the matrimonial home. He prayed for the exercise of the court's discretion in respect of his adultery since the summer of 1953 with a woman with whom he had been living and whom he wished to marry. He had been on very friendly terms with that woman in 1945 and 1946, and his wife had objected to the association, which was broken off. The friendship was renewed at the end of 1952 when the woman became his housekeeper.

When the wife deserted the husband she went to share a caravan with another man; but a petition presented by the husband in April, 1952, on the ground of adultery was dismissed in April, 1953, in a defended suit. Shortly afterwards, before the husband began to commit adultery, she unsuccessfully applied for an order of the justices on the ground of neglect to maintain. In both those proceedings she made it clear that she suspected an adulterous relationship between the husband and his housekeeper; and it was established that she was aware of the adultery after it in fact began. She continued to share the caravan with the man previously named as co-respondent:—

Held, (1) that, notwithstanding the wife's knowledge of the adultery, and her previous protests at the time of the earlier association between her husband and the woman concerned, she had shown by her conduct when she left that she was indifferent to her

husband's behaviour thereafter with other women. Her conduct as a deserter had not been affected by her knowledge of the adultery, and the desertion alleged had accordingly been proved.

(2) That it was a proper case for the exercise of the court's discretion, and that a decree nisi should be pronounced accordingly.

Herod v. *Herod* [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722 applied.

Williams v. *Williams* [1943] 2 All E.R. 746 distinguished.

UNDEFENDED PETITION for divorce on the ground of desertion.

The following statement of facts is substantially taken from the judgment: The parties were married in July, 1920, and finally separated in early 1951, when the wife left the husband. The husband, when serving in the Royal Air Force during the war, had met a woman who was at that time a widow, her first husband having been killed in 1940 at Dunkirk. The husband and the woman became very attached to each other; but in April, 1945, she married one Mepham, and the husband was best man at that wedding. That marriage was, however, very short-lived; and in 1948 Mepham obtained a decree of dissolution against his wife on the ground of her desertion of him very soon after their marriage.

In 1945 or 1946 there was an attachment between the husband and Mrs. Mepham. The wife intercepted a letter from Mrs. Mepham to him in or about 1946, which was only one of many. The letter was of an affectionate nature which she resented, and her anxieties as to the relations between her husband and Mrs. Mepham were not diminished by a somewhat angry letter written in September, 1946, by Mepham to the present petitioner in the following terms: "Hallo, Fred, my double-crossing pal "what does it feel like to be chief witness (co-respondent) in a "divorce case?" He made various threats and finished in these terms: "Will be seeing you very shortly. From one who "just ain't gonna forget," and signed "Mr. Mepham." Mepham was therefore taking a serious view of his wife's relations with the husband in the present suit. That letter was also intercepted by the wife, and the court was satisfied that she had every cause to question her husband. The court, however, found upon the evidence that the friendship was broken off, that the correspondence ceased, and that they did not see each other again until some months after the wife had left the husband in February, 1951. The husband, in fact, had not known where Mrs. Mepham was in the autumn of 1951, and found her only after he had caused inquiries to be made by an inquiry agent on his behalf.

The wife had said in the earlier proceedings referred to below that she was complaining from time to time not of the husband's association with Mrs. Mepham, which had ceased in 1946, but because when there was other trouble between them the husband used to say to his wife how infinitely preferable Mrs. Mepham was. The final trouble between the parties arose out of

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the wife's friendship and affection for a Pole called Horbacz, who had originally come as a lodger to the house. In February, 1951, the wife left the husband, having sold up a portion of the household furniture, took with her her personal belongings, went for a short time, of a few weeks, to lodgings, and then set up house with Horbacz in a caravan in Hemel Hempstead, where the court found that they had resided ever since. The husband learned that the wife was living in the caravan with this man, to whom he had objected from time to time, and in April, 1952, he presented a petition for dissolution of marriage in which he alleged that the respondent wife had committed adultery with Horbacz, whom he named as co-respondent. The matter was tried for several days, in April, 1953, by Mr. Commissioner Latey who, having heard the evidence, came to the conclusion that the husband had not proved his case and dismissed that petition. Immediately after that the wife summoned the husband before the justices for wilful neglect to provide reasonable maintenance for her; that summons was dismissed in 1953. The husband's adultery began very shortly afterwards.

T. J. Kelly for the husband.
Colin Duncan for the Queen's Proctor.

Richards v. *Richards* [1] was referred to in argument in addition to the cases cited in the judgment.

Karminski J. This is a petition by a husband, Alfred James Parrock, in which he prays for the dissolution of his marriage with the respondent wife, Lilian Parrock, on the ground that she has deserted him for three years and upwards immediately preceding the presentation of the petition. The husband says that the wife left him on February 27, 1951, taking her personal belongings with her, and that she has since refused to live with him again. The husband has to ask for the exercise of the discretion of the court because he himself has committed adultery, as set out in his discretion statement, with Mrs. Mepham.

When the case first came before me, I was a good deal troubled by the position created by the husband's own admitted adultery, because as he said in his discretion statement, and as he has repeated on oath in this court, he has in effect been living in adultery with Mrs. Mepham from about the middle of the year 1953 right up to the present time. Mrs. Mepham had been his housekeeper from December, 1952, but it is not suggested, and it certainly is not admitted by the husband, that adultery commenced until about six months after she first came to his house as his housekeeper. There have been other proceedings between these parties which in no way diminish the

[1] [1952] P. 307; [1952] 1 T.L.R. 1321; [1952] 1 All E.R. 1384.

difficulties of the court in deciding whether or not, first of all, desertion had ever commenced; and, if it had commenced, whether it had continued up till the time of the petition at the end of 1954, notwithstanding the petitioner's own admitted adultery.

[His Lordship then stated the facts and continued:] The husband now says that the wife has deserted him. The wife has not appeared or taken any part in these proceedings, but the relevant facts having been brought to my notice I felt it was a case where I should have assistance from the Queen's Proctor, certainly as to the law and, if necessary, as to the facts.

Mr. Colin Duncan appears for the Queen's Proctor and I am indebted to him for his careful argument on both facts and law. He has told me that the Queen's Proctor has made what I may term the usual inquiries and has discovered no grounds for intervening. As to the law, I think the law on this difficult subject of desertion where the petitioner has committed adultery is now tolerably well-established. The leading case on this subject is *Herod* v. *Herod*,[1] where the considered judgment of Lord Merriman P. is accurately summarized in the headnote, which reads: "If a spouse commits adultery after he or she has been "deserted, the desertion is not necessarily terminated as a matter "of law, regardless of the question whether the deserting spouse "knew of the adultery or whether it had any influence on his or "her conduct. If it is left in doubt whether the respondent knew "of the adultery or, if known, whether his or her conduct was "affected by it, the petitioner would fail to discharge the burden "of proof. The question is to be determined according to the "circumstances of each case. A spouse cannot be heard to say "that adultery at which he or she has connived or to which his "or her conduct has conduced is a reasonable cause for deser-"tion." This statement of the law, laid down in *Herod* v. *Herod*,[1] was subsequently approved by the Court of Appeal in *Earnshaw* v. *Earnshaw*.[2]

Mr. Duncan has rightly pointed out that the law in Scotland is different, and that, indeed, the House of Lords decided that in Scotland a pursuer who has committed adultery within three years, is in no circumstances entitled to obtain a decree of divorce: *Marshall (or Wilkinson)* v. *Wilkinson*.[3] But an examination of the judgments in that case makes clear that there their Lordships were dealing with the law of Scotland as it was in 1943, and as, in the view of the majority of their Lordships, it had been since the Act of 1573. No query appears to have been raised in that case by their Lordships as to the correctness or otherwise of the decision of *Herod* v. *Herod*,[4] which was referred to in argument and was also mentioned in the speech of Lord

[1] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.
[2] [1939] 2 All E.R. 698.
[3] 1943 S.C. (H.L.) 61; [1943] W.N. 145.
[4] [1939] P. 11.

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Simon L.C.,[5] where it was quoted with apparent approval. But English law is clear to this extent at least, that adultery by a petitioner within three years of the desertion which he alleges does not preclude him from establishing such desertion.

Mr. Colin Duncan called my attention to the decision of the Court of Appeal in *Williams* v. *Williams*.[7] In that case the facts were somewhat different from the present in that the husband had greatly upset the wife in 1938 by staying for a number of nights with a young woman in hotels in London and Brighton, a fact which, when it came to the wife's notice, not unnaturally caused her to wonder and indeed to suspect that her husband had committed adultery with that woman. It was found that no adultery had in fact been committed in 1938 by the husband with that young woman, but that in 1939 till the end of 1941 he had, in fact, gone off with the same young woman and had committed adultery with her. In 1942 he filed a petition for divorce on the ground that his wife had deserted him for three years immediately preceding the presentation of the petition, and the wife took no part in those proceedings and did not defend them. On the facts, Henn Collins J., who was trying the case at first instance, dismissed the petition and the matter came to the Court of Appeal, where the decision of Henn Collins J. was affirmed. The peculiar feature of that case, and which, perhaps, distinguishes it from the present, was that the wife had persuaded herself that adultery had been committed in 1938 although, in fact, it had not. But when the husband sought to rely on that he was met with the answer that his subsequent adultery must have had some effect upon the wife's mind. I think that the matter can be most conveniently summarized by a brief reference to the judgment of du Parcq L.J.[8]: "The question is whether, "because of her firm refusal to justify her desertion of her "husband by anything subsequent to the events of 1938, it can "be said with reasonable certainty that what happened later "made no difference to her conduct. For myself, I find it "impossible to say that, if the petitioner had kept aloof from "Miss Hooper for a longer period, and if he had persevered in "his attempts at reconciliation, or continued to desire it, for as "long as even one year out of the statutory period of three "years, his wife would still have refused inexorably to receive "him back. No one can say with certainty either that she "would, or that she would not, have relented, and it is after "all the act of the petitioner which has made it impossible to "give a certain answer."

The burden in cases of this kind must always be on the petitioner who has been committing adultery to satisfy the court of the matters required in *Herod* v. *Herod*,[9] that the respondent either did not know that adultery had been committed, or that,

[5] 1943 S.C. (H.L.) 61, 66.
[7] [1943] 2 All E.R. 746.
[8] Ibid. 572.
[9] [1939] P. 11.

if that knowledge was present to the respondent's mind, he was quite uninfluenced by it in his decision to remain apart and not return to the petitioner spouse.

The difference between the present case and the facts in *Williams* v. *Williams* [10] is this: in *Williams* v. *Williams* [10] the wife who was the respondent could not in any way be attacked because of her matrimonial conduct apart from the alleged desertion. It was not suggested, as it is here, that she had gone to live against the wishes of her husband in a caravan with another man under circumstances which might not unreasonably arouse the suspicion that adultery had been committed in that caravan. In the present case, the wife did so withdraw herself from cohabitation to start life in a caravan although, as Mr. Commissioner Latey found, she did not commit adultery there.

I have to consider this case, as *Herod* v. *Herod* [11] says I must, in the light of all the circumstances known to the court. So far as the respondent's knowledge in this case is concerned, I think it is tolerably clear that she knew that her husband was living in the same house, with Mrs. Mepham as his housekeeper; and she made her suspicions that adultery was quite probably being committed clear both at the trial before Mr. Commissioner Latey, and subsequently before the justices. On the facts as I know them now, the adultery did not commence until almost immediately after the wife's proceedings before the justices had been dismissed. I have no reason to doubt the accuracy of the petitioner's evidence on that, the more especially since the Queen's Proctor has been good enough to investigate the facts and has not found anything which he thinks ought to be brought to the court's notice on those matters. The wife lived, and still lives, in the same town of Hemel Hempstead as the petitioner does, and it is improbable under all the circumstances that the wife was at any rate free from suspicions as to what was going on between her husband and Mrs. Mepham. It would, indeed, be strange if some friend or acquaintance had not told her what was going on, and the petitioner as early as 1951, when he had resumed his acquaintance with Mrs. Mepham, made a quite frank disclosure to the married daughter of himself and the respondent when he told that daughter that he was in love with Mrs. Mepham and hoped one day to be able to marry her. I have no doubt whatsoever that the reason for these proceedings is because he and Mrs. Mepham do in fact want to marry. I have equally no doubt that the respondent wife knew that the husband was living with Mrs. Mepham not merely under the same roof as employer and housekeeper but as lover and mistress. She has taken no part in defending these proceedings. That may have some, but not much, significance; but it certainly does not relieve me of my obligations to decide this case in the light of the wife's knowledge

[10] [1943] 2 All E.R. 746. [11] [1939] P. 11.

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and of her attitude. I do not think myself, having now had the opportunity of considering the facts and the law with the great assistance of the Queen's Proctor, that the wife was affected by the knowledge of her husband's adultery, which I find as a fact she had. I think this is a case where, confronted with charges against herself, she not unnaturally counter-attacked not only in this court before Mr. Commissioner Latey, but also before the justices, and pointing out that her husband's conduct in the past was by no means free from blame.

I have not had in this case the advantage of any evidence from the wife, but I am satisfied that I have had read to me all the relevant passages of evidence which she gave before the commissioner and also the note of the evidence which she gave before the justices at Berkhamsted. Mr. Commissioner Latey, who had the advantage of seeing her in the witness-box for some time, found her to be in some matters an unreliable witness, and I have to try and decide this case in her absence.

In my view this is a case where the wife, perhaps because she was tired of her marriage and of her husband, and perhaps because she had a good deal of affection for Horbacz, decided to leave her husband and to set up home in this caravan. Once she decided to do that I do not think that the wife really cared at all whether Mrs. Mepham, originally the housekeeper, subsequently became the petitioner's mistress. I think that the wife was quite indifferent to what went on in the husband's home, or what the husband did with other women once she had gone to set up house with Horbacz. Having satisfied myself as well as I can of what went on in the mind of a woman whom I have not seen in the witness-box, I think that my duty is clear. This has not been an easy case, and it has not been made very much easier by a certain reluctance on the part of the petitioner to give away anything in evidence which he thought might injure his case, whereas my own task would have been infinitely easier had he been a rather more candid witness. But I think, or more accurately I hope, that I have now found where the truth lies. In my view, for the reasons I have given, I am satisfied that the petitioner has proved the contents of his petition. This is a case where I think it is right that the court's discretion should be exercised in the petitioner's favour if only to enable him, if he so desires, to marry Mrs. Mepham. I therefore pronounce a decree nisi on the prayer of the petition on the ground of desertion.

Decree nisi.

Solicitors: *Matthew Arnold & Baldwin; the Queen's Proctor.*

J. B. G.

[PROBATE, ETC., DIVISION.]

NOTE.

* SULLIVAN *v.* SULLIVAN.

1956
Feb. 9, 13.

Lord Merriman P. and Collingwood J.

Husband and Wife — Desertion — Constructive desertion — Reasonable belief in adultery — Justices — Practice — Specific allegation and notice of adultery not necessary—Nature of case of reasonable belief required.

At the hearing of a wife's summons on the ground of desertion the wife alleged that she had left the matrimonial home in the reasonable belief, induced by the husband's conduct, that he had committed adultery. Before the hearing the wife's solicitors, by certain letters to those representing the husband, gave notice of specific adultery to be alleged. The justices held that the adultery had not been proved, but that the husband was guilty of desertion. On the husband's appeal:—

Held, that a specific allegation of adultery should not be made unless it was intended to make an actual charge of adultery; in the present case it would have been appropriate and sufficient to give notice that the wife intended to rely on a reasonable belief that adultery had been committed at the time and in the circumstances specified, in other words, to state the substance of her case.

Frampton v. *Frampton* [1951] W.N. 250 and *Jones* v. *Jones* [1954] 1 W.L.R. 1474; [1954] 3 All E.R. 476n. explained.

APPEAL from an order of the justices for the City and County of Bristol.

The wife left the matrimonial home on September 23, 1955, and issued a summons on the ground of the husband's desertion. It was, therefore, necessary for her to justify her leaving by showing that, in effect, she had been expelled by her husband's conduct. This she sought to do by asserting that she left in the reasonable belief, induced by the husband's conduct, that he had committed adultery. In that connexion she relied on certain events which occurred between Thursday, September 15, 1955, and the discovery on Sunday, September 18, 1955, of certain stains on the husband's clothing by the wife. There was no formal complaint of adultery. The complaint was one of desertion on September 23, 1955.

On October 26, 1955, her solicitors wrote to the husband's solicitors asking them to accept their letter as notice that they intended, on behalf of the wife, to allege that the husband had committed adultery with a woman unknown on Friday, September 16, 1955. By a further letter of October 31, 1955, the date was corrected, but only the date, for the husband's solicitors were invited to note that it should have been alleged that adultery had been committed with a woman unknown on Saturday, September 17, 1955, not Friday, September 16, 1955, as had been stated in the letter of October 26, 1955; but it was still an allegation that adultery had been committed. Finally, on

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November 25, 1955, the particulars of adultery were again corrected in a letter from the wife's solicitors to those of the husband in which they said: "In view of the nature of the "evidence on which we must rely it would be improper to "specify any particular date on which adultery was committed, "and we therefore feel that we must give a fresh notice of "allegation (sic) in substitution of the one dated the 31st"—(that is the correction to Saturday the 17th)—"to read 'adultery "'with a woman unknown shortly before the discovery of the "'stains and blood on Mr. Sullivan's outer- and under-clothing "'on the morning of Sunday the 18th September.'"

On November 29, 1955, the justices for the City and County of Bristol found the charge of adultery against the husband was not proved and made an order in favour of the wife on the ground of the husband's desertion. From this order the husband appealed.

R. A. Macdonald for the husband.
W. M. Huntley for the wife.

Lord Merriman P. referred to the facts substantially as set out above, and continued: Short of an actual formal complaint, it would be difficult to imagine a plainer charge of adultery on a specified or at least an ascertainable date, albeit it was not with a specific woman but alleged to be with a woman unknown, and, moreover, in their reasons, the justices say that it was admitted that written notice had been given to the husband of the wife's intention to allege that he had committed adultery. However, the justices said that they were not satisfied that adultery had been proved, while, at the same time, they found that the wife had reasonable grounds at the time for so believing, and that such belief was induced by the husband's conduct.

In one phase of the argument Mr. Huntley, for the wife, submitted that there had been no determination adverse to the wife of the issue whether the husband had in fact committed adultery, because adultery was not the subject of her formal complaint, and that the notices to which I have just referred were given because of what was stated to be the universal practice to give notice of a charge of adultery whenever adultery was mentioned in any form whatever.

I do not in the least degree retract from the decision of this court in *Duffield* v. *Duffield*,[1] in which I am reported as saying[2]: ". . . I wish to emphasise, as has been emphasised repeatedly, "to my knowledge, by this court, that it is of the utmost "importance that whenever a charge of adultery is going to be "made, in whatever context, under the summary jurisdiction "procedure, full and proper particulars should be given," but I

[1] [1949] W.N. 159; [1949] 1 All E.R. 1105.

[2] [1949] W.N. 159.

repeat that the words were "whenever a charge of adultery is "going to be made." The point is, of course, that a charge of adultery may be made in more than one context, for example—(and these are not necessarily intended to be exhaustive)—as a bar to the jurisdiction of the court under section 6 of the Summary Jurisdiction (Married Women) Act, 1895, as a ground for revoking an order under section 7 of the Act, as a defence to a charge of desertion, or as ground for substantive relief at the instance of either the husband or the wife.

But there is an essential difference between making a charge of adultery and alleging that the conduct of one spouse or the other has induced a reasonable belief that adultery has been committed. In my opinion, a specific allegation of adultery should not be made merely as a matter of course unless it is intended to make the actual charge of adultery. In this case it would have been appropriate and sufficient to give notice that the wife intended to rely, in support of the charge of desertion, on a reasonable belief that adultery had been committed at the time and in the circumstances specified; in other words, to state the substance of her case. I think that this is the true effect of the decisions of this court in *Frampton* v. *Frampton* [3] and *Jones* v. *Jones* [4]; but I am saying what I am in deference to Mr. Huntley's statement that there is a practice which is supposed to necessitate the making of a charge of adultery merely because the charge of reasonable belief in adultery is being put forward, whether by way of defence or as the case may be. Therefore it is desirable, I think, that the matter should be brought back to where it is left in *Jones* v. *Jones*,[5] to which I have made reference, namely, that what is required is a correct statement of what is the substance of the wife's case, but that adultery should not be charged merely as a matter of course.

[His Lordship then, considering *Allen* v. *Allen* [6]; *West* v. *West* [7] and *Everitt* v. *Everitt*,[8] held that, when the two issues of adultery and reasonable belief by one party in that adultery, induced by the conduct of the other spouse, came to be determined by the same court at the same hearing, the negativing of the charge of adultery did not operate retrospectively to negative the existence of the reasonable belief in that adultery. He also held that it was impossible to say that the acts put forward in support of the reasonable belief remained the same throughout up to the moment of the justices' decision since the justices had had the benefit of evidence upon the matter which was not available to the wife when she formed her belief in the husband's adultery. It was, therefore, plainly open to the justices, while

[3] [1951] W.N. 250.

[4] [1954] 1 W.L.R. 1474; [1954] 3 All E.R. 476n.

[5] Ibid.

[6] [1951] W.N. 322; [1951] 1 All E.R. 724.

[7] [1954] P. 444; [1954] 3 W.L.R. 163; [1954] 2 All E.R. 505.

[8] [1949] P. 374; [1949] 1 All E.R. 908.

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Lord Merriman P.

finding that the adultery was not proved, to hold that, at the time when the wife left the matrimonial home, she believed that the husband had committed adultery and had reasonable grounds, induced by his conduct, for so doing. They were, therefore, entitled to hold that she had been expelled by the husband and that he was guilty of desertion. The appeal should be dismissed.]

Collingwood J. delivered a concurring judgment.

Appeal dismissed.

Solicitors: *Vallance & Vallance for Parry, Mackan & Hamilton, Bristol; Pengelly & Co. for J. W. Ward & Son, Bristol.*

E. J.

[Queen's Bench Division.]

1955
Nov. 28.

Hallett, Pearce and Pearson JJ.

*Regina *v.* Manchester Justices. *Ex parte* Gaynor.

Road Traffic—Disqualification—Removal—Disqualification removed as from future date—Power to entertain subsequent application for immediate removal—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 7 (3).

On an application under section 7 (3) of the Road Traffic Act, 1930, for the removal of a disqualification for holding a driving licence for three years from April 27, 1954, justices ordered its removal as from April 27, 1956. The applicant subsequently applied for the immediate removal of the disqualification on the ground of hardship. The justices were of opinion that they had no jurisdiction to hear the application, since the previous application had been granted, and that further applications could only be made if a previous application had been refused:—

Held, that the justices had jurisdiction to hear the second application.

Application for mandamus.

On April 27, 1954, the applicant, Roy Gaynor, was convicted by the Manchester justices of driving to the danger of the public contrary to section 11 (1) of the Road Traffic Act, 1930, and was fined £20 and disqualified from driving motor-vehicles for three years from the date of conviction. On May 27, 1955, the applicant applied under section 7 (3) [1] of the Act of 1930, for the

[1] Road Traffic Act, 1930, s. 7 (3): "A person who by virtue of a conviction or order under this Part of this Act is disqualified for holding or obtaining a licence, may, at any time after the expiration of six months from the date of the conviction or order, and from time to time apply to the court before which he was convicted or by which the order was made to remove the disqualification, and on any such application the court may, as it thinks proper, having regard to the character of the person disqualified and his conduct subsequent to the

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removal of the disqualification and the justices ordered its removal as from April 27, 1956. On August 31, 1955, the applicant sought to make a further application for the immediate removal of the disqualification on the ground that he had additional evidence to show that irretrievable hardship would be caused to him by the continuance of the disqualification. The justices refused to allow the application to be made on the ground that they had no jurisdiction to hear it, since the previous application had been granted, and further applications could only be made if a previous application had been refused. The applicant applied for an order of mandamus requiring the justices to consider the application.

F. P. Neill, for the applicant, contended that since at the time of the second application the applicant was still disqualified for holding a licence, the justices had jurisdiction to hear the application.

The justices were not represented.

HALLETT J. The court thinks that it is clear that the justices had jurisdiction to entertain the second application and an order of mandamus will be granted.

Application granted.

Solicitors: *Gregory, Rowcliffe & Co. for Pattinson, Harrison & Milne, Macclesfield.*

J. D. P.

"conviction or order, the nature of "the offence, and any other circum- "stances of the case, either by order "remove the disqualification as from "such date as may be specified in the "order or refuse the application."

[CENTRAL CRIMINAL COURT.]

* REGINA *v.* SILVER AND OTHERS.

C. C. C.

1956
Feb. 8, 9.

His Honour Judge Maude Q.C.

Vagrancy—Prostitution—Living on the earnings of prostitution—Flats let at increased rents to individual prostitutes for the purposes of prostitution—Vagrancy Act, 1898 (61 & 62 *Vict. c.* 39), *s.* 1 (1).

Four male persons were alleged to have let flats to individual prostitutes, knowing that they were to be used for the purposes of prostitution, and to have received an increased rent on that account. Four other male persons were alleged to have conducted an estate agency, the main business of which was to provide and let flats to individual prostitutes for the purposes of prostitution:—

Held, that the facts alleged did not constitute the offence charged of living wholly or in part on the earnings of prostitution contrary to section 1 (1) of the Vagrancy Act, 1898.

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

C. C. C.
1956
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v.
Silver.

Trial on indictment.

Bernard Silver, Cyril William Pullinger, Maurice Blair, George Modebadze, Wilfred Jerome Delmaine, Robert Edward Clement, Robert Laurent Falzon and Patrick Wilkinson were charged on indictment that they, being male persons, did, unlawfully and knowingly, live wholly or in part on the earnings of prostitution, contrary to section 1 (1) of the Vagrancy Act, 1898.[1] The ninth defendant, Albertine Falzon, was charged with aiding and abetting the other defendants to commit the offence with which they were charged.

The Crown alleged that the defendants Pullinger, Blair, Modebadze and Clement were landlords of Soho flats which would normally carry a rent of £3 to £5 a week, but which were let to individual prostitutes at rents as high as £25 a week. In addition, it was alleged, the women had to pay £200 key money. The other defendants were concerned in running an estate agency in Romilly Street, Soho, which the Crown alleged dealt with virtually nothing but providing and letting flats to prostitutes. From the 24 flats involved in the case it was alleged that rents totalling £26,000 a year were paid by the women. There was no evidence that any of the defendants were living with or habitually in the company of any of the prostitutes or had exercised control, direction or influence over the movements of any of them so as to bring subsection (3) of section 1 of the Vagrancy Act, 1898,[1] into operation.

All the defendants pleaded not guilty.

Mervyn Griffith-Jones and *Alastair Morton* for the Crown.

Jeremy Hutchison for the defendants Silver and Albertine Falzon.

Victor Durand and *John Abrahams* for the defendant Pullinger.

R. E. Seaton for the defendant Modebadze.

Tudor Price for the defendant Delmaine.

Reginald Hollis for the defendant Robert Laurent Falzon.

Brian Leary for the defendant Wilkinson.

The defendant Blair conducted his own defence.

[1] Vagrancy Act, 1898, s. 1: "(1) Every male person who— "(*a*) knowingly lives wholly or in "part on the earnings of prostitution "... shall be deemed a rogue and "vagabond within the meaning of "the Vagrancy Act, 1824, and may "be dealt with accordingly. ... "(3) Where a male person is proved "to live with or to be habitually in "the company of a prostitute [or is "proved to have exercised control, "direction, or influence over the "movements of a prostitute in such "a manner as to show that he is "aiding, abetting, or compelling her "prostitution with any other person "or generally], he shall, unless he "can satisfy the court to the contrary, be deemed to be knowingly "living on the earnings of prostitution."

Note: The words in square brackets were substituted by section 7 (1) of the Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), for the words "and has no visible "means of subsistence."

The following cases were cited in argument: *Attorney-General* v. *Brown* [2]; *Siviour* v. *Napolitano* [3]; *Rex* v. *Chapman* [4]; *Ledwith* v. *Roberts* [5]; *Calvert* v. *Mayes* [6]; *Regina* v. *Gorman* [7]; *Strath* v. *Foxon* [8]; *Prince Ernest of Hanover* v. *Attorney-General.* [9]

HIS HONOUR JUDGE MAUDE Q.C. Members of the jury, the Queen's courts can only administer the law as they find it, and they must, and I must, administer it strictly. Any feeling of indignation which the general public or the judiciary might have at a state of affairs that would appear to be grossly immoral is irrelevant unless the facts show that an offence has been committed against the existing law. I have come to the conclusion, having heard the evidence for the Crown, that within the law as it stands at the present time there is no case for these persons in the dock to answer. This is a matter which may be considered of some public importance and I think it is right that I should set out the reasons for coming to that conclusion.

At first sight it might appear, in ordinary language, clear that all the persons in the dock were knowingly living in part on the earnings of prostitution. But when the position is more carefully considered it can be seen that this is not so. The common law has always known how to deal with what are called brothels, that is to say, places where two or more women in the same premises are plying their trade as prostitutes. That, you understand, is different from premises, such as those in this case, where only one woman is operating. In 1885 the scope of the criminal law relating to these matters was widened by section 13 of the Criminal Law Amendment Act, 1885.[1] It is noticeable that the tenant, lessee, or occupier of any such premises is covered by one subsection while the lessor or landlord, or the

[2] [1920] 1 K.B. 773; 36 T.L.R. 165.

[3] [1931] 1 K.B. 636; 47 T.L.R. 202.

[4] [1931] 2 K.B. 606; 47 T.L.R. 620.

[5] [1937] 1 K.B. 232; 53 T.L.R. 21; [1936] 3 All E.R. 570.

[6] [1954] 1 Q.B. 342; [1954] 2 W.L.R. 18; [1954] 1 All E.R. 41.

[7] (1954) unreported.

[8] [1955] 3 W.L.R. 659; [1955] 3 All E.R. 398.

[9] [1955] 3 W.L.R. 868; [1955] 3 All E.R. 647, C.A.; reversing [1955] Ch. 440; [1955] 2 W.L.R. 613; [1955] 1 All E.R. 746.

[1] Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13: "Any person who—(1) keeps or "manages or acts or assists in the "management of a brothel, or "(2) being the tenant, lessee, or "occupier [or person in charge] of "any premises, knowingly permits "such premises or any part thereof "to be used as a brothel or for the "purposes of habitual prostitution, "or (3) being the lessor or landlord "of any premises, or the agent of "such lessor or landlord, lets the "same or any part thereof with the "knowledge that such premises or "some part thereof are or is to be "used as a brothel, or is wilfully a "party to the continued use of such "premises or any part thereof as a "brothel, shall" be liable to certain penalties.

NOTE: The words in square brackets were added by section 4 (1) of the Criminal Law Amendment Act, 1912, which reads: "Section thirteen "of the Criminal Law Amendment "Act, 1885, shall, so far as it relates "to brothels, be amended by insert-"ing after the word 'occupier' the "words 'or person in charge.'"

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agent of the lessor or landlord, is dealt with by a different subsection. So that the lessor or landlord was committing an offence if he knowingly let the premises or any part thereof to be used as a brothel, whereas the tenant, lessee, or occupier could be punished not only for permitting the premises to be used as a brothel but also for permitting them to be used for the purposes of habitual prostitution. One must be certain that the distinction between the lessor and the landlord on the one hand and the tenant, lessee, or occupier on the other hand was of importance to Parliament.

That being the position in 1885, it is quite obvious that persons who let their premises for the purposes of habitual prostitution for one prostitute only were impossible to hit; they could not be struck at; only the tenant, lessee or occupier could be. Indeed, a tenant, for instance, who was permitting premises to be used in a way forbidden by section 13 (2) of the Act of 1885 could claim the more privileged position of the lessor landlord if he or she sublet: see *Siviour* v. *Napolitano*.[2] Some 13 years passed, and it became clear to Parliament, in 1898, that so far as prostitution was concerned something more needed to be done. It was then made an offence by the Vagrancy Act, 1898, for the first time, to do something quite different, that is to say, knowingly to live wholly or in part on the earnings of prostitution. From 1898 to 1912 no attempt whatsoever was made by the prosecuting authorities to strike at landlords or agents concerned in the letting of premises for prostitution only, as opposed to brothels, by virtue of the Vagrancy Act of 1898; and after the Vagrancy Act had been amended in 1912 until the present time—that is to say, until *Regina* v. *Gorman*,[3] a prosecution which was launched at the County of London Sessions on September 8, 1951—no attempt was made to invoke section 1 of the Vagrancy Act of 1898 in the manner in which it has been invoked in this case. So that up to date, so far as is known by the extremely experienced counsel who appear both for the Crown and for the defence or by myself, there has never been any attempt of the kind before 1954. It does not mean because a statute has been allowed to slumber that it is of no effect. If, in fact, it is there, so to speak, as a bit of artillery ready to hand, it can be brought out years, and no doubt maybe hundreds of years, later on and properly used.

The question now arises, for the second time so far as is known, as to what these words mean, that is to say "knowingly "lives wholly or in part on the earnings of prostitution." It might seem, as I say, to those who did not give careful consideration to it that anybody who received money earned by a prostitute would be committing an offence. For instance, the chemist who sells medicines and other things to the prostitute

[2] [1931] 1 K.B. 636; 47 T.L.R. 202.

[3] (1954) unreported.

knowing that she is a prostitute would in part be living on the earnings of prostitution, in one sense, the broadest sense; the doctor who attends her, the lawyer who appears for her, if those persons know that she is in fact a prostitute, might appear to be committing an offence. That, of course, cannot be the intention of the Act. If in fact that were so, the state of the prostitute in this world would be simply appalling; she would be able to get no services—or only with the utmost difficulty—and the same would apply to the goods she wanted to buy. It is unthinkable. Therefore, one has to make up one's mind what the Act of 1898 really means.

It has been said in argument before me, by both sides, that the doctor, for instance, who treats the prostitute knowing that she is a prostitute is not really living on her earnings, although of course the money that is handed over is her earnings; what he is doing is, in fact, living on his own earnings; the doctor has earned his money. The shopkeeper, the grocer and the baker and so on, they earn their money. On the one hand, the doctor gives his services, and on the other, in the case of the shopkeepers, they give their goods in exchange for money: they, in fact, are earning their living. They are not, therefore, knowingly living in part on the earnings of prostitution at all. But it is said now—and it is the only instance to which I should be directing my attention—that where a landlord lets his premises for the purpose of prostitution and gets what I propose to call a prostitute rent, a wholly different situation arises; that is to say, in that the ordinary moral rent is less than the prostitute rent, then in fact he is so far as the prostitute rent addition is concerned living on the earnings of prostitution. Now I do not think he is. I think that what the landlord is doing is, he is living on his own earnings, just like the shopkeeper. A shopkeeper who grossly overcharged a prostitute because she was a prostitute would, nevertheless, be living on his own earnings—utterly, completely and disgustingly immoral, but they are his earnings. The doctor earns his money, the barrister earns his money, and the landlord earns his money, and so does the estate agent; they are all earning their money; they are living in part—or wholly, I suppose, although the professional man has other clients—on money that comes from a prostitute, but they are living on those moneys as the earnings of their own profession.

This is an important, clear-cut case where the statements made by some of the defendants reveal with appalling clarity a situation which must according to any standard be utterly immoral, but that does not bring them within this particular Act. I should like to add this. It looks to me as though the reason for this Act not having been used in this way before has been, in substance, that times have simply been changing. What was once in the view of those who were in charge of prosecutions not a serious menace has become one now. The problems of prostitution and how to deal with it are infinitely complicated.

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1956
REGINA v. SILVER.
His Honour Judge Maude Q.C.

It is right that every endeavour should be made, through the courts, to test the power of the police. This has now been done and, if my decision is correct, it only remains for Parliament to interfere if it thinks fit. But that is not for me. I should have no feelings about the subject; nor do I feel that I should do anything to indicate that it is my view that this, that or the other should be done. I can see that until these prosecutions had been brought it would be difficult, perhaps, to get Parliament to move in the matter. I do not know whether it may be that something will be done about it. It is a matter for the authorities to consider now as to what is necessary.

The result of all this is that the persons in the dock will now be discharged in one moment. As I say, the conduct of most of them has been utterly and disgustingly immoral. But that is not what I am here for, and that is not what you are here for, members of the jury; we are not a court of morals. I hope that I have done enough to indicate the reasons why it is my duty, sitting here to administer the law, to tell you now that there is no evidence on this indictment which would justify your convicting them of the offences charged, and that your duty is to say in answer to the clerk as to their guilt or otherwise that they are "Not Guilty."

The jury returned a formal verdict of "Not Guilty" in respect of all defendants, and they were discharged.

Solicitors: *Director of Public Prosecutions; William Foux & Co.; Alfred Kerstein & Co.; Tarlo, Lyons & Co.; Clerk of the Central Criminal Court.*

[COURT OF APPEAL.]

C. A.
1956
Feb. 27.
Singleton and Hodson L.JJ.

* HURLSTONE *v.* HURLSTONE AND ANTONIO.

Husband and Wife—Practice—Appeal—Decree absolute—Application of respondent wife for leave to appeal out of time—Husband's fraudulent conduct alleged—Wife's knowledge of decree nisi—Time and opportunity to appeal—Supreme Court of Judicature Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31 (1) (*c*).

Section 31 (1) of the Supreme Court of Judicature Act, 1925, provides that: "No appeal shall lie . . . (*c*) from an order absolute "for the dissolution or nullity of marriage in favour of any party "who having had time and opportunity to appeal from the decree "nisi on which the order was founded, has not appealed from that "decree."

A husband, having obtained a decree nisi of divorce on the ground of the wife's admitted adultery, and that decree having been made absolute, married the woman with whom it was alleged he

had himself had an adulterous association, although he had not asked in his petition for the exercise of the court's discretion. The wife now asked for leave to appeal out of time. She admittedly had been informed of the granting of the decree nisi, but she alleged that owing to the fraudulent deception of the husband, who had condoned her adultery and had assured her that the decree nisi was a mere formality and that he had abandoned the divorce proceeding, she had not had an opportunity to appeal against the decree nisi before it was made absolute:—

Held, that in the circumstances it was impossible to find that the wife had not had time and opportunity to appeal against the decree and therefore the application must be refused, despite the alleged fraudulent conduct of the husband.

Semble, that there was nothing in section 19 of the Matrimonial Causes Act, 1950, which would prevent the court from looking into the whole of the facts of the case in the event of the former wife applying for maintenance.

APPLICATION by a wife for leave to appeal out of time against decrees nisi and absolute of divorce granted in October and December, 1954, respectively, to her then husband.

The facts, as stated by counsel, were as follows: The wife, Mrs. Phyllis Evelyn Hurlstone, had confessed to her husband that she had committed adultery and she asked his forgiveness. He refused and some eight months later filed a petition for divorce. He then wrote to the wife suggesting a reconciliation. This was apparently effected in June, 1954, and the husband persuaded the wife to return the divorce papers, which had been served on her, to his solicitors, together with the acknowledgment of service, assuring her that this was merely a necessary formality, he having abandoned the idea of a divorce. The parties remained on the most friendly terms, sexual intercourse took place between them, and the wife was given to understand that as soon as suitable accommodation had been found cohabitation would be resumed.

In November, 1954, the wife met a friend who told her that she had seen a report of the wife's divorce in a newspaper. Thereupon the wife wrote to an inquiry agent, with whom she had had an interview previously, and he replied informing her that a decree nisi had been pronounced against her but that he understood that that decree had not been made absolute. The wife then taxed her husband with what she had learned and was told by him that the divorce petition had been entirely dropped, that the decree nisi was merely a temporary order of the court which had been made because the parties were not living together, and that it would expire. Believing that assurance the wife had continued in this way of apparent reconciliation with the husband until July, 1955, when by reason of an anonymous letter she discovered that the husband had in December, 1954, married a woman with whom it was alleged he had been carrying on an adulterous association for some considerable time before the alleged reconciliation. He had not asked for the discretion of the court in his petition.

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In the above circumstances the wife now submitted that owing to the fraudulent conduct of the husband she had been deprived of "time and opportunity" within the meaning of the Supreme Court of Judicature Act, 1925, s. 31 (1) (*e*) of appealing in time against the making of the decree absolute. She therefore asked for leave to appeal notwithstanding time had expired.

E. Brian Gibbens, for the wife, said she was still interested in retaining her marriage, but if she could not do so she was interested in obtaining a maintenance order against her husband. As the matter stood she would be debarred, in proceedings for maintenance, from alleging her husband's misconduct against her, that not having been raised at the hearing of the divorce proceedings. (See *Duchesne* v. *Duchesne*.[1])

The husband did not appear and was not represented.

SINGLETON L.J. I am sorry, but I do not think that this court can accede to the request for leave to appeal notwithstanding that time has expired. I should have liked to do so in one sense, but if we did so, it appears to me, from that which we have been told by Mr. Gibbens and from the documents before us, that there could only be one end to this matter.

Section 31 (1) of the Supreme Court of Judicature Act, 1925, provides: "No appeal shall lie . . . (*e*) from an order absolute "for the dissolution or nullity of marriage in favour of any "party who, having had time and opportunity to appeal from the "decree nisi on which the order was founded, has not appealed "from that decree."

The decree nisi was granted to the husband, on the ground of the wife's adultery, on October 14, 1954. It is quite clear that some little time later the wife was told by a friend of hers that she had seen her divorce in the paper. The wife then wrote to the inquiry agent with whom she had had some interview earlier, and the inquiry agent wrote on November 22, 1954, telling her that her husband "obtained what is termed a 'decree nisi' on "October 14, 1954, at Hanley Divorce Court. I understand the "decree has not yet been made absolute." On November 27, 1954, the wife wrote to the inquiry agent again: "Thank you "very much for the information you have given me. I would "like this to be kept private and from my husband Thomas "Hurlstone, in case he thinks I'm interfering with his business, "as I'm still good friends with him and would like this kept."

The wife had seen her husband and he had told her something which apparently led her to think that he had dropped the divorce. She had said earlier how she knew from the friend that there had been something in the paper saying that a divorce had been granted against her. She knew from the inquiry agent that a decree nisi had been granted. I cannot see that anyone could

[1] [1951] P. 101; 66 T.L.R. 87; [1950] 2 All E.R. 784.

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successfully argue that she had not had "time and opportunity "to appeal from the decree nisi" before it was made absolute. If that is right, it would be a waste of time and money to give leave to appeal. It is for that reason that I think we are bound to refuse this application.

At the same time I feel sure that Mr. Gibbens is not quite right in saying that the wife's right to maintenance goes. I feel (without having had the matter argued) that that which has been told to us is material on any application for maintenance which she may bring. I do not think that she ought to be cut out from having the whole of these matters put before the one who has to fix the amount of maintenance (if any) which she is granted. It is right, in a case of this kind, that that which we have said should be known. It may, for all I know, come back to this court again. I hope it will not. The application must be refused.

HODSON L.J. I agree. I also agree that, so far as we have investigated the matter, it does not appear that there is anything in section 19 of the Matrimonial Causes Act, 1950, which would prevent the court looking into the whole of the facts of this case in the event of this ex-wife making an application for maintenance.

Application refused.

Solicitors: *Cunliffe & Airy for Knight & Sons, Newcastle-under-Lyme.*

A. W. G.

[PRIVY COUNCIL.]

J. C.†
1956
Mar 7.

* HEPTULLA BROTHERS LIMITED . . APPELLANTS;
AND
JAMBHAI JESHANGBHAI THAKORE . . RESPONDENT.

ON APPEAL FROM THE EASTERN AFRICA COURT OF APPEAL.

East Africa (Kenya)—Landlord and tenant—Rent restriction—Jurisdiction of Rent Control Board—Finding by board of landlord and tenant relationship—Not res judicata in superior court—Increase of Rent (Restriction) Ordinance, No. 22 *of* 1949, *as amended by the Increase of Rent (Restriction) (Amendment No.* 2) *Ordinance, No.* 34 *of* 1951, *s.* 5 (1) (*n*).

Tribunal — Statutory — Jurisdiction — To determine facts establishing own jurisdiction—Whether determination res judicata. Estoppel —Per rem judicatam—Statutory tribunal jurisdiction to determine own jurisdiction.

By section 5 (1) of the Increase of Rent (Restriction) Ordinance, 1949, of Kenya, as amended by the Increase of Rent (Restriction)

† *Present*: LORD OAKSEY, LORD TUCKER, LORD COHEN, LORD KEITH OF AVONHOLM and MR. L. M. D. DE SILVA.

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(Amendment No. 2) Ordinance, 1951, "[The Rent Control Board] "shall have power to do all things which it is required or "empowered to do by or under the provisions of the Ordinance, "and in particular shall have power— . . . (*n*) to exercise juris- "diction in all civil matters and questions arising under this "Ordinance."

Section 5 (1) (*n*) of the Ordinance does no more than confirm the competence of the board to deal with all civil matters and questions arising under the Ordinance. It does not give to the board the power to determine what civil matters and questions arise under the Ordinance. The board, which has jurisdiction only in issues arising between landlord and tenant, have in any particular case to be satisfied that a relationship of landlord and tenant does exist as a preliminary to bringing the Ordinance into operation, but that is a function merely incidental to the application of any section of the Ordinance that is invoked and not a power conferred by any section of the Ordinance. Accordingly, the question of the relationship of landlord and tenant cannot be made res judicata by a finding of the board if a superior court in subsequent proceedings between the same parties in respect of the same property decides that the facts to constitute that relationship do not exist; the finding of the board on the question of such relationship can never be anything more than a collateral finding which cannot raise a plea of res judicata.

Dictum of Lord Esher M.R. in *Regina* v. *Commissioners for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313, 319; 4 T.L.R. 636 applied.

The Judicial Committee, being of the opinion that the material before them was quite insufficient to establish, on a claim by the respondent to obtain possession of the suit premises, whether the relationship between the respondent and the appellants was one of landlord and tenant or of licensor and licensee (the Supreme Court of Kenya, affirmed by the Eastern Africa Court of Appeal, having held the latter) remitted the case to the Supreme Court to be tried on all issues other than those of res judicata and estoppel (the latter having been abandoned before the Board).

Appeal (No. 13 of 1955) from an order of the Court of Appeal for Eastern Africa (October 22, 1954) whereby (i) an appeal from a judgment of the Supreme Court of Kenya (July 5, 1954) in favour of the present respondent for the recovery of possession of certain premises was dismissed, (ii) a finding of fact that the relationship between the parties was that of licensor and licensee (not landlord and tenant) was confirmed, and (iii) the action was remitted to the Supreme Court for the determination of certain limited issues only.

By the respondent's amended plaint, dated February 3, 1954, he alleged that he was tenant of a certain plot of land in Nairobi, and that the appellants were his statutory subtenants of part of the plot; and that the appellants had committed breaches of various covenants in their lease. He alleged, alternatively, that the appellants were licensees and that their licence had been revoked. Notice to quit had been served, but the appellants had not complied with it. The respondent claimed possession, or, alternatively, an injunction to restrain the appellants from committing further breaches of covenant, and damages.

The defendants pleaded, inter alia, that the action was res judicata because the matters in issue had been in issue in certain specified cases between the parties before the Central Rent Control Board.

1956. Feb. 14, 15, 16, 20, 21. *Dingle Foot Q.C.*, *Ralph Millner* and *Sirimevan Amerasinghe* for the appellants.

Viscount Hailsham Q.C. and *J. G. Le Quesne* for the respondent.

In addition to the cases referred to in the judgment the following cases were cited in argument: *Ram Kirpal Shukul* v. *Rup Kuar* [1]; *Hook* v. *Administrator General of Bengal* [2]; *Ramachandra Rao* v. *Ramachandra Rao* [3]; *Kalipada De* v. *Dwijapada Das* [4]; *Inland Revenue Commissioners* v. *Sneath* [5]; *Humphries* v. *Humphries* [6]; *Hoystead* v. *Commissioner of Taxation* [7]; *Rex* v. *Lincolnshire Justices. Ex parte Brett* [8]; *E. H. Lewis & Son Ltd.* v. *Morelli* [9]; *Rajwani* v. *Degamwala* [10]; *Griffiths* v. *Davies* [11]; *Rex* v. *London, etc. Rent Tribunal. Ex parte Honig* [12]; *Regina* v. *Durham Quarter Sessions. Ex parte Virgo* [13]; *Toronto Railway* v. *Toronto Corporation* [14]; *Reed* v. *Nutt* [15]; *Want* v. *Moss and Wife* [16]; *Langford Property Co. Ltd.* v. *Goldrich* [17]; *Dutton* v. *Sneyd Bycars Co. Ltd.* [18]; *J. & F. Stone Lighting and Radio Ltd.* v. *Levitt* [19]; *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols*,[20] and *Christopher Brown Ltd.* v. *Genossenschaft Oesterreichischer Waldbesitzer.*[21]

March 7. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM: This appeal arises out of an action brought by the respondent (hereafter called the plaintiff) against the appellants (hereafter called the defendants) in the Supreme Court of Kenya at Nairobi to obtain possession of certain business premises in Nairobi occupied by the defendants, or, alternatively, for an injunction against their committing breaches of certain covenants, and for other relief. One of the issues between the parties is whether the parties are in the relationship of landlord

[1] (1883) L.R. 11 I.A. 37.
[2] (1921) L.R. 48 I.A. 187.
[3] (1922) L.R. 49 I.A. 129.
[4] (1929) L.R. 57 I.A. 24.
[5] [1932] 2 K.B. 362; 48 T.L.R. 241.
[6] [1910] 2 K.B. 531.
[7] [1926] A.C. 155; 42 T.L.R. 207.
[8] [1926] 2 K.B. 192.
[9] 65 T.L.R. 56; [1948] 2 All E.R. 1021.
[10] (1950) 17 E.A.C.A. 37.
[11] [1943] K.B. 618; 59 T.L.R. 383; [1943] 2 All E.R. 209.
[12] [1951] 1 K.B. 641; [1951] 1 T.L.R. 41; [1951] 1 All E.R. 195.
[13] [1952] 2 Q.B. 1; [1952] 1 T.L.R. 516; [1952] 1 All E.R. 466.
[14] [1904] A.C. 809; 20 T.L.R. 774.
[15] (1890) 24 Q.B.D. 669; 6 T.L.R. 266.
[16] (1894) 70 L.T. 178.
[17] [1948] 2 K.B. 423; [1948] 2 All E.R. 439.
[18] [1920] 1 K.B. 414; 36 T.L.R. 54.
[19] [1947] A.C. 209; 62 T.L.R. 737; [1946] 2 All E.R. 653.
[20] [1949] 1 K.B. 35; 64 T.L.R. 438; [1948] 2 All E.R. 432.
[21] [1954] 1 Q.B. 8; [1953] 3 W.L.R. 689; [1953] 2 All E.R. 1039.

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and tenant or of licensor and licensee of the premises in question. The defendants, however, take the plea that this is not a live issue being already res judicata of another tribunal in proceedings to which some reference must first be made.

This appeal is a stage in a series of actions between the same parties. The matter started with proceedings before the Central Rent Control Board at Nairobi on an application dated January 27, 1951, by the plaintiff, described as "landlord," against the defendants, described as "tenant," for ejectment of the tenant for failure to pay rent and other charges and for "breaches of the "tenancy existing between the tenant and landlord." After defence had been entered the plaintiff restricted the grounds of his application to non-payment of rent and matters touching the payment of rent, and ultimately a consent order was made by the Rent Control Board on May 9, 1951, in the following terms: "The arrears due (Shs.5018/32 including rent for May, 1951) "and admitted must be paid by May 15, 1951. The rent of each "month must be paid in future in full, viz., Shs. 285/– inclusive "of water and dust bin only, in advance by the 5th day of that "month. Should there be any breach of the above conditions, "the landlord (head-tenant) will be entitled to vacant possession "forthwith. The parties agree to leave the question of costs to "the board and the board directs that each party bear its own "costs."

Some seven weeks later, on June 21, 1951, the defendants started proceedings before the Rent Control Board in respect of alleged interference by the plaintiff with the defendants' enjoyment of the shop premises occupied by them as his tenants. It appears from the "tenants' case" that there was some part excepted from the alleged let to the tenants which left that part in the occupation of the plaintiff, and that the plaintiff also occupied an upper floor to which access was had by a staircase situated near the front door of the shop. The defendants alleged that their use of, or access to, the shop was obstructed by a glass counter introduced by the plaintiff, who threatened further to erect an access to the staircase, and that this obstruction and threat had in view "to annoy and harass the tenants so as to "compel the tenants to vacate the premises." Their Lordships would observe that they find it impossible to appreciate from the "tenants' case" the nature and extent of the division of the premises between the parties and the manner of annoyance said to be caused or apprehended by the glass counter or by the threatened access. The plaintiff in his defence denied that he was the defendants' landlord, "having no privity of contract "with the claimants," and without prejudice to this denial admitted certain of the facts stated by the defendants, but in terms that do not make any clearer to their Lordships the nature of the division of the premises between the parties. He denied any right of the defendants to call for removal of the counter and that it or the proposed structural alteration would in any

way harass and annoy the tenants and prayed that the "tenants' "case" be dismissed with costs.

No action appears to have been taken in these proceedings before April 20, 1953. On that date the plaintiff made application under section 16 (1) (*b*) of the Rent (Restriction) Ordinance, 1949, to the Rent Control Board for recovery of possession of the premises "on the grounds that the tenants have been guilty of "conduct which is a nuisance or annoyance to the claimant who "is a joint occupier" in a variety of respects specified in the application. The defendants entered a defence denying the plaintiff's allegations, and this and the previous application having been consolidated, the Rent Control Board gave judgment on November 26, 1953, in which they held that it was plain from the pleadings of the plaintiff that the relationship of landlord and tenant existed between the parties but that the plaintiff and the defendants were joint occupiers of the shop and not adjoining occupiers within the meaning of section 16 (1) (*b*) of the Ordinance. Accordingly, the Rent Control Board dismissed the application brought by the plaintiff under this section and gave leave to the defendants to withdraw their application against the plaintiff with liberty to bring a fresh case later upon the same facts.

The plaintiff then took further proceedings before the Rent Control Board against the defendants on December 7, 1953. In his plaint, he alleged that he was tenant of the plot in question and by lease dated May 1, 1941, sublet part of it to Mr. Ahamedali M. Heptulla for a period of two years and 11 months, by whom it was assigned to the defendants on May 9, 1942, and that on the expiry of the lease the defendants held over as statutory tenants upon the same terms and conditions as to rent and all other matters as were set forth in the lease. The plaint then set out certain covenants contained in the lease, which it is unnecessary for present purposes to specify, alleged breaches of the covenants in various respects, referred to the previous proceedings of April 20, 1953, and applied under section 16 (1) (*a*) of the Ordinance for an order for recovery of possession; an injunction; damages; costs; and such further and better relief as the court might consider just. This plaint was dismissed on December 14, 1953, on the ground that "the matter having "been absolutely disposed of by the board and the previous case "dismissed without permission to bring a fresh case, this fresh "plaint cannot be entertained by the board at all and must be "summarily rejected." Their Lordships' Board are not able fully to appreciate the grounds of this decision as the earlier application (of April 20, 1953) was brought under section 16 (1) (*b*) of the Ordinance, whereas the later was brought under section 16 (1) (*a*) of the Ordinance. But their Lordships do not find it necessary to enter into the merits of any of the proceedings brought before the Rent Control Board.

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The plaintiff next started the present proceedings in the Supreme Court of Kenya at Nairobi on February 3, 1954. In his plaint he repeats verbatim the whole of the allegations made against the defendants in the earlier proceedings before the Rent Control Board commenced on December 7, 1953. The basis of his action has, however, been enlarged. He sues the defendants first as subtenants holding over as statutory tenants of part of the shop premises of which he alleges he is the tenant. Alternatively, he sues the defendants as his licensees of part of the premises. Further alternatively, he sues the defendants as occupiers of part of the aforesaid premises. He alleges that he has given the defendants notice to quit and he prays for (i) an order for recovery of possession or, in the alternative, (ii) an injunction restraining them from committing either further breaches of the aforesaid covenants of their tenancy, or further breaches of the terms and conditions of their licence, or further acts of nuisance; and, in any event, for damages, costs and further and other relief.

In defence the defendants plead res judicata and estoppel in respect of the proceedings before the Rent Control Board, claim to be contractual tenants of the plaintiff, deny that they are his licensees and otherwise traverse the allegations of the plaintiff in various detailed respects to which their Lordships do not find it necessary to refer.

The action came before Corrie J., who, relying largely on a judgment of the Court of Appeal for Eastern Africa in *Karamat Ali* v. *Champion Shoe Co.*,[1] held that there was not a letting such as would bring the parties within the scope of the Increase of Rent (Restriction) Ordinance, 1949, and that, accordingly, the Rent Control Board had no jurisdiction to deal with the matters at issue between the parties. There was thus no res judicata or estoppel. He further held that the relationship between the parties was that of licensor and licensee, and that the term of the licence having expired, it was competent for the plaintiff to give the defendants notice to quit, and that this had been done. He therefore made an order for recovery of possession.

From this judgment the defendants appealed to the Court of Appeal for Eastern Africa. Their grounds of appeal were that as the case had been argued by agreement between counsel only on two preliminary points, viz., the jurisdiction of the Supreme Court (now abandoned) and res judicata, the case, in the event of these objections being overruled, should have proceeded to a hearing on the merits; further, that the judge had erred in overruling the defendants' plea of res judicata and estoppel; in holding that the relationship between the parties was that of licensor and licensee; and in making an order for recovery of possession. On October 22, 1954, the Court of Appeal, without delivering any judgment, made the following order:—

[1] (1948) 16 E.A.C.A. 15.

" 1. That this appeal be dismissed.

" 2. That the order for possession made by the Supreme Court " and the finding of fact that the licence had been revoked be " set aside, but that the finding that the relationship between " the parties was that of licensor and licensee be confirmed.

" 3. That the action be remitted to the Supreme Court for the " determination of the following issues only:—(i) Whether the " licence granted by the respondent to the appellants was revoked " in fact. (ii) Whether the appellants committed the alleged " breaches of covenants or terms of the licence, or, alternatively, " the alleged nuisance, (iii) (*a*) whether the said licence was " lawfully determined, and (*b*) whether the respondent is entitled " to the relief claimed in the plaint, or any part of it, and the " amount of damages, if any.

" AND with a direction that judgment be entered accordingly.

" AND IT IS FURTHER ORDERED that the appellants do pay " three-quarters of the costs of this appeal and that the costs of " the previous proceedings in the Supreme Court be paid as " ordered by that court and that the costs of the re-trial be " reserved to the discretion of the trial judge."

From this order an appeal has been taken to their Lordships' Board. The submissions for the defendants before the Board were that the issues between the parties, having already been determined by the Rent Control Board from whose decisions no appeal had been taken, were res judicata and could not be re-opened before the Supreme Court, and that the plaintiff was also barred by estoppel in pais from reopening these issues. If wrong on these points the case, it was submitted, should be sent back for trial on all issues other than res judicata and estoppel. Before the Board defendant's counsel ultimately abandoned his plea of estoppel. These submissions were traversed by counsel for the plaintiff.

It is agreed between the parties and seems also to their Lordships clear that the Rent Control Board has jurisdiction only on issues arising between landlord and tenant. The relevant Ordinance is the Increase of Rent (Restriction) Ordinance, 1949, as amended by the Increase of Rent (Restriction) (Amendment No. 2) Ordinance, 1951. The Ordinance applies to all premises, whether dwelling-houses or business premises, situate in the area of a Rent Control Board, with certain exceptions which are not material to the present case. (Section 1 (2) of the Ordinance of 1949.) By the Ordinance of 1951 " business premises " is defined as meaning " a building or part of a building let or to be let for " the public service or for business trade or professional purposes, " and includes the land occupied therewith and comprised in the " letting "; and " dwelling-house " means " any house or part " of a house or room let as a dwelling or place of residence and " includes the site of the house and the garden and other lands " or buildings comprised in and incidental to the letting, but not " let as a separate entity or source of profit." The Ordinance

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accordingly only applies to let premises. It was submitted, however, for the defendants that the Rent Control Board had committed to it by the Ordinance, either expressly or impliedly, the power to determine conclusively (subject to any right of appeal) the question of its own jurisdiction. This submission was based on the terms of section 5 (1) (*n*) of the Ordinance of 1949, which runs as follows: "[The board] shall have power to do all things "which it is required or empowered to do by or under the pro- "visions of the Ordinance, and in particular shall have power— "(*n*) to exercise jurisdiction in all civil matters and questions "arising under this Ordinance." In their Lordships' view, this provision does not have the meaning or effect for which the defendants contend. It does no more than confirm the competence of the board to deal with all civil matters and questions arising under the Ordinance. It does not give to the board the power to determine what civil matters and questions arise under the Ordinance. The board have in any particular case to be satisfied that a relationship of landlord and tenant does exist as a preliminary to bringing the Ordinance into operation, but that is a function merely incidental to the application of any section of the Ordinance that is invoked and not a power conferred by any section of the Ordinance.

On this view it is unnecessary to deal with various aspects of the plea of res judicata which were canvassed before their Lordships' Board. The matter is really ruled by the following passage in the judgment of Lord Esher M.R. in *Regina* v. *Commissioners for Special Purposes of the Income Tax*[2]: "When an inferior court or tribunal or body, which has to "exercise the power of deciding facts, is first established by "Act of Parliament, the legislature has to consider what powers "it will give that tribunal or body. It may in effect say that, "if a certain state of facts exists and is shewn to such tribunal "or body before it proceeds to do certain things, it shall have "jurisdiction to do such things, but not otherwise. There it is "not for them conclusively to decide whether that state of "facts exists, and, if they exercise the jurisdiction without its "existence, what they do may be questioned, and it will be held "that they have acted without jurisdiction. But there is "another state of things which may exist. The legislature may "intrust the tribunal or body with a jurisdiction, which includes "the jurisdiction to determine whether the preliminary state of "facts exists as well as the jurisdiction, on finding that it does "exist, to proceed further or do something more. When the "legislature are establishing such a tribunal or body with limited "jurisdiction, they also have to consider, whatever jurisdiction "they give them, whether there shall be any appeal from their "decision, for otherwise there will be none. In the second of "the two cases I have mentioned it is an erroneous application

[2] (1888) 21 Q.B.D. 313, 319; 4 T.L.R. 636.

" of the formula to say that the tribunal cannot give themselves " jurisdiction by wrongly deciding certain facts to exist, because " the legislature gave them jurisdiction to determine all the facts, " including the existence of the preliminary facts on which the " further exercise of their jurisdiction depends; and if they were " given jurisdiction so to decide, without any appeal being given, " there is no appeal from such exercise of their jurisdiction."

In their Lordships' opinion the present case falls within the first of the two types of cases mentioned by Lord Esher. The question of the relationship of landlord and tenant cannot, therefore, be made res judicata by a finding of the Rent Control Board if a superior court decides that the facts to constitute that relationship do not exist. The finding of the Rent Control Board in these circumstances can never be anything more than a collateral finding which cannot raise a plea of res judicata.

There remains only the question whether the order of the Court of Appeal should stand. That order confirms the finding of the Supreme Court that the relationship between the parties was that of licensor and licensee. Their Lordships have been unable to discover from the material before them any evidence on which this question can be satisfactorily determined, and they have been referred to nothing other than the pleadings and the admissions and actings of the parties therein, as disclosed in the record of the various proceedings to which reference has already been made. In their Lordships' opinion, these are quite insufficient to establish whether the relationship was one of landlord and tenant, or of licensor and licensee. No evidence other than the pleadings before the Rent Control Board and the orders made therein was before the Supreme Court. Their Lordships have reached the conclusion that the finding of the Court of Appeal on the relationship of the parties cannot, in the circumstances, be supported without evidence of the relevant facts, including the titles, if any, to possession and the nature of the occupation of the premises.

The appellants were unable to obtain from the Court of Appeal a stay of proceedings pending the present appeal to their Lordships' Board, and their Lordships have been informed that further procedure under the order of the Court of Appeal has taken place, including the granting of an order for possession of the premises in question. These are not, however, matters which can affect the judgment of their Lordships' Board.

The Board will humbly advise Her Majesty that the orders of the Supreme Court and of the Court of Appeal for Eastern Africa be set aside; and that the case be remitted to the Supreme Court to be tried on all the issues between the parties other than the issues of res judicata and estoppel. Their Lordships direct that the appellants (defendants) bear the costs of the hearing before the Supreme Court on the preliminary points of res

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judicata and estoppel and that otherwise each party bear their own costs in the hearing before the Court of Appeal and before their Lordships' Board.

Solicitors: *T. L. Wilson & Co.; Bell, Brodrick & Gray.*

C. C.

[PROBATE, ETC., DIVISION.]

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Jan. 30.
Lord Merriman P. and Davies J.

* PILCHER *v.* PILCHER (No. 2).

Husband and Wife — Maintenance — Justices — Arrears accrued when order apparently discharged — Further arrears — Enforcement — Arrears—Retrospective time-limit—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 76.

A wife obtained a maintenance order for £3 a week in all for herself and the child of the marriage in the magistrates' court, Gibraltar, in May, 1952, which was registered in England in July, 1953, under the provisions of section 1 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, after the husband had come to England. In November, 1953, the order was discharged by an English court of summary jurisdiction, the husband alleging that the wife was in desertion; but in May, 1955, an appeal out of time by the wife against the discharge was allowed ([1955] P. 318; [1955] 3 W.L.R. 232; [1955] 2 All E.R. 644).

In June, 1955, the wife applied to the English court for the enforcement of arrears, which by then amounted to some £396. No payments at all had been made since December, 1954. The magistrate found that the husband's reasons for non-payment were the activating reason that he was determined that he would not pay the wife and that he wished to argue (although precluded from doing so) that his wife was in desertion. While appreciating that the court had power, under section 76 of the Magistrates' Courts Act, 1952, to remit all or part of any arrears in its discretion, he felt that to do so in the present case would pro tanto be revoking the original order by a "back-stairs" method:—

Held, (1) that the magistrate had wrongly exercised his discretion, for it was clear from section 76 of the Act that by remitting arrears the order is not revoked.

(2) That the fact that for a period when arrears were actually accruing the order had apparently been revoked was a relevant matter for consideration in deciding whether any arrears should be remitted.

(3) That it was desirable when enforcing maintenance orders in courts of summary jurisdiction that there should be a retrospective time-limit, such as in the Divorce Division, where the period was one year.

(4) That the proper order would be to remit all arrears which had accrued prior to the date of the application except for £100.

Appeal from the West London magistrates' court.

On March 17, 1952, while the husband was resident in Gibraltar and the wife in La Linea, Spain, the magistrates' court at Gibraltar adjudged that the husband had been guilty of wilful

neglect to provide reasonable maintenance for his wife and child, and ordered him to pay her through the clerk of the court £2 a week for herself and £1 a week for the child.

The husband returned to England not long after the order was made; the wife and child continued to reside in La Linea. On July 13, 1953, the order was registered at the West London magistrates' court under the provisions of section 1 (1) of the Maintenance Orders Act, 1920. On July 20, 1953, the husband applied for the discharge of the order, alleging that the wife had refused a bona fide offer of reconciliation; and the order was discharged on November 3, 1953. On an application in February, 1954, to enforce arrears an order was made in respect of arrears accrued due prior to November 3, 1953; a further application to enforce arrears in November, 1954, was dismissed. On May 24, 1955, the wife, after being given leave to appeal out of time, successfully appealed to the Divisional Court against the order of November, 1953, discharging the original order, and against the orders of February and November, 1954, in respect of arrears.[1]

On June 21, 1955, the husband was summoned at the West London court in respect of arrears which had by then accrued, namely, £396 17s. 10d. He had made no payments of any kind since December, 1954, and stated in his evidence that he earned £9 a week and that he still maintained his attitude that he would not pay his wife anything. An order for the full amount was made against him, and the magistrate, Mr. Guest, gave the following judgment:—

"The position today is that the order made in Gibraltar "stands because no court in this country has jurisdiction to vary "or revoke it. Therefore, it is now the duty of this court on "the application of the wife, to consider to what extent and why "the respondent is in arrears and what order should be made. "I find that today the arrears are £396 17s. 10d. on an order "of £2 for wife and £1 for child weekly, and that the respon-"dent has made no payment since December, 1954. His means "have been carefully inquired into and, in my opinion, are and "were sufficient to enable him to pay the weekly order with no "more difficulty than lies on many other respondents to similar "orders. His reasons for non-payment seem to me to be two— "the activating reason that he has determined he will not pay "this woman, the secondary that he wishes to argue, as is his "moral right and ought to be a legal possibility but is not, that "his wife has deserted him. On the second reason his counsel "has drawn my attention to the remarks of the Divisional Court. ". . . I am aware that the power to remit all or part of any "arrears lies in the discretion of the court but that discretion "must be judicially exercised, and I cannot think that it would "be a proper exercise of discretion to remit arrears in a case

[1] [1955] P. 318; [1955] 3 W.L.R. 232; [1955] 2 All E.R. 644.

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" where one feels that the order itself might require to be varied " or revoked but has not the jurisdiction to consider whether so " to do. I understand the great hardship of a man being subject " to an order which he can never apply in Great Britain to have " varied or revoked, but as Parliament has given no power in " orders such as these I would be wrong to take it by the back- " stairs; the same reasoning applied to the power counsel suggests " I have to refuse to enforce the order. I ought to say that as " the wife is out of not only this jurisdiction but of the jurisdic- " tion of the court which made the order—I would if I felt I had " the power remit all the arrears applicable to her but none " applicable to the child. Finally, in view of the respondent's " statement that he will not pay and my finding that he could " and always could have paid, I do not see any way of avoiding " committal, but as his counsel has suggested that he might like " to appeal against this decision, and as undoubtedly this is one " of the most tangled cases ever to come before this court, I shall " in fact adjourn these proceedings until Tuesday, August 9, " 1955, to see whether notices of motion have been served. I " therefore formally, to enable an appeal, make the committal " order now which it seems I cannot avoid."

An order was made for the payment of £396 17s. 10d. or committal for three months suspended in the first instance for six weeks.

The husband appealed.

J. Scott Henderson Q.C. and *Eric Stockdale* for the husband.
Melford Stevenson Q.C. and *Joseph Jackson* for the wife.

No cases were cited in argument.

Lord Merriman P. This is a husband's appeal against an order made by Mr. Guest, the metropolitan magistrate, sitting at the West London court, for enforcement by committal of the sum of £396 17s. 10d. said to be the arrears of maintenance in favour of the wife, and of the child of the marriage in respect of whom she was awarded custody, due under an order. The full history—to avoid repetition—is set out in the reported case of *Pilcher* v. *Pilcher*.[1] I say " to avoid repetition " because an extremely confused history was, I hope, to some extent elucidated by the combined efforts of my brother and myself on that occasion; but the upshot of it was that the original order, made by the Gibraltar court, was held to have been revoked without jurisdiction to do so for more than one reason by one of the courts in London—I expressly avoid using the contentious word " Metropolitan " court in that context—and that two attempts to enforce that order before the West London court were still alive. Both were remitted to the West London court on the

[1] [1955] P. 318.

wife's original complaint to enforce the order, and our judgment concluded with these words: "The two complaints by or on "behalf of the wife for the enforcement of arrears will be remitted "to the West London magistrates' court for rehearing. We wish, "however, to make it plain that we do not seek to give any "indication of the course that should be taken on the rehearing "of those complaints."

I pause to say in passing that we had referred in express terms to the power given by section 76 of the Magistrates' Courts Act, 1952, in connexion with these complaints, to remit the whole or any part of the arrears. Our judgment ended: "It will be a "matter entirely for the magistrate's discretion in the light of "the evidence before him whether to enforce or to remit as he "thinks proper the whole or any part of the sum due under the "registered order."

If those words mean anything they mean that the magistrate could either enforce the whole or enforce part, or remit the whole or remit part, and that is what we intended should happen. But on an application to enforce the whole Mr. Guest, in effect, held that he had no option but to enforce the whole, and he has done so, and has done so for a reason which neither counsel has attempted to justify, that if he were to remit, either in whole or in part, as I understand it, he would pro tanto be revoking the original order by a "back-stairs" method.

Well, I do not think it is necessary to say more than that the fallacy of that argument is apparent, because it is perfectly certain and clear, on the face of the section, that by remitting arrears one does not revoke an order. The two things are entirely distinct.

Now, the question in the circumstances is, what should we do? This litigation has already been considerably protracted, and I gather that it is now in process of being further protracted by a divorce suit at the instance of the husband, who is asking for the dissolution of his marriage on the ground of alleged desertion by the wife. I merely say that, if and when that suit terminates in his favour, it may be a very potent matter to be brought before any court which has to deal with any further stages of this Gibraltar order for maintenance on the ground of wilful neglect to maintain.

At the moment we have to deal with the fact that having remitted the order for enforcement or remittance of arrears, nothing, in fact, has happened; and we have the right—indeed, the duty—to deal with the matter either by remitting it further to the magistrate or by making any order which we think that the magistrate ought to have made. There is one fact which is common ground, and that is that during a period of time, which amounted to about 18 months in all, the order, albeit wrongly, had been in form revoked, and it is clear on any view of the matter that this large figure of arrears includes, amongst other things, the arrears at £3 a week which would have accrued due;

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indeed, which have accrued due during that time when once it is held that the revocation was of no validity.

Nevertheless, it seems to me to be a matter clearly for consideration in deciding what should be done about a figure of £396 in respect of which, without any question of payment by instalments, the man has been committed to prison for non-payment, that it does contain a large sum of money which has accrued during a period when he supposed he was under no liability to pay at all.

There is another consideration which I think should apply, and that is that, not, I think, as a matter of law but as a matter of practice, it is usually considered by courts which are asked to enforce orders of this sort, and it certainly is the practice in this Division when men are brought up before its courts for committal in respect of maintenance orders, that there should be a time-limit retrospectively. The custom in this Division is not to enforce arrears for more than a year backwards.

Either of these two considerations in this case seems to me to be an illustration of another overriding principle which, I think, should always be borne in mind in considering these questions of enforcing arrears, and, indeed, in connexion with the amounts of the orders themselves, and that is that it is always better to have an order in force for a sum which a man will pay rather than go to prison, instead of having one in force for which he will go to prison rather than pay. It is clear that this order as it stands, for £396 17s. 10d., has been shown quite plainly to be one in respect of which he would go to prison rather than pay. I can well understand that that may be so, but, of course, he has defied the court—there is no question about that—in saying very foolishly that nothing would induce him to pay anything. That has been minimized to some extent by Mr. Scott Henderson, who, while making it plain that he has no authority to put forward any proposition at all, has suggested to us that, in effect, it would be reasonable to enforce only those arrears which have accrued in respect of the maintenance for the child, as distinct from the maintenance for the wife.

I am not prepared to deal with it on that basis. The whole order is an order in favour of the wife, as has been explained on more than one occasion by this court. What I think we should do is to try to find some sum which, in the circumstances of this case, would enable the order to go forward, from this date, at any rate, with some inducement to the man to keep up his responsibility to his wife until in some way or another, with which it is not at the moment in our power to deal, some different order is substituted for that which is at present in force, or the present order is cancelled altogether.

I think that the proper thing to do is to remit all the arrears which had accrued before June 21, 1955, when the matter was before the magistrate, except £100 of such arrears, that the

committal order should stand, but be suspended on the condition that the husband pays 5s. a week off the arrears in addition to the amount of the order.

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DAVIES J. I entirely agree, and do not wish to add anything.

Order for payments varied.

Solicitors: *Burton & Son; Alan, Edmunds & Phillips.*

J. B. G.

[COURT OF APPEAL.]

*LYNCH v. THORNE.

C. A.

1956 *Feb.* 27, 28, 29.

[Plaint No. L. 652.]

Lord Evershed M.R., Birkett and Parker L.JJ.

Building — Contract — Implied term — Contract to complete erection of dwelling-house — Erection in accordance with specifications — Whether implied warranty as to fitness for habitation.
Contract—Implied term.

The plaintiff agreed to purchase from the defendant, a builder, a plot of land with a partially erected dwelling-house on it and the defendant undertook to complete the dwelling-house in accordance with the plan and specifications annexed to the agreement. The specification provided that the walls were to be nine-inch brick walls. The dwelling-house having been erected, the sale was completed and the plaintiff took possession. It subsequently appeared that the nine-inch wall on the south side of the house did not keep driving rain out and one of the bedrooms was as a result unusable. The plaintiff claimed damages. The county court judge held that the defendant had carried out the building work precisely in accordance with the specification and with sound materials and good workmanship. He, however, gave judgment for the plaintiff, holding that the plaintiff had relied on the defendant's skill and that there was an implied warranty that the house should be fit for human habitation:—

Held, that on the sale of land with an agreement to erect on it, or to complete the erection of, a dwelling-house, prima facie, there was an implied condition that the house when built should be fit for human habitation; the express terms of the contract might be such, however, as to be wholly or partly inconsistent with any such implied condition and, if wholly inconsistent, they would negative any reliance which otherwise it would be said the buyer placed on the skill and judgment of the seller; if, on the other hand, the express terms were only partly inconsistent, there would be room for the implied term to operate in the area not covered by the express condition. Applying that principle to the facts, the defendant, having carried out the building works precisely in accordance with the specifications with good materials and workmanship, and it having been established that the house could only have been made fit for habitation if additional work had been done which would be inconsistent with the terms of the contract, there was no room for

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the operation of any implied warranty that the house should be fit for habitation; and that, accordingly, the plaintiff's claim failed.

Dictum of Romer L.J. in *Perry* v. *Sharon Development Co. Ltd.* [1937] 4 All E.R. 390, 394 applied.

Appeal from Judge Glazebrook sitting at Bromley County Court.

By a contract dated May 28, 1953, the plaintiff, George Daniel Lynch, agreed to purchase from the defendant, Stanley Arthur Thorne, a plot of land known at No. 183 Meadway, Bromley, Kent, with a dwelling-house in course of erection and the defendant agreed to complete the dwelling-house in accordance with the specification annexed to the contract. The specification, which was detailed, provided that the walls should be nine-inch brick walls. The house was completed and the premises were conveyed to the plaintiff on September 30, 1953, and he took possession on October 8, 1953.

The house was in an exposed position and the nine-inch outside south wall of one of the bedrooms failed to prevent the damp penetrating, with the result that the bedroom became unusable. Some of the windows were of faulty construction and let in the rain. According to the evidence of expert witnesses a nine-inch wall would probably not be effective to keep out the rain where a house was in such an exposed situation as was this house. The plaintiff in this action claimed damages alleging that it was an implied term of the contract for sale that the dwelling-house when completed should be reasonably fit for human habitation.

The county court judge held that the defendant had completed the house precisely in accordance with the specification annexed to the contract and of sound material and good workmanship. He further held that it was an implied term of the contract that the house should be reasonably fit for human habitation. He gave judgment for the plaintiff for the sum of £95, of which £80 was the cost of making the wall damp-proof and £15 the cost of treating the windows.

The defendant appealed against so much of the judgment as related to the wall. He did not appeal against the decision in respect of the windows, since the specification did not cover the defect of which the plaintiff complained.

The terms of the contract and of the specification, the evidence of the expert witnesses, and the county court judge's judgment are more fully stated in the judgment of Lord Evershed M.R.

Claude Duveen Q.C. and *John Davies* for the defendant.

H. G. Garland for the plaintiff.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Miller* v. *Cannon Hill Estates*

*Ltd.**; *Hoskins* v. *Woodham* †; *Jennings* v. *Tavener* ‡; *Reigate* v. *Union Manufacturing Co. (Ramsbottom) Ltd. and Elton Copdyeing Co. Ltd.* §

LORD EVERSHED M.R. The question in this case is whether the defendant, who was the builder of the house now belonging to the plaintiff, is liable upon an implied covenant for the loss or damage suffered by the plaintiff because one of the rooms on the first floor, as it turns out, is not weather-proof; it has indeed admitted damp to such an extent that the plaintiff has been unable to use it as his son's bedroom. Therefore, the plaintiff may say (and for the purposes of this judgment I will say) that quoad that room the house has turned out to be uninhabitable or not fit for human habitation.

The law of England has been for many generations well settled that prima facie upon a contract for sale of a piece of land with a house on it, and similarly upon a contract for the demise of land with a house on it, there is no warranty as to the habitability of the house. The law so settled is illustrated in the well known case of *Hart* v. *Windsor*,[1] and the judgment in that case of Parke B. The rule is, or has sometimes been said to be, a hard one for the purchaser or lessee who has to console himself with the Latin maxim caveat emptor. But to the general rule there are undoubtedly exceptions: for example, when the subject-matter of a contract of letting is a furnished flat or house, then there is implied a covenant or warranty that the subject-matter is fit for habitation: see the judgment also of Parke B. in *Smith* v. *Marrable*.[2] Another exception arises where the contract is not merely a contract for the sale of a piece of land with a house on it, but is a contract for the sale of a piece of land with a house, plus a covenant or obligation on the part of the vendor to build or complete the house. The last mentioned exception has been illustrated in several cases to which we have been referred, and it will suffice if I refer to one of them, namely, *Perry* v. *Sharon Development Co. Ltd.*[3] In the course of his judgment in that case MacKinnon L.J. put the matter thus: "There is obviously "a difference in kind between a contract for the sale of a house "which is an existing and complete structure and a contract for "the sale of an uncompleted house which has to be completed "by the vendor. In the former case, quite clearly there is no "implied undertaking by the vendor as to the fitness of the "house or its condition. In such circumstances, the maxim "*caveat emptor* clearly applies to the full when the purchaser "inspects the house by himself, or by his surveyor, and makes "up his mind as to its condition and fitness for occupation. The "other type of house, a house only partly erected, or to be

* [1931] 2 K.B. 113.
† [1938] 1 All E.R. 692.
‡ [1955] 1 W.L.R. 932; [1955] 2 All E.R. 769.
§ [1918] 1 K.B. 592.
[1] (1844) 12 M. & W. 68.
[2] (1843) 11 M. & W. 5.
[3] [1937] 4 All E.R. 390, 395.

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"completed, is different in two respects. In the first place, the "maxim *caveat emptor* cannot apply, and the buyer, insofar as "the house is not yet completed, cannot inspect it, either by "himself or by his surveyor, and, in the second place, from the "point of view of the vendor, the contract is not merely a "contract to sell, but also a contract to do building work, and, "insofar as it is a contract to do building work, it is only natural "and proper that there should be an implied undertaking that "the building work should be done properly."

Where there is a written contract expressly setting forth the bargain between the parties it is, as a general rule, also well established that you only imply terms under the necessity of some compulsion. It was thus that Lord Russell of Killowen expressed himself in *Luxor (Eastbourne) Ltd.* v. *Cooper*,[4] and similarly Scrutton L.J. in the case to which Mr. Garland referred us of *Reigate* v. *Union Manufacturing Co. (Ramsbottom) Ltd.*[5] I am, however, prepared to assume for the purposes of this judgment that, whether or not it can be said that any necessity so compels in the case where a vendor contracts to sell the land and also to complete the building, in such a case prima facie there is an implied covenant on the vendor builder's part that he will complete the house so as to make it habitable. Still, such a term prima facie to be implied must, according to well established principle, always yield to the express letter of the bargain. I need do no more than refer to the judgment of Romer L.J. in *Perry's* case.[6] He said[7]: "It is well-established "by numerous authorities, to some of which Serjeant Sullivan "has called our attention, that, in the case of the sale of a "completed house, there is to be implied on the part of the "vendor no warranty as to the house being in any particular "condition. The same rule would apply in the case of an "uncompleted house, which is the subject-matter of a sale, "where the structure stands at the time of the sale. Where, "however, the contract is for the sale of a house when completed, "there is an implied contract on the part of the vendor, in the "absence of there being any express contract as to the way in "which the house is to be completed, that the house shall be "completed in such a way that it is fit for human habitation."

The contract that was entered into provides in the first clause that the vendor, the defendant, should sell the plot of land specified, together with the house intended then to be erected upon it. There follow certain clauses, common in contracts for the sale of land. Clause 4 provides: "The vendor will complete the building "in course of erection on the said plot of land in accordance with "the block plan and specification attached to this Agreement." It was conceded before the county court judge, or at least clearly found by him, that by the term "block plan" was meant a

[4] [1941] A.C. 108, 125; 57 T.L.R. 213; [1941] 1 All E.R. 33.
[5] [1918] 1 K.B. 592, 605.
[6] [1937] 4 All E.R. 390.
[7] Ibid. 394.

1/8th-inch scale plan. I therefore look to see what is the meaning and extent of the express obligation which clause 4 in the contract states. The specification provides for the manner in which the work is to be done, that is to say, it specifies inter alia the material to be used. Among other of the clauses it provides as follows: "Brickwork to be laid in cement mortar, facing bricks "to be Ockley double diamond dark multi red facings pointed "in cement to special colour. Damp proof course to be as "approved, with a cement rendered plinth," and so forth. I place that specification side by side with the 1/8th-inch scale plan, which discloses quite plainly—and upon this the judge's finding is precise—that the southern wall, with which we are here concerned, was to be, and was shown and specified as intended to be, a solid 9-inch brick wall, the brickwork to be of the character mentioned in the specification.

The findings of fact in light of that bargain—and nobody has sought to quarrel with them, or so far as I can see could quarrel with them—are these: the judge has said, after referring to the plan and to the specification: "It is not disputed that "the house has been built exactly in accordance with the draw- "ings and specification." What has turned out to be the result I think I can most expeditiously state by reading a paragraph of the judgment: "Three architects, all of whom have inspected "the house, have given evidence about the cause of this pene- "tration. The south and west walls are rather exposed for a "London house, and Mr. Woodward"—he was the plaintiff's architect—"said that in that situation a 9-inch solid brick wall "(which is what these walls are) will not prevent penetration; "they should be cavity walls, or solid walls tile-hung. Mr. "Tachell"—he was one of the architects on the other side— "said that in such a situation a 9-inch wall is bound to admit a "certain amount of damp. He said that in due course, perhaps "two or three years, the bricks may 'weather' and, if they "do, that will reduce the penetration. Mr. Woodward agreed "with this, but neither of them could say that weathering was "likely to stop penetration altogether. The third architect,"— on the same side as Mr. Tachell—"Mr. Pipe, thought that the "rain probably came through minute cracks in the cement mortar "rather than through the bricks themselves (which are a hard "type) and he gave some interesting reasons for preferring the "old type lime mortar," which was not specified. "All three "gentlemen agreed that the bricks and mortar are of good quality "and the bricklayers' workmanship excellent. I think it would "be fair to summarise their evidence by saying that one of them "would expect a 9-inch solid wall in that position to allow driving "rain to penetrate and the other two would not be at all surprised "if it did."

The effect of that evidence and those findings is that the contract having provided that the house should be built and completed in a particular way by the use of particular materials

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of particular characteristics, the builder precisely and exactly complied with his obligation. And he is also found to have shown through his servants a high standard of workmanship. Prima facie that finding seems to me, on the language of Romer L.J., necessarily to exclude the operation of any implied contract. May I repeat the language of the Lord Justice [8]: "Where, "however, the contract is for the sale of a house when com- "pleted, there is an implied contract on the part of the vendor, "in the absence of there being any express contract as to the "way in which the house is to be completed, that the house "shall be completed in such a way that it is fit for human "habitation." Here there was an express contract as to the way in which the house was to be completed. The express provisions were exactly complied with, and any variation from them which would have rendered this wall water proof would (as Parker L.J. observed during the course of the argument) have been a deviation from the express language of the contract.

Mr. Garland has sought to avoid that result in one of two ways. He has said, first, as I have followed him: even though there is here an express contract precisely prescribing the way in which this work is to be done, still there is an overriding promise or warranty that the edifice, when built in strict accordance with those terms, will be a habitable house. That seems to me to involve an extension of the principle of implied terms for which I can find no authority, and which indeed seems to me to be in direct conflict with the authorities to which I have already referred. Then, secondly, he says—and Mr. Garland uses this rather to emphasize and support the main contention already stated: after all, the plaintiff, the unfortunate Mr. Lynch, no expert himself in the mysteries of architecture and house building, relied, and the judge found that he relied, upon the skill and the judgment of the defendant, the builder. I am unable to derive from that fact the conclusion which commended itself to the judge. Of course, if a skilled person promises to do a job, that is, to produce a particular thing, whether a house or a motor-car or a piece of machinery, and he makes no provision as a matter of bargain as to the precise structure or article he will create, then it may well be that the buyer of the structure or article relies upon the judgment and skill of the other party to produce that which he says he will produce. But that, after all, is only another way of formulating the existence in such circumstances of an implied warranty. On the other hand, if two parties elect to make a bargain which specifies in precise detail what one of them will do, then, in the absence of some other express provision, it would appear to me to follow that the bargain is that which they have made; and so long as the party doing the work does that which he has contracted to do, that is the extent of his obligation. For the plaintiff obviously one cannot

[8] [1937] 4 All E.R. 390, 394.

help feeling a great deal of sympathy; but a grown adult man is presumably capable of taking competent skilled advice if he wants to; and if he elects not to do so but to make a bargain in precise terms with someone else, then, though no doubt he does rely upon the skill of the other party in a sense, he only does so in the sense that he assumes that the other party, as was the fact in this case, will do the job he has promised to do competently and, at best, that he believes that the house he is going to build will be a habitable house. But that is far short of importing into the transaction any such overriding condition or warranty as that for which Mr. Garland has contended. It would appear almost to involve the result that because the plaintiff elected not to take advice himself, therefore there was some duty of care thrust upon the defendant which should more properly have been borne by somebody engaged by the plaintiff. These considerations seems to me to find no place in the authorities, as I have understood them, and since, as I think, there was here what Romer L.J. has called an express contract as to the way in which the house was to be completed, I can find no room for an implied warranty, the only effect of the operation of which would, so far as I can see, be to create an inconsistency with the express language of the bargain made.

Sympathising, therefore, as I do with the plaintiff (but let me say also with the defendant, who appears to be a perfectly conscientious builder who performed his task with the utmost skill) this is a case in which I think, with all respect to the judge, the plaintiff cannot recover damages from the defendant. I think that the judge should have dismissed the action, so far as this part of the case is concerned. I do not forget that there was another claim relating to a window, and it is not now in dispute that the terms of the specification, plus the plan, did not so precisely identify the nature of the work to be done as to exclude the operation of an implied obligation to do the job in regard to the window effectively. Upon that matter we are not asked to express an opinion. So far as this claim is concerned, I think the judge should have dismissed it, and that this appeal accordingly ought to be allowed.

BIRKETT L.J. I am entirely of the same opinion. We have this remarkable case that a contract, which expressly stated the manner in which the house was to be completed, was fulfilled to the very letter, the workmanship and the materials being of the very best. Neverthless, there is no doubt about the findings that this particular nine-inch wall did allow driving rain to penetrate.

Therefore, the only question is the legal question. Mr. Garland presented what appeared to be an attractive argument that, underlying all the terms of the written contract there was an implied warranty that when all the written terms were

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carried out, the completed house would be fit for human habitation. He said that the plaintiff who obviously knew nothing about technical matters, relied upon the skill and judgment of the defendant, who manifestly did. That was the argument which the county court judge accepted. He said: "If the "builder says, 'I will build you a house according to this plan "'which I have made' there is, I think, an implied term that "the plan will result in a habitable house, provided the "customer relied on the builder's skill in drawing the plan. "Applying the same reasoning to a contract for the sale of a "house to be erected or completed according to an agreed plan, "the issue seems to me to depend first, upon whether the plan "was the builder's own or was merely the instructions he "received from the purchaser; and if the former, whether the "purchaser relied upon it or exercised his own judgment." Then he concluded: "The gist of the matter is the buyer's reliance on "the seller's skill. If, though the seller provide the plan and "specification of a house to be built, it appears that the buyer "did not rely on his skill (for instance, that he consulted his "own architect) no term or warranty is implied. I am satisfied "that in the present case the plaintiff regarded the defendant as "an expert and relied entirely on his plan and specification; and "therefore I hold there was an implied warranty that the house "would be reasonably fit for habitation."

The argument on the contrary was put by Mr. Duveen in the court below and by Mr. Davies here: here there was a contract in express terms; those express terms have been fulfilled to the letter; there is certainly no room for the application of any implied warranty. It cannot be said that the workmanship was bad or the materials bad because all that is concluded by the finding of the county court judge. It is submitted on behalf of the defendant that, when you have a contract of this nature, express in its terms, there is no room for the application of the implied warranty suggested by Mr. Garland and found by the county court judge. In *Perry* v. *Sharon Development Co. Ltd.*[9] Romer L.J. said: "Where, however, the contract is for "the sale of a house when completed, there is an implied con-"tract on the part of the vendor, in the absence of there being "any express contract as to the way in which the house is to "be completed, that the house shall be completed in such a "way that it is fit for human habitation." Here there was an express contract as to the very way in which this completion should be carried out. That is agreed and the judge has found that the house was completed in precisely that way. I think, therefore, there was no room for the application of this implied term and that the county court judge in applying it was wrong. For these reasons I agree with the judgment of the Master of the Rolls, and I think this appeal ought to be allowed.

[9] [1937] 4 All E.R. 390, 394.

PARKER L.J. I have come to the same conclusion and can state my reasons very shortly. This contract was at any rate partly a contract for work and labour. The plaintiff clearly desired the house for habitation and to some extent relied on the skill and judgment of the defendant, who was a builder of houses. Those facts must be taken to be known by the defendant. In those circumstances I think that, prima facie, there is an implied condition that the house when built shall be fit for human habitation. I say prima facie because, of course, the express terms of the contract may be such as to show that they are wholly or partly inconsistent with any such implied condition. If wholly inconsistent that will clearly negative any reliance which otherwise it would be said the buyer placed on the skill and judgment of the seller. If, on the other hand, the express terms are only partly inconsistent, there will be room for the implied condition to operate in the area not covered by the express condition.

Applying that to the facts of this case, there was, as it seems to me, by reference to the specification and the plan, an express condition that the wall should be nine-inch solid walls made of a particular kind of facing brick and laid in and pointed with cement. The county court judge has found that that work was precisely carried out by the builder and carried out with good workmanship. Despite that, the south bedroom was clearly not fit for habitation by reason of driving rain seeping through the brickwork. How could this have been avoided? Only, as it seems to me, by doing something such as making cavity walls, rendering the brickwork, hanging tiles on the brickwork—all of which, quite plainly, are inconsistent with the express terms of the contract deducible from the specification and the plan.

Accordingly, so far as concerns the failure in this case to make the house fit for habitation, there was no room for the operation of any such term. Accordingly Mr. Garland is driven to putting the case in this way, that throughout there is an overriding condition, warranty, or guarantee (whatever you like to call it) that the house will be fit for habitation. In other words he is forced to imply a term which in effect overrides the express terms of the contract. It seems to me that that is a very bold proposition, because by its very nature an implied term can only operate in so far as it is permitted by the express terms of the contract so to do. For these reasons and the reasons given by my Lords, I would allow this appeal.

Appeal allowed.

Solicitors: *Franks, Charlesly & Leighton; A. R. Kirk & Partners.*

B. A. B.

[COURT OF APPEAL.]

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Feb. 15, 16.

Lord Evershed M.R., Birkett L.J., Roxburgh J.

* WISEBURGH *v.* DOMVILLE (INSPECTOR OF TAXES).

Revenue—Income tax—Profits of trade—Damages—Proceedings by agent for breach of contract terminating agency agreement—Compromise of proceedings on payment of agreed damages—Compensation received by agent for loss of agency—Taxable as profits of trade.
Conflict of Laws—Scottish and English law—Income tax.

A manufacturers' agent entered into an agreement with a company to act as their agent for a certain period. The company dismissed him without giving him due notice and he brought an action against them, claiming damages for breach of contract, an account of the commission due, and payment thereof. The action was settled on terms agreed between the parties which were embodied in an order under which the agent was to receive £4,000 as damages for breach of the agreement and costs, and it was ordered that he should recover nothing in respect of the claim made by him for commission and expenses.

The General Commissioners decided that the sum of £4,000 was taxable profits for the year in which it was actually received. Harman J., dismissing the appeal, held that the sum received represented compensation for the profit which the taxpayer would, or might have, made out of the agreement between the breach and the due ending date, and, as such, represented income corresponding to the commission which he would have received if the agreement had been allowed to run. On appeal by the agent from that decision:—

Held, that although the taxpayer's agency business might have suffered a disaster by the breach of the agreement, it could not be said that it was thereby partially destroyed; and the question whether the £4,000 was a taxable profit was ultimately one of fact for the Commissioners, who, on the facts of this case, were entitled to come to the conclusion that it was a taxable profit.

Barr Crombie & Co. Ltd. v. *Inland Revenue Commissioners* (1945) 26 T.C. 406; 1945 S.C. 271 distinguished.

Kelsall Parsons & Co. v. *Inland Revenue Commissioners* (1938) 21 T.C. 608 and *Inland Revenue Commissioners* v. *Fleming & Co. (Machinery) Ltd.* (1951) 33 T.C. 57 applied.

Decision of Harman J. [1955] 1 W.L.R. 1287; [1955] 3 All E.R. 458 affirmed.

APPEAL from Harman J.[1]

The case stated by the Commissioners for the general purposes of the Income Tax Acts for the division of Manchester, so far as relevant, provided: 1. At a meeting of the Commissioners held on March 6, 1952, Albert Wiseburgh (hereinafter referred to as "the taxpayer") appealed against assessments to income tax made upon him for the years and in the amounts following: 1949/1950—£12,000; 1951/1952—£10,000. The two assessments under appeal were made under Schedule D to the Income Tax Act, 1918, in respect of the taxpayer's profits as an agent; and were made in estimated amounts and were alternative assessments.

[1] [1955] 1 W.L.R. 1287; [1955] 3 All E.R. 458.

The only questions for determination by the Commissioners were: (1) whether or not the sum of £4,000 received by the taxpayer in respect of the ending of an agreement with a principal, Gordon Mills Ltd., was wholly or partly taxable; (2) if so, for which year of assessment.

The following facts were proved or agreed: The taxpayer was appointed sole agent of Gordon Mills Ltd. under an agreement made on April 2, 1942, between the company and the taxpayer. The agreement was never given any goodwill value in the taxpayer's books, the legal costs involved in the preparation of the agreement were claimed and allowed as a deduction in the computation of the taxpayer's profits. On or about July 1, 1948, there was a breach of the agreement by the company in circumstances set out in the pleadings in proceedings referred to below. Before these circumstances arose the taxpayer reasonably expected the agreement to continue for several years. His appointment as agent could at that date under the terms of the agreement have been lawfully determined by the company by notice expiring on October 20, 1949.

Proceedings were instituted by the taxpayer against the company whereby he claimed: damages for breach of contract; that an account be taken of the commission and expenses due to him under the terms of the agreement; and payment of the amount found due on the taking of the account.

The company filed a defence to the claim and paid £4,000 into court. One of the assertions in the defence was that the taxpayer was not entitled to any commission or expenses.

After a considerable amount of negotiation the action was settled (without any account being taken) on terms agreed between the parties, which were embodied in an order of the Manchester District Registrar, dated April 20, 1950, whereby it was ordered that the taxpayer should be at liberty to enter judgment against the company for the sum of £4,000 as damages for breach of agreement and for the costs of the action; that he should recover nothing in respect of the claim for commission and expenses; and that the sum of £4,000 paid into court by the company should be paid out to his solicitors in satisfaction of the sum of £4,000 damages. Before the settlement of the action the taxpayer was advised by leading counsel that the claim to commission would have to be abandoned; this advice was accepted by him and he gave his counsel a free hand to settle the action on that basis.

Commission on orders obtained before, but delivered after, July 1, 1948, would have amounted to £3,128. A sum of £807 was due in respect of commission for June, 1948, for goods delivered during that month. The taxpayer had since before the war of 1939–1945 carried on a selling agency business in ladies' garments. The number of agencies had varied from time to time, but during the years ending March 31, 1947, and March 31,

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1948, there were two agencies which produced commissions as follows:—

	Year ending March 31, 1947.	Year ending March 31, 1948.
Green, Hearn & Co. Ltd.	£4,568	£6,582
Gordon Mills Ltd.	£8,730	£8,223

The commissions during the years ending March 31, 1949, March 31, 1950, and March 31, 1951, were as follows:—

	Year ending March 31, 1949.	Year ending March 31, 1950.	Year ending March 31, 1951.
Green, Hearn & Co. Ltd.	£6,247	£11,711	£11,816
Gordon Mills Ltd.	£1,811	—	—

There was produced to the Commissioners by a representative of the Crown a statement which was accepted by the taxpayer as correctly showing the commissions paid to him by the various agencies he had held, or the various businesses to which he had from time to time rendered services, between 1939 and 1951.

The taxpayer was in a position to hold only a small number of agencies, for (a) he had to devote much time and attention to his work for Gordon Mills Ltd., (b) he could not hold agencies in competing businesses, and (c) he had to try to have one agency in high class goods and one in lesser class goods. The loss of the agency with Gordon Mills Ltd. meant the loss of about half the taxpayer's income. It also inflicted damage to the taxpayer's goodwill, as the circumstances of his dismissal lessened his prestige in the trade, besides reducing the size of his business by about half. It also meant that Gordon Mills Ltd. dealt directly with the customers introduced by the taxpayer. It was to the taxpayer's interests to obtain relatively permanent agencies. In 1946 the taxpayer's wife became the controlling shareholder in a company called K. Wiseburgh Ltd., which manufactured and merchanted many types of clothing, and the taxpayer became the manager of the company's business. Thereafter it was difficult for him to obtain agencies, as there would in many cases be a conflict of interest between his position as an agent for other manufacturers and his position in virtual control of K. Wiseburgh Ltd. Down to the date of the hearing of the appeal the taxpayer had only the one remaining agency, namely that with Green, Hearn & Co. Ltd.

On behalf of the taxpayer it was contended (inter alia): (1) The agreement of April 2, 1942, was the principal source of his earnings, was one of the only two sources which he had at

the time of the dispute, and was one of the three permanent agencies which he had possessed. (2) The agreement was wrongfully determined, and the £4,000 was paid for breach of contract. (3) The taxpayer sustained damage to his business structure because of such breach of contract, and the £4,000 was paid and received in respect of that damage. (4) The agreement might have continued indefinitely, and the £4,000 was paid and received with that fact in view. (5) The £4,000 could not be related to any fiscal year or years. (6) The £4,000 was not taxable, as it was a capital receipt of the taxpayer's business. (7) Alternatively, if the £4,000 was paid in respect of commission, as the Inland Revenue contended, it was, to the extent of £3,935, a receipt of the taxpayer's business for the accounting period ended March 31, 1949, and the remaining £65 was not a revenue receipt at all.

On behalf of the Crown it was contended (inter alia): (1) The taxpayer received £4,000 as damages, defined in the particulars of claim as commission that would have been earned by October 20, 1949. The agency for the company was not fundamental to his business organisation and the £4,000 was not for the loss of an enduring asset. The loss was to be regarded as a normal incident of the business carried on by the taxpayer and the sum of £4,000 would be a receipt on revenue account for the year ending March 31, 1951, the basis year for 1951–1952.

Alternatively, the taxpayer was entitled under the agreement to commission amounting to £3,935, being £807 commission due for June, 1948, and £3,128 commission on orders obtained before July 1, the goods being delivered after that date. Notwithstanding anything in the order made by the Manchester District Registrar, the £4,000 paid to the taxpayer by the company was in respect of that commission and expenses. If this were so then the sum of £3,935 should be assessed for 1949/50 as having been earned in the year ending March 31, 1949.

The Commissioners gave their decision as follows: "So far "as they are questions of fact we find as facts, and so far as they "are questions of law we hold: (1) The taxpayer, according to "his returns, carried on business as a manufacturers' agent "at the time he was engaged by Gordon Mills Limited and con-"tinued as such during the whole of the engagement and after "October 20, 1949. (2) According to his statement of claim in "his action against Gordon Mills Limited he claimed that he "had lost the commission which he would otherwise have earned "between July 1, 1948, and October 20, 1949. (3) The terms of "the agreed judgment had no bearing whatsoever on the question "whether the amount awarded was capital or income. (4) The "amount awarded in fact took the place of the commission which "he would have been earning if the engagement had been con-"tinued to October 20, 1949. (5) The sum of £4,000 is taxable "profits for the year in which it was actually received."

The taxpayer appealed to the court. On October 26, 1954, his appeal was dismissed by Harman J., who held that the sum

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of £4,000 represented compensation for the profit which the taxpayer would or might have made under the agreement between the breach and the due ending date of the agreement and, as such, represented income corresponding to the commission which he would have received if the agreement had been allowed to run.

N. E. Mustoe Q.C. and *G. B. Graham* for the taxpayer.

Sir L. Ungoed-Thomas Q.C. and *Sir Reginald Hills* for the Inspector of Taxes.

Cases cited in argument not referred to in the judgments: *Henley* v. *Murray* [2]; *John Smith & Son* v. *Moore* [3]; *Henderson* v. *Meade-King, Robinson & Co. Ltd.* [4]; *Inland Revenue Commissioners* v. *David C. Macdonald & Co.* [5]

LORD EVERSHED M.R. In this case I have come to the same conclusion as Harman J. and I think, therefore, that this appeal fails.

The subject-matter involved is the sum of £4,000 which was paid out to the taxpayer by way of settlement of an action which he had brought against a company, Gordon Mills Ltd., the action being based on an alleged breach by Gordon Mills Ltd. by way of repudiation of a contract of agency which the taxpayer had with them at the time. The question, when properly formulated, is whether, within the language of the applicable Income Tax Act, 1918, Schedule D, paragraph 1 (*a*) (ii), this is properly chargeable as being in respect of "the annual profits "or gains arising or accruing" to the taxpayer from a trade. His trade, in respect of which he admittedly is or was taxable, is that of a sales agent for articles of women's clothing manufactured by various manufacturing companies.

The facts are fully set out in the case stated and it is unnecessary, for the purposes of my judgment, that I should restate them fully. I can sufficiently state the essentials of the matter by reference first to Appendix D to the case which shows that during a number of years beginning in 1939 and ending in 1951 the taxpayer had agencies of this character for a number of manufacturers totalling in all twenty. It is, however, necessary to observe at once that at no one time did the taxpayer hold agencies for twenty such firms or anything like that number. Indeed, at the relevant date, namely, July 1, 1948, when Gordon Mills Ltd. terminated the taxpayer's agency with them, he had two such agencies, one with a company called Green, Hearn & Co., and the other with this company, Gordon Mills Ltd. However, the importance of this schedule lies in the circumstance that during the business life of thirteen years which

[2] [1950] W.N. 241; [1950] 1 All E.R. 908; 31 T.C. 351.
[3] [1921] 2 A.C. 13; 37 T.L.R. 613; 12 T.C. 266.
[4] (1938) 22 T.C. 97.
[5] (1955) Tax Leaf. 1757.

it covers, the taxpayer's agencies varied in their nature and number from time to time. Some were held for a very short time: some, by the figures, may have represented little more than isolated transactions conducted on a commission basis: others lasted longer. In the case of Green, Hearn & Co. the agency had continued by 1951 for no less than twelve years, and, similarly, the Gordon Mills agency at the relevant date had lasted for seven years or more; but it was in the nature of an agency business of this kind that there might be from time to time changes in the actual agencies held, by the substitution of one for another. I need say no more about this particular agency than that its terms were comprehended in a written agreement, one clause of which provided that it was terminable on either side by twelve months' notice ending on October 20 in any year. It is therefore an incident of importance, in this case, that, if it is to be regarded in any sense as an asset, its quality must be judged by its legal character, and it was an asset liable to determination on relatively short notice. On the other hand, it is fair to say, as Mr. Graham emphasized in his short but forceful speech, that it was obviously in the ordinary expectation of the parties (and the case so finds) that, if all went well, the contract in fact as a business matter would be likely to have gone on, one might say, indefinitely. Unfortunately for him, or perhaps fortunately for him, because I know not the ultimate financial gain or loss, the taxpayer engaged himself in 1948, the year with which we are concerned, as manager for a business, of which his wife was substantially the proprietor, called K. Wiseburgh, Ltd., a business of manufacturing and merchanting garments of the same character, to some extent at least, as those made by Gordon Mills. It was because of that enterprise that Gordon Mills said that he was neglecting his proper obligation to them and had accordingly treated the contract as at an end.

Thereupon the taxpayer issued his writ and by his statement of claim he asked for damages for breach of contract and also for an account of the commission which he alleged was at that date due and unpaid in respect of his past work. It is right to observe that, as pleaded, the damage for breach of contract which the taxpayer alleged was "damage in that he had lost commis-" sion which he would otherwise have earned." He says that the real damage lay not so much in the loss of the commission which would otherwise have been earned but in the loss of the particular contract; but to my mind there is no valid distinction for the present purpose between these two.

The taxpayer might have alleged that the real damage to him, apart from the loss of a certain amount of commission, lay in this: that if the determination were wrongful his goodwill as sales agent in this line of business was thereby seriously impaired. If and in so far as damages were claimed because his

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goodwill as a sales agent had been impaired, I can well conceive, to say the least of it, that the taxpayer would have had a strong case for saying that such a sum of damages would not be taxable.

The order was an order made by consent. It followed, apparently, after a considerable period of negotiation, for it is dated in April 20, 1950. The Commissioners in their conclusions state that the terms of the judgment had no bearing whatsoever on the question whether the amount awarded was taxable or not. That conclusion was much criticized by Mr. Mustoe, and it was also criticized to some extent by Harman J. If by it the Commissioners meant that the judgment and the language of it were for all purposes wholly irrelevant in any case, I should have agreed with the criticism; but, for my part, I think also that the criticism may be somewhat less than just to the Commissioners. The reason for that view will appear when I have read the order: "Pursuant to the order of the registrar whereby "it was ordered: That the plaintiff [the taxpayer] be at liberty "to enter judgment against the defendants for the sum of "£4,000 as damages for breach of agreement of service and for "costs of the action, . . . That the plaintiff do recover "nothing from the defendants in respect of his claim for com-"mission and expenses"—that is a reference to the second head of the claim which Mr. Mustoe called pre-breach commission—"That the sum of £4,000 paid into court by the "defendants . . . be forthwith paid out to the plaintiff's "solicitors . . . in satisfaction of the said sum of £4,000 "damages: That the action be withdrawn from the list. It is "this day adjudged that the plaintiff recover against the said "defendants £4,000 and costs of the action throughout to be "taxed. . . ." The judgment is at least relevant to this extent. It shows—and the parties were entitled to compromise their action in such terms as they chose—that there was no sum being paid for pre-breach commission. Had it been the other way round, Mr. Mustoe conceded that he would have been in difficulty in saying that unpaid commission paid as a result of a law suit to get payment of it is not taxable. But it seems to me that, once it is conceded, and the judgment makes it clear that this was an agreed sum of damages for breach of this agreement by its repudiation, then the utility of this order is exhausted for our purposes. In other words, it still remains for the court to say whether in the circumstances of this case a general sum of damages for breach of this agreement was "profits or gains arising or accruing" to the taxpayer from his trade.

There is one other inference which must be drawn from the form of the judgment read in the light of the pleadings—and I do not forget that this is a consent order, a settlement when no doubt both parties had considered all their alleged rights and defences—and that is this: I think that, on the face of it, it is impossible for the court to infer that this £4,000 or any part

of it must be treated as paid by way of damages for the loss of the taxpayer's goodwill. The form of the pleadings plus the amount of the damages really makes that impossible.

I return, therefore, to the question, was this sum paid by way of damages in respect of this agency contract "profits or "gains" arising from the trade of the taxpayer as a sales agent? Mr. Mustoe's argument had the attraction of simplicity, for it may be put thus: he said that the £4,000 represents what was paid to the taxpayer in exchange for a profit-earning asset which he had lost owing to the breach of the contract by the defendants. That being so, Mr. Mustoe contended, it follows that it is a capital item. I have said that there is an attraction in that argument and if the question were res integra it would be more attractive still; but, it clearly will not do as a test in these cases in the light of the authorities to which we have been referred.

It is true that for the most part the authorities are decisions of the Inner House of the Court of Session in Scotland which do not bind this court; but the Income Tax Acts apply indifferently on either side of the border and, therefore, I should in any case be slow to indicate when sitting in this court an entirely new approach to the incidence of taxation in England from that which I think has now been well established in Scotland. In other words, I feel that we should follow the line of the Scottish decisions and the principle which can be extracted from them.

Faithful to that prelude, I will cite the language of Lord President Normand and say "No infallible criterion emerges from "a citation of the case law. Each case depends upon its own "facts." (*Kelsall Parsons & Co.* v. *Inland Revenue Commissioners.*[1]) I do not think it is necessary to go over the cases which have been cited to us; it is fair to say, as Mr. Mustoe put it, that the case I have last mentioned, *Kelsall Parsons & Co.* v. *Inland Revenue Commissioners* [1] is perhaps very much at one end of the line and *Barr, Crombie & Co.* v. *Inland Revenue Commissioners* [2] is a case very much at the other end of the line. *Kelsall Parsons* [3] was a case in which the business of the company (for the taxpayer there was a company) was that of agent for manufacturers. They, however, had at the relevant date far more agency contracts than Mr. Wiseburgh had at the relevant date, and, moreover, the sum subject there to the consideration of the Inner House was a sum paid for cancellation of a contract which in any event would have determined in a relatively short time and in regard to which, as Lord Normand says, the taxpayer had no reasonable expectation of its further continuance.

However, Mr. Graham pointed out that the present case is really distinguishable on its facts, and distinguishable in a

[1] (1938) 21 T.C. 608; 1938 S.C. 238.

[2] (1945) 26 T.C. 406; 1945 S.C. 271.

[3] 21 T.C. 608.

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significant degree from *Kelsall Parsons*.[3] First, the agencies which Mr. Wiseburgh held were but two. Secondly, as I have said earlier, although the agency which we are considering was expressed to be determinable at relatively short notice, in truth, if all had gone well, there would have been no reason to suppose that it would have been. And thirdly, as the Commissioners pointed out, the effect of the loss of this contract was, quoad the taxpayer's agency business, very substantially to depreciate his earnings; whereas in the *Kelsall Parsons* case [3] the court pointed out that the earnings of the taxpayer out of the agency business were not much different from what they had been before the cancellation of the material contract. I agree that in respect of those matters the present case differs from that case; but I am unable to agree that those differences are of such significance as to bring the case from the territory, so to speak, of *Kelsall Parsons* [4] into the land of *Barr Crombie*.[5] On its facts, if one were content to take the analogy of facts, the present case may be said to be more closely resembling the later case of *Inland Revenue Commissioners* v. *Fleming & Co.* (*Machinery*) *Ltd.*,[6] and I have already said that I must resist Mr. Mustoe's invitation to refuse to follow the Scottish line of authority.

But, to bring the matter over to what I have called the *Barr Crombie* [7] land, it must be shown that, in truth and in substance, what the taxpayer parted with was not merely his rights and expectations under a contract entered into in the ordinary course of his trade, but was a parting by him with one of his enduring capital assets, as it is called. It is on that sort of consideration, as I said earlier, that this case might well have been different if the £4,000 had been paid because the taxpayer's goodwill had been damaged. In the *Barr Crombie* [7] case the agency which was there cancelled amounted to the substance of the whole business of the tax-paying company; its receipts accounted for nearly nine-tenths of the total earnings and its loss necessitated the complete reorganisation of the taxpayer's business, a reduction in its staff, and the taking of new and smaller premises. In effect, a substantial part of the business undertaking had gone. Here, as it seems to me, what has happened in brief is that the taxpayer has been carrying on this business which for thirteen years has shown variations in the actual agreements which it has comprehended; and the business has suffered something of a shock and perhaps something of a disaster by reason of this quarrel with a valuable customer. But beyond that, it seems to me that it is not right to say that the taxpayer had his undertaking as a sales agent partially destroyed or taken away.

The matter being very largely one of degree, which is, as Lord Normand said, a matter of fact, the question in the end is,

[3] 21 T.C. 608.
[4] Ibid.
[5] 26 T.C. 406.
[6] (1951) 33 T.C. 57.
[7] 26 T.C. 406.

I think, one of fact for the Commissioners to find. On the facts of this case it seems to me that the Commissioners were entitled to find, and justified in finding, as they did, without any misdirection of law, that this amount awarded to the taxpayer was a taxable profit; that is to say, a part of the profits or gains arising from the business for the year in question. Harman J. thus expressed himself towards the end of his judgment [8]: "The "taxpayer was a manufacturers' agent. He had other agencies "from time to time and carried on business as an agent, and "one of the incidents of such business is that one agency may "end and another begin. The fact that an agency was a key "agency, and therefore was important to him and represented "half of his income, seems to me to be irrelevant." With the possible exception of substituting "inconclusive" for "irrele- "vant," I agree entirely with that statement; and I agree with what the judge said later: "it was a normal incident in this "kind of business that an agency should come to an end, and the compensation paid is, it seems to me quite clearly, income.

I agree with Harman J.; and I agree with him on the ground that, at the end of it all, it is a legitimate conclusion which the Commissioners on the facts of the case were entitled to find. For these reasons, this appeal fails.

BIRKETT L.J. I am entirely of the same opinion; but, in view of the arguments of Mr. Mustoe and Mr. Graham, I will say one word by way of supplement.

We have been concerned all the time with this sum of £4,000. Towards the end of the discussion Mr. Graham invited us to consider the nature of the £4,000. That was in the submission that he could distinguish the facts in the *Kelsall Parsons* case [9] from the facts of the present case. What he said was that the damages were in the nature of a sum of money, a surrogatum or quid pro quo for the loss of this contract. He also asked us to consider the nature of the business.

It is perfectly plain that, in all the cases which have been before the courts on this or on a similar topic, the courts have felt an intense difficulty in laying down anything like a precise line that could be applied to the facts of any given case. But what I think they have done now, as emerges from the cases cited to us by Mr. Mustoe, is this: they have said one's duty is, first of all, to examine with care the facts, come to a decision on the primary facts, make such inference as those facts demand, bearing in mind at all times the considerations which have been laid down in the various cases.

As I mentioned during the argument, I think that the most helpful passage was that from Lord Russell's judgment in *Inland Revenue Commissioners* v. *Fleming & Co.* (*Machinery*)

[8] [1955] 1 W.L.R. 1287, 1292. [9] 21 T.C. 608.

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Ltd.[10]: "The sum received by a commercial firm as compensation for the loss sustained by the cancellation of a trading contract or the premature termination of an agency agreement may in the recipient's hands be regarded either as a capital receipt or as a trading receipt forming part of the trading profit. It may be difficult to formulate a general principle by reference to which in all cases the correct decision will be arrived at since in each case the question comes to be one of circumstance and degree. When the rights and advantages surrendered on cancellation are such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt." Then he cites the cases of *Van den Berghs Ltd.* v. *Clark*[11] and *Barr Crombie & Co. Ltd.*,[12] and on the other side *Kelsall Parsons & Co.*[13] So it is perfectly plain that there is no fixed rule, no precise rule or standard by which we can lay it down and say: "You have come within it or come without it." It is a matter of degree and all the facts of the case must be considered.

The difficulty in this case is this: that nobody quite knows for what the £4,000 was in fact paid. I have been looking at the pleadings, which have not been read in full, and it appears to me that on the pleadings the very clearest issues were raised. I see that in the defence the defendants admitted the letter of July 1, 1948, which puts an end to the contract. They say: "Certainly we wrote it but we were entirely justified in so doing." Then they say in the particulars—and this seems to me a very important matter—"Though the plaintiff [the taxpayer] was bound in accordance with the terms of clause 1 of the agreement of service with the defendants to act as the defendants' sole agent for the export market, the plaintiff during the currency of the said agreement exported articles of a similar nature to those manufactured by the defendants under the name of two firms known as K. Wiseburgh Ltd. and K. Wiseburgh Export Ltd., of each of which said companies the plaintiff had control. Such conduct constituted a breach of his contract with and a dereliction of his duty to the defendants." Then they say that he persistently neglected the agency. Under paragraph (c), I find the gravest allegations are there made: "The plaintiff's conduct towards the defendants who were at all material times his employers was such as completely to

[10] 33 T.C. 63.
[11] [1935] A.C. 431; 51 T.L.R. 393; 19 T.C. 390.
[12] 26 T.C. 406.
[13] 21 T.C. 608.

" frustrate the purpose of the contract and to indicate complete " lack of faith in and desire to co-operate with them." They refer to certain letters, and say: " the plaintiff in terms refused " to speak on the telephone upon a matter concerning business " affairs with the managing director of the defendants: the plain- " tiff gave express instructions to his staff . . . that they were not " to have any communication by telephone with the defendants," but that it was only to be by correspondence. Then there is this: " at a time when the defendants' selling season was at " its height, the plaintiff refused in a letter dated May 19, 1948, " to canvass further sales on behalf of the defendants." That was pleaded but it was never fought out in the courts. If it were true, the defendants were saying with reference to this selling agreement: " You yourself declined to go on with it, and " at the height of the season for selling these goods you refused " to canvass further—in other words, you dropped the agreement " altogether."

In the reply equally important and serious things were said: " By the letters set out above and by the general tone of " hostility displayed by the defendants in other correspondence " between themselves and the plaintiff . . . and by their refusal " to discuss prices with the plaintiff contrary to clause 11 . . . " and by their failure to keep the plaintiff fully informed as to " stocks . . . and by failure to keep the plaintiff informed as to " their cloth position, the defendants created a situation in which " maintenance of the contractual relationship between the " parties was impossible." All I need say about it is this: First of all, on the pleadings, there were the very gravest allegations by both sides. Secondly we know the action was compromised by this payment of £4,000: but the grounds on which the sum of £4,000 was arrived at are quite impossible to determine. One never knows in these matters. One has heard that settlements are sometimes made a little easier outside court because the presence of one leader was urgently required in another court; but it is impossible to speculate why the £4,000 was paid in this case. When, however, one sees that in the year ending March 31, 1948, the commissions were £8,223, and yet £4,000 only was paid in this case for the ending of this particular contract, it shows how impossible it is to arrive with any certainty at the nature of the payment of £4,000 in any detailed sense.

The taxpayer says that it was a payment " for injury to the " goodwill of my business." I agree with what Lord Evershed M.R. has said about that. In the whole of this statement of claim, detailed as all the complaints are, there is no breath of a suggestion of that kind. It is confined wholly to the loss of commission. All the details in the pleadings, the defence and reply, really go to that purpose.

What the Crown say here is this: If one looks at the cases which have been decided, applying them to the facts as they are

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now known in the present case, the reasonable inference which we ought to draw from those facts is that this was merely a profit from the trade within Schedule D (1) (*a*) (ii) of the Income Tax Act, 1918, and was not a sale of a capital asset as the taxpayer contends. I have been troubled all the way through in this case on the question of the two Wiseburgh companies. I can understand it being said: "I had two contracts and those "were the whole of my business. You took one away and you "left me with only the one contract, and in that respect you "have injured my profit-making apparatus. You have taken "away a capital asset of value." But one must remember what are the facts in this case. The contention was raised in the pleadings: that, so far as the asset about which this complaint was made, the taxpayer would not go on with it, and it was on that ground the defendants say that they were entitled to write that letter of July 1. He had declined at the height of that season to comply with the agency agreement and they were therefore justified in doing what they did. We do not know what was the extent of the K. Wiseburgh business, and we are told they were limited companies, of which he was the manager. It was not an agency in the ordinary sense. If the truth be that this man was concerned to say: "Here am I with a profit-"able agency, it is true, but I can do much better for myself by "having two companies of my own under my own control and "I will do it at the expense of this agreement," it seems to me a little difficult for that man to say: "I want damages for the "injury which you have done to my profit-making apparatus" when, on the true facts, it may very well be that the profit-making apparatus had been changed by his own free will. I have been troubled throughout this case by that consideration, because we do not know what was the extent of the Wiseburgh trade. We only have the allegations which are made that, so far as the export trade was concerned, taking goods which in the ordinary way might have gone from the agency with Gordon Mills Ltd., and all those goods went from Wiseburgh. We know there is that allegation and the further one that the taxpayer himself had by letter declined to go on with the agreement. These things have not been tried, but they are surely matters which must be taken into consideration when it is said by one side that this is for the loss of a capital asset, and on the other that this is a trade profit arising in the ordinary way from your profits under Schedule D.

I do not think it is necessary to add anything further. Harman J., who gave consideration to this matter, came to the conclusion that the Commissioners were perfectly justified in their findings as they stated them, and he upheld them; and I need only add that in this court nothing that I have heard leads me to suppose that the Commissioners fell into error, and certainly

nothing that for one moment makes me feel that Harman J. fell into error.

For my own part, I would dismiss the appeal.

ROXBURGH J. I agree that this appeal should be dismissed.

Appeal dismissed.

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Solicitors: *Garland-Wells, Riches & Co.; Solicitor of Inland Revenue.*

I. G. R. M.

[COURT OF APPEAL.]

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Revenue—Income tax—Profits of trade—Company—Resignations from agency and secretaryship to another company—Payment by third party of sum in consideration of resignation—Whether taxable as trading receipt—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 4), *Sched. D.*

The taxpayers, a mining finance company, provided agency, secretarial and other similar services in London and Johannesburg for a number of companies and the receipts and outgoings in respect of such services were included in its assessment to tax under Schedule D, Case I, of the Income Tax Act, 1952.

Together with the trustees of one F., the taxpayers held a substantial shareholding in the K. company, a South African company, and they had a contract with that company under which they provided agency and secretarial services for a remuneration. In 1949 the taxpayers and the F. trustees sold their shares in the K. company to certain purchasers who, in accordance with the agreement of sale, paid to the taxpayers £20,000 in consideration of their vacating their office as secretaries and agents; of that sum they retained £16,138 and paid the balance to the F. trustees. The sum retained was credited to reserve account in the balance sheet as "amount received during 1949 as compensation for loss of office."

On being assessed to income tax in respect of this sum, the taxpayers appealed to the General Commissioners, who found that it was a trading receipt and dismissed the appeal. Harman J. affirmed the decision of the Commissioners. On appeal:—

Held, (1) that the making of agency contracts was part of the taxpayer's business and the cancellation of the contract in question in no way affected the "profit-making apparatus" of the taxpayer and that the Commissioners were entitled to find that the sum of £16,138 represented profits or gains of the taxpayer arising in the ordinary course of its trade.

Kelsall Parsons & Co. v. *Inland Revenue Commissioners* (1938) 21 T.C. 608 and *Inland Revenue Commissioners* v. *Fleming & Co. (Machinery) Ltd.* (1951) 33 T.C. 57 applied.

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(2) That the fact that the sum in question was paid by a third person, not a party to the agency contract, was not material, since it was clearly established that the question of liability to tax had to be determined having regard to the nature of the payment in the recipient's hands.

Decision of Harman J. [1955] 1 W.L.R. 1314; [1955] 3 All E.R. 779 affirmed.

Appeal from Harman J.[1]

The case stated, so far as relevant, provided:

At meetings of the Commissioners on October 18 and 25, 1954, the Anglo-French Exploration Co. Ltd. (hereinafter called "Anglo-French") appealed against an estimated assessment to income tax made in respect of the profits of its trade or business for the year ended April 5, 1951, in a sum of £50,000, less capital allowances £100.

The question for the determination of the Commissioners was whether or not, in the circumstances, a sum of £16,138 4s. 2d. (part of a total sum of £20,000) received from Philip Hill Securities Corporation Ltd., was a trading receipt which should be included in the computation of its profits for income tax purposes.

The circumstances, which had been agreed between the parties, were as follows:

Anglo-French was a public company incorporated in the United Kingdom in 1889 under the Companies Acts, 1862 to 1886. Its registered office was in, and control of the company was exercised by the board of directors from, London. It had a branch office in Johannesburg. It carried on the business of a mining finance company and its profits were assessed to tax under Schedule D, Case I.

For many years, also, Anglo-French had provided agency, secretarial and other similar services in London and Johannesburg for a number of companies, and the receipts and outgoings in respect of those services were included in Anglo-French's Case I assessment. In 1949 Anglo-French were providing such services both in South Africa and London for three companies and in London, only, for a further five companies.

Anglo-French had either (a) provided such services for companies without holding shares in the companies concerned, or (b) held shares in companies for which it did not provide such services, or (c) provided such services for companies in which it had also held shares. The names of the eight companies included that of "Kleinfontein Estates & Township Ltd. [Year "of Commencement 1899]." There had been (with three immaterial exceptions), for upwards of the past fifteen years, no changes in the companies for which Anglo-French had so acted. The annual rates of fees and rents receivable by Anglo-French from the above-mentioned companies for the provision

[1] [1955] 1 W.L.R. 1314; [1955] 3 All E.R. 779.

of secretarial services and office accommodation, as at March/April, 1949, was set out in a schedule to the Case.

Kleinfontein Estates & Township, Ltd. (hereinafter referred to as "Kleinfontein") for whom Anglo-French provided secretarial services in London and Johannesburg and in which Anglo-French held shares, was at all material times a public company incorporated in South Africa and carrying on business there.

From June 19, 1931, the terms and conditions on which Anglo-French provided such services to Kleinfontein in Johannesburg were regulated by a formal agreement between the two companies, which, by its terms provided that it should continue in force from year to year until determined by either party giving six months' calendar notice. The agreement further provided, inter alia, that Kleinfontein should by way of remuneration pay to Anglo-French £1,200 per annum and a further sum of £60 per annum for rental of office accommodation. This remuneration was subsequently, by mutual agreement, increased to £1,500 per annum.

In addition to acting as secretary of Kleinfontein in Johannesburg and providing all necessary secretarial services, Anglo-French also provided similar services for Kleinfontein in London. The fee paid by Kleinfontein to Anglo-French for these services in London was £60 per annum.

In May, 1949, Anglo-French, together with another friendly shareholder (the estate of the late Sir George Farrar), held a majority of the shares in Kleinfontein. Anglo-French had never had a controlling interest in Kleinfontein.

In 1947 negotiations took place for the sale of Anglo-French's share in Kleinfontein but, in the events which happened, these negotiations were subsequently broken off.

In May, 1948, and March, 1949, further negotiations took place regarding a possible sale by Anglo-French of its shares in Kleinfontein. On this occasion the offer to purchase (which was in no way connected with the 1947 negotiations) was made on behalf of Philip Hill Securities Corporation Ltd. (hereinafter referred to as "Philip Hill").

Ultimately, by a letter dated March 29, 1949, Philip Hill made a formal offer to purchase from Anglo-French and certain other shareholders, at the price of 35s. each per share, not less than 70,000 shares of 5s. each fully paid in Kleinfontein. By clause 6 of the terms and conditions set out in the letter Anglo-French was to tender its resignation as agents and secretaries to Kleinfontein, and Philip Hill was to pay to Anglo-French on the tender of that resignation a sum of £20,000. This offer was accepted by Anglo-French.

The participation of the trustees of the estate of the late Sir George Farrar was confirmed by a letter to the Anglo-French manager in Johannesburg in which they stated that they would

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be willing to sell to Philip Hill, at 35s. per share, the shares in Kleinfontein held by them. A circular was sent to the shareholders, who had not participated in the transaction, informing them that Anglo-French and the George Farrar trustees had accepted an offer from Philip Hill of 35s. per share for their respective shares in Kleinfontein amounting in all to 70,491 shares of 5s. each out of a total of 85,000 shares. They were also informed that, in consideration of its vacating the office of secretary and agent of Kleinfontein, Anglo-French had been paid a sum of £20,000.

The transactions were finally completed and the resignation of Anglo-French from the office of secretary and agent of Kleinfontein and the resignation of the London Committee of Kleinfontein were also tendered and accepted with immediate effect.

Having resigned from their office with Kleinfontein, Anglo-French duly received the sum of £20,000 from Philip Hill. After paying a proportional part to the George Farrar trustees in accordance with an agreement with them, Anglo-French retained £16,138 4s. 2d. That sum was credited to reserve account in the published balance sheet of Anglo-French and described as "Amount received during 1949 as compensation "for loss of office." Reference to this sum was made in the report of directors in the same year as follows: "During the "year the company relinquished its office as secretaries and "agents to Kleinfontein Estates and Township Ltd. An amount "of £16,138 received as compensation for loss of office has "been placed to the credit of general reserve."

On behalf of Anglo-French it was contended: (a) that in order to ascertain whether a payment is a capital or a revenue receipt every case must be determined on its own particular facts; (b) that the agreed facts in this case indicate that the sum of £16,138 4s. 2d. was part of the price, viz., £20,000 paid by a third party (Philip Hill) to Anglo-French in consideration of its agreeing to give up an agency contract and that, accordingly, the case was distinguished from the type of case where the payment was received by an agent from his principal; (c) that, having regard to its terms and the surrounding circumstances, the said agency contract together with the right to exercise the duties thereunder was a capital asset of Anglo-French and its surrender at the instance of Philip Hill was a transaction analogous to a sale of a capital asset; (d) that the said sum of £16,138 4s. 2d. was therefore a capital receipt and not a trading receipt of Anglo-French; (e) that the appeal should be allowed.

It was contended by the Crown: (a) that the said sum of £16,138 4s. 2d. was received by Anglo-French as compensation for the loss of one of its agencies in the ordinary course of its business and not in consideration of a sale or any such analogous transaction; (b) that in fact the said agency contract and the

right to perform the duties thereunder did not constitute an asset, which Anglo-French could or did sell, and further, that the fact that the payment of compensation for its loss was made by a third party was immaterial; (c) alternatively, as Anglo-French was a mining finance company, that if any such sale or analogous transaction did take place, which was not admitted, the proceeds thereof were profits which arose from a financial dealing; (d) that in either event the said payment of £16,138 4s. 2d. was a revenue receipt and therefore taxable profit; (e) that the appeal should be dismissed.

The Commissioners held that the £16,138 4s. 2d. was a trading receipt of the appellants and must be included in its profits for the purpose of income tax and the appeal failed.

Harman J. dismissed the appeal of Anglo-French from the decision of the Commissioners.

Anglo-French appealed.

H. H. Monroe for the appellant company.

Roy Borneman Q.C. and *Sir Reginald Hills* for the Crown.

The following cases were referred to argument and were not cited in the judgment: *Henley* v. *Murray* [2]; *Greyhound Racing Association (Liverpool) Ltd.* v. *Cooper (Inspector of Taxes)* [3]; *Henderson* v. *Meade-King, Robinson & Co. Ltd.* [4]; *MacDonald* v. *Inland Revenue Commissioners.* [5]

LORD EVERSHED M.R. The question involved in the present case relates to a sum of £16,138 4s. 2d. which was received by the appellant company, Anglo-French Exploration Company Ltd. in the year 1949.

It is right that, at the outset of my judgment, I should refer to the terms of the schedule under which the claim is made, namely, Schedule D of the Income Tax Act, 1918, which was the Act of Parliament then in force. Its terms are very familiar, but I hope I shall be excused if I recite them: "Tax under this "schedule shall be charged in respect of—(a) The annual "profits or gains arising or accruing— . . . (iii) to any person ". . . from any trade, profession, employment, or vocation, "whether the same be respectively carried on in the United "Kingdom." I have thought it right and relevant to refer to the terms of that schedule because, in my judgment, Mr. Borneman correctly reminded us that the cases of individual persons sought to be charged under Schedule E of the Act, where the charge is "in respect of every employment of profit," do not form a safe guide to cases under Schedule D, at least as a

[2] [1950] W.N. 241; [1950] 1 All E.R. 908; 31 T.C. 351.

[3] [1936] 2 All E.R. 742; 20 T.C. 373.

[4] (1938) 22 T.C. 97.

[5] [1940] 1 K.B. 802; 56 T.L.R. 665; 23 T.C. 449.

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general proposition. We must consider the correctness or otherwise of the assessment here made in the light of the language which I have read of Schedule D.

The question, so interpreted, as it is before us can be thus expressed: Does this sum of £16,000 odd represent profits or gains of the Anglo-French Exploration Company Ltd. arising from its trade? In other words, was it a sum received by the appellant company in the ordinary course or stream of its trading operations?

The facts of the case are not in dispute, and since they are fully recited in the case stated, it is unnecessary for me to repeat the whole of the narrative. The essential facts, however, are as follows. The Anglo-French Exploration Company Ltd.—I will henceforth call it "Anglo-French"—was formed as an English company at the end of last century: its business being that of a mining and finance company particularly concerned, according to the terms of the case stated, with seeking scope for the investment of capital in South Africa.

Among the South African companies in which Anglo-French held for many years a substantial shareholding was the Kleinfontein Estates and Township Ltd., which I will henceforth call "Kleinfontein." In that company Anglo-French held, at all relevant dates, rather less than one-third of the total of its share capital which consisted of shares of 5s. 0d. denomination. A similar but slightly larger shareholding in Kleinfontein was at all material times held by persons who were the trustees of the late Sir George Farrar. Anglo-French and the Farrar trustees had each of them two nominee directors on the board of Kleinfontein, but, in fact, the fees, which were paid to the Anglo-French nominee directors, were in turn paid over by them to Anglo-French.

In addition to that shareholding interest, Anglo-French for many years acted, under the terms of a written agreement and certain correspondence, as agents and secretaries of Kleinfontein for the annual fee of £1,500 sterling. The substance of the obligation as agents and secretaries undertaken by Anglo-French was that they provided office accommodation and office staff for Kleinfontein in Johannesburg. The agreement was determinable by six months' notice on either side; but in practice, and so long as Anglo-French and the Farrar trustees co-operated together, Kleinfontein would not be able to determine the agreement against the wishes of Anglo-French. In May, 1949, Philip Hill Securities Corporation Ltd., another English company, made an offer for the shares of the Kleinfontein company at a price of 35s. 0d. per share. It was also part of that offer that, when the stage was reached whereby more than 50 per cent. of the issued shares of Kleinfontein had been acquired, the Philip Hill Company would pay the sum of £20,000 in consideration of the resignation by Anglo-French of its office as agents and secretaries.

As Mr. Monroe has said, and said rightly, the true transaction must be carefully analysed. I will read part of the paragraph in the offer which related to that last-mentioned matter. "Subject to your company's acceptance of this offer and upon "delivery to our company of 43,000 of the said shares"—43,000 being just over 50 per cent.—"with transfer forms as aforesaid "attached thereto, your company will tender its resignation as "agents and secretaries to the Kleinfontein Company, acceptance "of which we undertake to procure forthwith upon its being "tendered, and upon the tender of such resignation we shall pay "to your company in cash the sum of £20,000." Those offers, the offer to buy the shares at 35s. 0d. each, and the offer in respect of resignation by Anglo-French, were accepted by Anglo-French. In due course, and in accordance with the terms of the arrangement, the £20,000 having been received, part of it was paid over by Anglo-French to the Farrar trustees, the figure of £16,138 4s. 2d. representing the balance of the £20,000 retained by Anglo-French.

I observe two things: (1) the £20,000 was not part of the purchase price of the shares, as was indeed conceded in the courts below, and as has been here conceded on the part of the Crown. Had it been otherwise, had it been part of the purchase price, then either Anglo-French would have got more than the other shareholders for their shares (which is inconsistent with the Philip Hill company's offer) or, to avoid that result, Anglo-French would have had to distribute £20,000 rateably among all the shareholders; (2) the agency agreement being on the face of it determinable by six months' notice, it was quite plainly only worth a sum like £20,000 so long as Anglo-French and its friends, the Farrar trustees, could control the Kleinfontein Company. That plain fact is recognised by the terms of the offer, as also by the distribution by Anglo-French of the £20,000 when they received it.

Mr. Monroe's argument before us, which, if he will allow me to say so, was presented with cogency and lucidity, was to this effect: (1) The £20,000 was paid in truth as consideration for the giving up or destruction, as distinct from the mere discharge, of the agency, that being, he said, the legal effect of the true analysis of the bargain as recorded in the document; (2) it is nihil ad rem that £20,000 was far in excess of the true value of the agreement, since the parties to the arrangement could put any price they liked upon it; (3) it is also nihil ad rem that the £20,000 was, so to say, tied up with the trading transaction, namely, the sale of the shares. It was a separate bargain and constituted a capital payment. (4) It is nihil ad rem likewise that Anglo-French chose to divide the £20,000 between themselves and the Farrar trustees, as they did. (5) It therefore follows from the first proposition that the sum received was a capital payment in the hands of Anglo-French, because it was in truth paid to, and received by, them for the destruction, the

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assigning, the giving up, or whatever phrase you like to use, of a source of income, videlicet, a capital asset.

The Commissioners rejected this argument. They found that the sum in question was a trade receipt, meaning thereby, as I understand, a receipt by Anglo-French in the ordinary course of their trade. In my judgment, the Commissioners were entitled, on the facts, so to find, and in so finding they made no error in law.

If the matter were res integra, I think that there is much to be said for the simple view that a sum of money received in consideration for the giving up or destruction of an agreement under which you look to earn an annual sum is capital and not income: for in such case the sum received might be described fairly as the capitalised equivalent at the present time of income prospects. But the question remains, not whether that sum in some senses or in some contexts might sensibly be called a "capital" payment, but whether within the terms of Schedule D it is a profit or gain arising from the trade of the recipient.

And the matter is not in any case res integra. The line of cases to which we have had our attention directed, starting from the well-known trilogy: *Inland Revenue Commissioners* v. *Newcastle Breweries Ltd.*,[1] *Short Brothers* v. *Inland Revenue Commissioners*,[2] and *Inland Revenue Commissioners* v. *Northfleet Coal & Ballast Co. Ltd.*,[3] seem to me to emphasise that sums received for the cancellation of an agency or of other similar agreements which have been entered into by the recipient in the ordinary course of its trade will themselves, prima facie, be regarded as received in the ordinary course of trade unless the transaction involves a parting by the recipient with a substantial part of its business undertaking. The case of *Barr Crombie & Co. Ltd.* v. *Inland Revenue Commissioners*[4] was a case of that exceptional character.

On the other hand, we have the cases to which we were referred in this case (as also in the case we decided recently of *Wiseburgh* v. *Domville*[5]) of *Kelsall Parsons & Co.* v. *Commissioners of Inland Revenue*,[6] and *Inland Revenue Commissioners* v. *Fleming & Co. (Machinery) Ltd.*[7]

I have referred to the case of *Wiseburgh* v. *Domville*[8] in which we gave judgment since the first hearing of this case now under consideration, and I may perhaps repeat in this case what I there said: that we have not thought it right to express a different view from that which has been persistently entertained in the Court of Session in Scotland, where, as it happens, the majority of these cases seem to have arisen for determination.

[1] (1927) 42 T.L.R. 185; 12 T.C. 925.
[2] 12 T.C. 988.
[3] 12 T.C. 1102.
[4] (1945) 26 T.C. 406.
[5] Ante, p. 312.
[6] (1938) 21 T.C. 608.
[7] (1951) 33 T.C. 57.
[8] Ante, p. 312.

I will make one or two references to the judgments in *Kelsall Parsons & Co.*[9] and *Fleming & Co.*[10] My first reference is to the judgment of Lord President Normand in the former case. The Lord President said[11]: "It is not necessary that I should review "all the authorities which were cited to us, but I must advert "to the contentions ably urged by the appellants' counsel that "the determination of the Commissioners is contrary to principles "recognised in some of these authorities. Counsel maintained "that a payment for loss of a 'profit-making apparatus' was "necessarily a capital payment in the hands of the recipient who "received it as compensation for such loss. This proposition is, "I think, too vague and too wide. I find it impossible to "reconcile with some of the decided cases." The Lord President then referred, among others, to the case of *Short Brothers Ltd.* v. *Inland Revenue Commissioners.*[12] He continued[13]: "These "two cases were referred to by Lord Macmillan in his speech in "*Van den Berghs Ltd.* v. *Clark*,[14] and I think they can be treated "as of high authority since they passed the scrutiny of the House "of Lords without adverse comment. Then it was urged that "the whole structure of the appellants' business was affected by "the cancellation and that on the authority of *Van den Berghs "Ltd.* v. *Clark*[14] the payment should therefore be treated as "a capital payment. I have already given reasons for thinking "that the structure of the business carried on by the appellants "was in fact, as the nature of the business required, so designed "as to absorb such shocks as the cancellation of a single, albeit "an important, agency contract."

I will next make a reference to the leading judgment of Lord President Cooper in *Fleming's* case.[15] That was a case in which a contract had been cancelled and a restrictive covenant had also been entered into. The Lord President said: "It is conceded by "the Inland Revenue that the £590 and the £800" (being the values paid in respect of the restrictive covenants) "are not "revenue payments and I imagine that this concession would "equally have been made even if the proportions allocated to "those parts of the agreement had been far larger. It is against "the £5,320 alone that the challenge is directed, and taking the "agreement at its face value the Inland Revenue maintain that "clause 1 specifically records simply the loss by a selling agency "of one agency (out of eight which they held in 1948) and that "such a loss is or must be treated as a normal trading risk. I "can see no satisfactory answer to this contention unless we "can impart a special meaning to clause 1 by reading along with "it the rest of the agreement." Lord Russell put the matter thus[16]: "It may be difficult to formulate a general principle by

[9] 21 T.C. 608.
[10] 33 T.C. 57.
[11] 21 T.C. 608, 621.
[12] 12 T.C. 955.
[13] 21 T.C. 621.
[14] [1935] A.C. 431; 51 T.L.R. 398; 19 T.C. 390.
[15] 33 T.C. 57, 62.
[16] Ibid. 63.

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"reference to which in all cases the correct decision will be "arrived at since in each case the question comes to be one of "circumstance and degree. When the rights and advantages "surrendered on cancellation are such as to destroy or materially "to cripple the whole structure of the recipient's profit-making "apparatus, involving the serious dislocation of the normal "commercial organisation and resulting perhaps in the cutting "down of the staff previously required, the recipient of the "compensation may properly affirm that the compensation "represents the price paid for the loss or sterilisation of a capital "asset and is therefore a capital and not a revenue receipt." Finally, Lord Keith concluded his judgment thus [17]: "I think "accordingly that the sum of £5,320 must be regarded as com-"pensation for loss of profits and not for loss of a profit-earning "asset. This may seem a large sum for loss of profits to an "agency terminable at will: but it may reflect the long period "during which the agency had continued and a desire on the "part of Imperial Chemical Industries Ltd. to act generously. "Also reasonable notice would have been required to terminate "the agency and there might have been contentious questions "as to what notice was required. Compensation in lieu of notice "would in my opinion quite clearly be a revenue receipt."

Accepting the law applicable as being that which may be derived from these cases, Mr. Monroe was, in effect, compelled to say either one of two things: namely, either (1) that the agency contract in this case was a capital asset, and, therefore, that the proceeds of sale of that asset must be capital, unless the business of the company involves trading or dealing in that kind of asset; or (2) that the agency contract here was so long-standing and so important to the company as to distinguish the present case on the facts or as a matter of degree from such cases as *Kelsall Parsons* [18] and *Fleming*.[19]

It is true that the facts show that Anglo-French held some eight agency and secretarial contracts and had done so for a considerable time with little variation. Nevertheless, the making of such contracts was part of the business of Anglo-French, and the cancellation of this one contract in no sense affected the "profit-making apparatus" of the company which retained its offices and staff, etc., in Johannesburg exactly as before. In my judgment, Mr. Monroe's first alternative proposition is really inconsistent with the cases. The taxpayers in the *Kelsall Parsons* case [20] and the *Fleming* case [21] were not dealers in agency contracts.

Mr. Monroe's second alternative answer is a question of fact and degree. As I have said, at the beginning of this judgment,

[17] Ibid. 65.
[18] 21 T.C. 608.
[19] 33 T.C. 57.
[20] 21 T.C. 608.
[21] 33 T.C. 62.

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I think that the Commissioners were fully entitled to find the conclusion of fact which they did.

I should add that the fact that the £20,000 was paid, not by the Kleinfontein company, but by a stranger to the agency contract, namely, the Philip Hill company, in my judgment, is immaterial. It has been clearly established that a question of this sort must be determined by having regard to the nature of the payment in the recipient's hands. I, therefore, think that Harman J. arrived at an entirely correct conclusion in this case. He said at the end of his judgment [22]: "Apart from the holding "of the shares, the secretaryship was worth little or nothing. It "was only the appellants' special position that enabled them to "obtain this money. It was in fact a sum earned in the course "of the company's trade, namely, the sale of shares, and, even "though not part of the purchase price, was only earned because "of the holding of the shares and by way of inducement to part "with them. On this analysis, as it seems to me, this was "money earned by the company in the course of its trade and "therefore a trading receipt and must be charged to tax "accordingly."

I agree with that conclusion, and I think that this appeal fails and must be dismissed.

JENKINS L.J. I agree, and I have nothing I can usefully add.

BIRKETT L.J. I also am of the same opinion, and also have nothing to add.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Coward, Chance & Co.; Solicitor of Inland Revenue.*

B. A. B.

[22] [1955] 1 W.L.R. 1314, 1322.

[COURT OF APPEAL.]

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* THOMPSON-SCHWAB AND ANOTHER *v.* COSTAKI AND ANOTHER.

[1955 T. No. 2065.]

Injunction — Nuisance — Interlocutory injunction — Form — Use of premises for prostitution—Action by owners of adjoining premises —Costs.
Nuisance — User of premises — Prostitution — Action by adjoining owners.

The user of premises for prostitution and the perambulations of the prostitutes and their customers can in law amount to a private

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nuisance as constituting a sensible interference with the comfortable and convenient enjoyment of neighbouring premises.

The plaintiffs sought an injunction restraining the defendants from using residential premises in the West End of London for the purposes of prostitution, and alleged that the activities complained of seriously interfered with the comfortable and convenient enjoyment of their nearby dwelling-houses and had an adverse effect on the value of those houses for residential purposes. Wynn-Parry J. ordered that the defendants be restrained until trial or further order from using, causing or permitting the premises to be used for the purposes of prostitution, and he ordered them to pay the costs of the motion forthwith:—

Held, that the plaintiffs had made out a sufficient case to justify protection of their rights pending the trial of the action but that the form of the order should be amended to comply with the usual practice of the Chancery Division by limiting the prohibition against use for the purposes complained of to use "in the manner "complained of by the plaintiffs in this action or otherwise so as "to cause a nuisance to the plaintiffs or either of them" and by ordering the defendants to pay to the plaintiffs their costs of the motion in any event.

Decision of Wynn-Parry J. affirmed.

Appeal from Wynn-Parry J.

On November 29, 1955, Frank Thompson-Schwab and Harold Hyam Wingate, of 13 and 8 Chesterfield Street, Westminster, W.1, respectively, issued a writ claiming an injunction to restrain the defendants, Blanche Marie Costaki and Caroline Sullivan, from using, causing or permitting to be used, the premises 12 Chesterfield Street for the purpose of prostitution. Notice of motion for an interlocutory injunction was given on December 9, 1955. The evidence in support of the motion was, in substance, that the first plaintiff, Frank Thompson-Schwab, lived at 13 Chesterfield Street adjoining the premises in question, with his family, which included a young son, and that he employed there for the purpose of his domestic affairs three young girls. He said that until the events of which he complained began in the autumn of 1955, Chesterfield Street, though not far distant from streets with an unsavoury reputation, had remained a good class residential street not affected by the activities of common prostitutes and that the activities of which he complained at 12 Chesterfield Street seriously depreciated the value of his house as a residence and seriously interfered with the comfortable and convenient enjoyment of his house as a residence.

His evidence and that of his co-plaintiff was supported by that of three inquiry agents who made observations at various dates in October and November, 1955. The substance of their evidence was that the two defendants during the relevant period were making use of 12 Chesterfield Street as a resort while carrying on their practices as prostitutes; they were, that is to say, leaving those premises, walking for the purpose of solicitation towards Curzon Street, returning to the house with the men whom they had solicited, and then the men would leave the

house and the women would leave after them. On December 13, 1955, Wynn-Parry J. ordered "that the defendants be restrained "until after judgment in this action or until further order whether "themselves or by their servants or agents or any of them or "otherwise howsoever from using or causing or permitting to be "used the premises . . . for the purposes of prostitution." He ordered the defendants forthwith to pay the costs of the motion.

The defendants appealed.

Ingram J. Lindner Q.C. and *B. B. Stenham* for the defendants.

Charles Russell Q.C. and *Maurice Berkeley* for the plaintiffs.

In addition to the case referred to in the judgments the following were cited in argument: *Tod-Heatly* v. *Benham* [1]; *Ives* v. *Brown* [2]; *Metropolitan Asylum District Board* v. *Hill* [3]; *Cunard* v. *Antifyre Ltd.* [4]; *Malone* v. *Laskey* [5]; *Attorney-General* v. *Corporation of Nottingham* [6]; *Dewar* v. *City and Suburban Racecourse Co.* [7]; *Walter* v. *Selfe* [8]; *Reg.* v. *Grey* [9]; *Fleming* v. *Hislop* [10]; *St. Helen's Smelting Co.* v. *Tipping* [11]; *D. C. Thompson & Co. Ltd.* v. *Deakin.* [12]

LORD EVERSHED M.R. The question raised by this appeal is a matter of some public interest and, I do not doubt, some public importance too. [His Lordship stated the facts set out above and referred to the order made by Wynn-Parry J. He continued:] Mr. Lindner and Mr. Stenham, for the defendants, have put the first plank in their case boldly, thus: they say that the law of nuisance, as it has been developed from the ancient assize, has never comprehended activities of this kind which, they say, though possibly shocking to the susceptibilities of ordinary people, does not in any material, that is physical, way interfere with the land of the plaintiffs or their use of it. That such is their case—whether entirely of their own motion or not I do not pause to inquire—is perhaps made plainer by the circumstance that the defence which they have, as we were told, put in makes it clear that, according to their submission, they should be free (that is, without impinging upon the civil rights of any other person) to use these premises for the purposes of prostitution to their heart's content and in any way they like. That certainly seems a bold plea. But Mr. Lindner has pointed out with truth that no case has come before the courts in which this kind of activity has been held to constitute a common law nuisance.

[1] (1888) 40 Ch.D. 80; 5 T.L.R. 9.
[2] [1919] 2 Ch. 314.
[3] (1881) 6 App.Cas. 193.
[4] [1933] 1 K.B. 551; 49 T.L.R. 184.
[5] [1907] 2 K.B. 141; 23 T.L.R. 399.
[6] [1904] 1 Ch. 673; 20 T.L.R. 257.
[7] [1899] 1 I.R. 345.
[8] (1851) 4 De G. & Sm. 315.
[9] (1864) 4 F. & F. 74.
[10] (1886) 11 App.Cas. 686.
[11] (1865) 11 H.L.Cas. 642.
[12] [1952] Ch. 646; [1952] 2 T.L.R. 105; [1952] 2 All E.R. 361.

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I have said that the present appeal relates to an interlocutory order. I do not think it would be right (and I certainly do not in all the circumstances think it necessary) that I should attempt any exposition or any definitive view of the wrong known as nuisance. For the purposes of this motion I am content to take as correct (as did Wynn-Parry J.) the following passage in paragraph 970 of Clerk and Lindsell's book on Torts (1954), 11th ed., p. 561: "A private nuisance may be and usually is caused by "a person doing on his own land something which he is lawfully "entitled to do. His conduct only becomes a nuisance when the "consequences of his acts are not confined to his own land but "extend to the land of his neighbour by"—then (1) and (2) are inapplicable here—"(3) unduly interfering with his neighbour "in the comfortable and convenient enjoyment of his land."

The forms which activities constituting actionable nuisance may take are exceedingly varied, and there is the highest authority for saying that they are not capable of precise or close definition. If the principle is rightly stated in the passage which I have read, then it must depend upon the facts of each particular case whether the conditions, which I have stated as required to constitute a nuisance, are satisfied; and in considering whether they are satisfied or not the court must, I apprehend, apply to the matter the usages of civilized society as they may be at the relevant date.

In *Sedleigh-Denfield* v. *O'Callaghan*[1] Lord Wright said[2]: "It is impossible to give any precise or universal formula, but "it may broadly be said that a useful test is perhaps what is "reasonable according to the ordinary usages of mankind living "in society, or more correctly in a particular society. The forms "which nuisance may take are protean."

In the years 1955 and 1956 I daresay that the activities of prostitutes are less taboo in ordinary polite conversation than they were a hundred years ago; and it is true that so far as the evidence in this case goes there is nothing about the activities of the two defendants which is shown to be unlawful in the sense of being illegal or criminal. But it does not, to my mind, follow at all that their activities should, therefore, be regarded as free from the risk or possibility that they cause a nuisance in the proper sense of that term to a neighbour merely because they do not impinge upon the senses—for example, the nose or the ear—as would the emanation of smells or fumes or noises. In other words, the test as it seems to me (and I adopt it for the purposes of this appeal) is that which I have stated, namely, whether what is being done interferes with the plaintiffs in the comfortable and convenient enjoyment of their land, regard being had, to borrow Lord Wright's language, to the usages in this matter of civilized society, and regard being also had to the character, as proved, of the neighbourhood.

[1] [1940] A.C. 880; 56 T.L.R. 887; [1940] 3 All E.R. 349.

[2] [1940] A.C. 880, 903.

The plaintiffs have shown, in my opinion, a sufficient prima facie case to the effect that the activities being conducted at No. 12 Chesterfield Street are not only open, but they are notorious, and such as force themselves upon the sense of sight at least of the residents in No. 13. The perambulations of the prostitutes and of their customers is something which is obvious, which is blatant, and which, as I think, the first plaintiff has shown prima facie to constitute not a mere hurt of his sensibilities as a fastidious man, but so as to constitute a sensible interference with the comfortable and convenient enjoyment of his residence, where live with him his wife, his son and his servants.

It appears to me, therefore, that for the purposes with which we are concerned—namely, the protection of the plaintiffs' rights pending a trial—there was ample justification for the judge using his discretion, to grant an injunction. The exact extent and character of the alleged nuisance will be judged when oral evidence is given, and it will then no doubt be possible to form a closer view of the interference and inconvenience than appears from the written word in an affidavit.

I must turn now to see what is said on the other side, because I must pass also to the secondary matter which Mr. Lindner has argued, namely, the form of the relief granted. The first defendant, Blanche Marie Costaki, has put in no evidence whatever; and it is plain from the manner in which her case has been conducted, let alone her defence, that she in no sense refutes the allegations made about her. It is said that her proved use of the premises for the purposes of prostitution amounts to a very few isolated instances. I do not in fact agree. The incidents are no doubt few in number, but I do not think they are isolated. She does not state, nor do we know, what interest (if any) either defendant has in the premises No. 12 Chesterfield Street. It would, of course, be a relevant circumstance (though I am not pursuing this matter) if they had some proprietary interest in the premises. Caroline Sullivan, on the other hand, states in an affidavit—which, again, in no way refutes the much more detailed allegations about her activities—that shortly before the issue of the writ (but plainly, I observe, when she knew that proceedings were imminent) she ceased to resort to No. 12 Chesterfield Street for the purposes of prostitution, and she says in that affidavit that it was not her intention to resort there again. An undertaking was offered at some stage in the court below on her part, but it has not been renewed here; and having regard to the admitted (for so it really is) facts about her activities right up to a day or two before the issue of the writ, I can see no good reason why the relief which the judge thought it right to grant should not also be granted against her.

Let me say one other thing which might have been said earlier. It is, I should have thought, obvious, having regard to the proximity of other streets with a less savoury reputation,

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that if this kind of use of houses is allowed to creep into Chesterfield Street, the whole character of the street might very soon and very seriously change for the worse. That, I think, is a circumstance which it is proper to bear in mind in considering whether, pending the trial, an injunction should be granted to protect the plaintiffs in their use of their own residences. But the question remains: whether it is right that the form of the injunction should be of the absolute and unqualified character which I have read? The phrase "for the purposes of prostitu-" tion" is one, I think, that might be open to more than one possible meaning. It might be said, or it might not be said, to include the case where a woman lived in a house in the position of a kept woman, not indulging in promiscuous activities, but living there in sin with one man. Such an activity might well not constitute a nuisance.

I am, indeed, clear in my own mind, that the extreme views which might be urged on either side could not be sustained. It could not, I think, be sustained—if the words "for the purposes "of prostitution" have their widest possible significance—that every use of a house for such purposes must constitute a nuisance. But I am equally clear (as I have perhaps already sufficiently indicated) that it is not possible to assert that no use of premises for the purposes of prostitution could cause a nuisance. It may be said, perhaps, that in regard to such an activity as prostitution, it would be contra bonos mores for the court to involve itself in any inquiry of its extent or exact character. On the other hand it has, so far as my experience goes, not been the practice of the Chancery Division, in granting interlocutory relief, to grant it in the extreme, absolute and unqualified form which we have here; and on the whole, therefore, I think it is better that the usual practice should be maintained, and that the form of injunction should be qualified in the more usual fashion by adding at the end "in the manner "complained of by the plaintiffs in this action or otherwise so "as to cause a nuisance to the plaintiffs or either of them."

I make that suggested qualification so as to be in accord with normal practice, which I think on the whole should not be departed from in the present case. But I also wish to make it clear that for the purposes of this motion the difference is one of form rather than substance and is in truth academic only; for the words that I have used will make it quite plain that the continuation by either of these women of the activities which are described in the evidence would constitute a breach of the injunction. The question of the proper form of any injunction granted at the trial can then be further considered in light of the facts finally proved.

There remains also the question of costs. It is again, in my experience, unusual to provide (as this order provides) that the defendants should pay forthwith on taxation the costs of the motion. I am not saying that such an order is not within

the discretion of the judge in appropriate cases. But I need not pursue that aspect of it because Mr. Russell is quite content (and again I daresay the point is quite academic) that the order should again be varied to conform with more usual practice, and that the order as to costs should read: "That the defendants do "pay to the plaintiffs their costs of the said motion in any event," and then there will not have to be the wasteful, and I daresay futile, procedure of a separate taxation. But save for those two variations, which are really matters of form and not of substance, I think that no good ground is shown why we should interfere with the steps which the judge thought it right to take to protect the proper interests of the plaintiffs, and I would, accordingly, dismiss the appeal.

ROMER L.J. I agree and have only a very few words to add.

The principal submissions on which the defendants rely are, first, that no amount of user of premises for the purposes of prostitution can in itself constitute a private nuisance actionable at the instance of the occupiers of neighbouring houses. As to that I am quite satisfied that the proposition so presented is a great deal too wide; and for the reasons which Lord Evershed M.R. has given I think that the contrary could now hardly be suggested. It is, however, a question of fact in each particular case whether a nuisance has or has not been established.

The second point on which the defendants rely is that nothing can constitute a private nuisance at law unless it affects the reasonable enjoyment of other premises in a physical way. This is only an interlocutory application, and at the trial no doubt that point will be taken again and may be argued at greater length, but my present impression is that it is unsound. It appears to be an unwarrantable gloss on the law on the subject as formulated in the textbooks and, what is perhaps more important, it appears to be inconsistent with the judgments of this court in *Lyons & Sons* v. *Wilkins*,[3] which was the picketing case. Consequently I am not prepared to accept either of the principal submissions on which the defendants are founding their case on this appeal.

The question then whether the plaintiffs have made out a case for the interference of this court by injunction is, as I have indicated, one of fact; and although the affidavit evidence which the plaintiffs have put in is not of a very elaborate description (and will no doubt receive further attention and be given in more detail at the trial) there is, I think, ample to lead to the conclusion that what these defendants have been doing in this house constitutes an actionable interference with the plaintiffs in the reasonable and ordinary enjoyment of their houses. Lord Evershed M.R. has said, one of the plaintiffs at all events—indeed I think both of them—have young sons living there and their

[3] [1899] 1 Ch. 255; 15 T.L.R. 128.

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THOMPSON-SCHWAB v. COSTAKI.
Romer L.J.

wives, and one of them has three young servants. One can well imagine the effect of what is going on in the house, almost next door in one case and exactly next door in the other is likely to have on the minds of those young people. One can imagine also the feelings of visitors who come to the houses, or are invited to the houses, and all sorts of other considerations inevitably arise from the user to which the defendants have openly been putting the house to which they have resorted. I have no doubt that Wynn-Parry J. was quite right—taking the evidence in a broad sense—in giving the relief for which the plaintiffs asked, although I agree with Lord Evershed M.R. that the actual form of the order went too far, and should be modified in the manner which he has suggested. Subject to that, I would dismiss the appeal.

PARKER L.J. I entirely agree with what my Lords have said.

Appeal dismissed.

Solicitors: *Beach & Beach; Reynolds, Gorst & Porter.*

E. D.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1956
March 12.
Lord Goddard C.J., Hilbery and Byrne JJ.

* REGINA *v.* COTTRELL (No. 2).

Road Traffic—Disqualification—Power to vary—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 6, 7 (3).

Per curiam. On an application under section 7 (3) of the Road Traffic Act, 1930, the court has no power to vary a disqualification for holding a licence by limiting the class of vehicle to which it applies, but may only remove the disqualification or refuse the application.

Regina v. *Cottrell*, ante, p. 70; [1955] 3 All E.R. 817 approved.

APPLICATION for extension of time for leave to appeal against sentence.

On July 12, 1954, the applicant, Haydn Cottrell, pleaded Guilty at Swansea Assizes to a charge of dangerous driving arising out of an incident which occurred when he was driving a motor-lorry and which involved the death of a bystander. Glyn-Jones J. imposed a fine of £50 and said: "In addition, you will be dis-"qualified from driving all motor-vehicles for a period of five "years, but I do not want necessarily to bring it about that you "never drive even your motor-bicycle during the whole of that "period, and I will say this, that you have your right to apply, "on the proper grounds, for the removal of that disqualification "after an appropriate interval and I will express the opinion "that, if at the end of one year from now the court is satisfied

" with your behaviour and performance, I should not think it out " of keeping with the spirit of my sentence that you should then " have the disqualification varied so as to permit you to ride your " motor-bicycle."

On November 16, 1955, the applicant applied to McNair J., at Cardiff Assizes, under section 7 (3) of the Road Traffic Act, 1930,† for variation of the disqualification. McNair J.‡ held that under section 7 (3) of the Act of 1930 the court had no power to vary a disqualification, but could only remove it or refuse the application and that, although the facts would justify the exercise of a discretion to vary the disqualification in the manner sought, they did not justify its removal, and, accordingly, he refused the application.

The applicant now applied for extension of time for leave to appeal against sentence.

The applicant did not appear and was not represented.

LORD GODDARD C.J. This application comes before the court in very unusual circumstances. The applicant was convicted before Glyn-Jones J. at the Summer Assizes for Glamorganshire in July, 1954, of the dangerous driving of a motor-lorry. The judge fined him £50 and disqualified him from driving all motor-vehicles for a period of five years; but he then went on to say that if he applied after the expiration of 12 months to have the disqualification removed so far as it related to motor-cycles he thought that it would be a proper case in which indulgence could be shown to him. The applicant did apply after 16 months to have the disqualification altered to permit him to ride a motor-cycle so that he could go to and from work. McNair J.[1] held, as this court thinks, quite rightly, that he had no power to make the order. The applicant is now seeking leave to appeal, not against the refusal of McNair J. to vary the disqualification, but

† Road Traffic Act, 1930, s. 6: " Any court before which a person " is convicted of any criminal offence " in connection with the driving of a " motor-vehicle (not being an offence " under Part IV of this Act)—(*a*) may " . . . order him to be disqualified " for holding or obtaining a licence " for such period as the court thinks " fit. . . . Provided that, if the court " thinks fit, any disqualification im- " posed under this section may be " limited to the driving of a motor- " vehicle of the same class or descrip- " tion as the vehicle in relation to " which the offence was committed."

S. 7 (3): " A person who by virtue " of a conviction or order under this " part of this Act is disqualified for " holding or obtaining a licence, may, " at any time after the expiration of " six months from the date of the " conviction or order, and from time " to time apply to the court before " which he was convicted or by which " the order was made to remove the " disqualification, and on any such " application the court may, as it " thinks proper, having regard to the " character of the person disqualified " and his conduct subsequent to the " conviction or order, the nature of " the offence, and any other circum- " stances of the case, either by order " remove the disqualification as from " such date as may be specified in " the order or refuse the application."

‡ Ante, p. 70; [1955] 3 All E.R. 817.

[1] [1956] 1 W.L.R. 70; [1955] 3 All E.R. 817.

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against the original sentence, and of course that will involve our extending the time because the conviction was 18 months ago.

[His Lordship referred to section 6 of the Road Traffic Act, 1930, and continued:] Where a person is convicted of an offence which either carries or enables the court to impose disqualification, the court can do one of three things under section 6: they may, except in cases where the disqualification is directed, refuse to disqualify; secondly, they may disqualify a person entirely from getting a licence to drive; or, thirdly, they can say: "We "disqualify you from driving the particular class of vehicle which "you were driving at the time of the accident."

[His Lordship read section 7 (3) and continued:] The applicant applied to McNair J. under that subsection, and that judge held that, although the subsection enabled him to remove the disqualification, it did not enable him to vary it, so the applicant found that the disqualification imposed by Glyn-Jones J. still stood. I think that this is a point to which the Minister's attention might be drawn, as there is a Road Traffic Bill before Parliament at the present time, and it might be a useful thing to provide that a court may not only remove a disqualification, but may also vary it.

The first thing we have to decide is whether we should give leave to appeal against the original sentence imposed by Glyn-Jones J. in 1954. Glyn-Jones J. obviously meant that he did not wish the disqualification with regard to a motor-cycle to remain in force for all the five years for which he disqualified the applicant from holding a licence; and the judge no doubt thought, per incuriam, that under section 7 the applicant would be able to go to the court, as he said, in a year, to get the disqualification varied, but unfortunately the judge was in error in that. Knowing that this case was coming on, the judge saw me and explained that if he had realized what the consequences would have been he thinks it probable that he would have done what he undoubtedly had power to do, and that was to have limited the disqualification to the driving of lorries. The position is that the applicant has been led to believe by what the judge said at the trial that after an interval of not less than a year he would be able to get permission to drive a motor-cycle. It would be hard on the applicant if, by reason of an error into which the judge fell at the moment, and into which we are all liable to fall from time to time, for it is impossible to bear in mind all the various provisions of the Road Traffic Act with regard to disqualification, a more serious punishment was put upon him than was intended by the judge; and the court cannot help taking notice of the fact that he has been disqualified from driving his motor-cycle for more than a year now. The court has come to the conclusion that the right thing to do is to grant an extension of time in which to appeal. We do not think that it is necessary to call on the prosecution because there is no law in the case. It is a strong thing to do after all this time, but

we think that in the particular circumstances the applicant has been misled by an error of the judge, and that he ought to have an extension of time in which to appeal. We give him leave to appeal against his sentence and we treat this application as the hearing of the appeal. We have decided to alter the sentence which was passed by Glyn-Jones J. by leaving the disqualification as it stands for five years, but limiting it under the proviso to section 6 to the driving of motor-lorries, and that will enable him now to ride a motor-cycle.

Application allowed. Sentence varied.

J. F. L.

[PROBATE, ETC., DIVISION.]

1956
Mar. 5, 6.
Barnard J.

* CLARK *v.* CLARK (BY HER GUARDIAN).

Husband and Wife — Desertion — Mental patient, by — Respondent a voluntary patient — Respondent capable of forming intention to desert—Respondent's wish to remain in hospital—No proper home available—Just cause for remaining apart.

A wife was admitted as a voluntary patient to a mental hospital with the husband's approval in June, 1943, where she remained. In October, 1943, the husband ceased to visit her after she had failed to recognize him, and never visited her thereafter nor went to the hospital to make personal inquiries about her. In May, 1952, after visiting a Citizen's Advice Bureau, he communicated with the hospital, and although stating in a letter to the medical superintendent that he would try to save money for a home, and to visit his wife in his holidays, never in fact did so. He was informed soon afterwards that his wife would hardly be fit to leave hospital even if she wished, which was not the case. The husband, who had committed adultery with one woman in 1946, began to commit adultery with another shortly after he had received this information. In July, 1954, he presented a petition for divorce on the ground of desertion.

Evidence from the hospital established that the wife at material times had a mind which was capable of forming an intention to desert, that she did not wish to return to her husband, and that if she had sought the advice of the medical superintendent he would not have advised her to go out from the mental hospital unless he felt satisfied that she was going to a home where she could be properly looked after:—

Held, (1) that the original separation had been by consent.

(2) That the husband had not established on the evidence that a fixed intention by the wife not to live with her husband existed three years prior to the presentation of his petition.

(3) Further, that the fact that there was no proper home for the wife to go to if she wished to leave hospital amounted to a just cause for her not returning to her husband.

Keeley v. *Keeley* [1952] 2 T.L.R. 756 distinguished.

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Clark v. Clark.

Defended petition for divorce by husband on the ground of desertion.

The parties were married in August, 1939, according to the rites of the Roman Catholic Church, the wife being a Catholic but the husband a Protestant. The husband was then serving in the Army, and within a very short time of the marriage war broke out. The parties never really had a matrimonial home. They lived occasionally, when the husband had a leave, with the wife's parents, who had a home near Liverpool; and occasionally she went to wherever he happened to be stationed.

The wife had a number of miscarriages. A child was born to her in October, 1942; but the child only lived for about seven months, and the loss of the child had a very grave effect on the wife's mind. The husband in his evidence said that she completely went to pieces, and after being for a time in a general hospital for observation, she was admitted as a voluntary patient to Rainhill Mental Hospital, Liverpool, on June 11, 1943, where she was still a patient at the date of these proceedings. Up till that time the marriage had been a normally happy one.

The husband consented to her going to the mental hospital, and, indeed, it was he who persuaded her to go there. He visited her from time to time up to October, 1943, but did not visit her thereafter. On the last occasion that he visited her she was unable to recognize him.

In June, 1944, the husband was posted overseas to Europe, and served there (with the exception of one or two leaves) until December, 1945, when he returned to England. He was released from the Army on February 19, 1946, and returned to Liverpool, where the parties had been when the wife was admitted to the mental hospital. He remained in Liverpool until June, 1948: during that time, although he stated in his evidence that he telephoned the hospital on occasions, he never once visited his wife, nor went to the hospital to make personal inquiries about her. In June, 1948, he went to London. He was not a skilled man in any sense of the word and he did different labouring jobs in Liverpool and later in London.

In May, 1952, he consulted a Citizen's Advice Bureau in regard to his marriage in circumstances set out in the judgment: it appeared that he was not sure where the wife then was. After writing to the hospital he received a letter from the mental hospital stating that the wife was "solitary and self-absorbed, "understanding what is said to her but never conversing. "She is tidy in her habits and occupies herself usefully. She "is in good physical health." But it was pointed out to the husband that he would be unable to obtain a decree of divorce on the ground of insanity as she was not a certified patient and there had been no order justifying her detention, although the letter added "There might be a possibility [of divorce] if you could "prove that she deserted you." Although the husband in his reply said that he would try to plan a return to her, would

save money for a home, and would try to visit Liverpool on his holidays, he never in fact made any attempt to see his wife and there was no evidence that the wife ever knew of the husband having any home in London or anywhere else where he was ready to receive her. The medical superintendent informed the husband that the wife was "still suffering from a mental illness and "would hardly be fit to leave hospital even if she wished, which "is not the case"; and he reported on August 1, 1952, that the wife "is quite definite in her answers to the questions which I "repeated several times. She states that she wishes to stay in "hospital and that she does not want to go to her husband, and "has not wanted to go to him in the past."

The medical inspector had personally examined the wife on December 4, 1951, and reported "Although mute I found her "accessible. She nodded when asked repeatedly whether she "wished to remain here and said 'no' when asked if she wished "to go home. Although confused she retains her volition and, as "I saw her today, she is fit to remain as a voluntary patient."

The court found upon the medical evidence that the wife had a mind which was capable of forming an intention to desert. The effect of the medical evidence was that if the wife had sought the advice of the medical superintendent he would not have advised her to go out from the mental hospital unless he felt satisfied that she was going to a home where she could be properly looked after.

On July 28, 1954, the husband presented a petition for divorce on the ground of desertion; and asked for the discretion of the court in respect of adultery with one woman in 1946, and with another woman, whom he had met in January, 1951, shortly after the correspondence of 1952.

David Weitzman Q.C. and *John Hazan* for the husband.

Stuart Horner for the Official Solicitor as guardian ad litem for the wife.

Keeley v. *Keeley* [1] was cited in argument.

BARNARD J. outlined the history of the parties up to the husband's arrival in London in 1948 and continued: The facts of this case (I shall have to deal in a little more detail presently with some of the husband's evidence, more particularly in regard to letters he wrote) are fairly simple, but I admit that I find it difficult to apply the law to them.

In May, 1952, which is some four years after he had been in London, the husband consulted a Citizen's Advice Bureau. I think it is perfectly clear from their letter to him that he had really put his wife out of his mind and was not worrying about her at all. In fact, even when he was in Liverpool in 1946, when

[1] [1952] 2 T.L.R. 756.

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he had come out of the Army, he never went to see her, and if one looks at his discretion statement you will find that during that year he was having an affair with some other woman, and obviously was not bothering about his wife. It is perfectly plain that he was not even certain that his wife was still in the hospital, because the Citizen's Advice Bureau wrote saying: "Is "Mrs. Clark still a patient in your hospital?" and then asked for any other information they had. It is also quite clear that the husband told the Citizen's Advice Bureau he was not quite sure where she was. When he last heard of her she was in this hospital, and when he found that she was still in the same hospital and the hospital authorities were not wishing to give any information about the patient except to the husband himself, you find him writing a letter on May 29, 1952, in which he says: "My reason being that I am about to make a start at sorting "out the mess I have made of this last ten years. Your informa- "tion will give me a good lead in a really determined start. "Another woman and child is involved who befriended me when "I was really down and unable to work, and during the times "when I was in hospital she supplied my needs. With her I "found a happiness which I had never enjoyed before although "I had never lived with her." We now know from his discretion statement that this was yet another woman whom he said he had met early in the year 1952; but on his own evidence it is clear that he had met her in January, 1951.

The husband would not agree that he wrote this letter with divorce in his mind. His explanation was that through this other woman he realized for the first time what companionship was, and it was that which made him want his wife all the more. I find myself quite unable to accept that explanation. You only have to read on in the letter: "However, I shall await your "reply before putting my case before a solicitor." Whatever case could he have to put before a solicitor if all he really wanted was to have his wife back? I do not think that the husband was being at all frank with me about this letter, and it is quite obvious to my mind that having met this other woman he was really thinking about matrimony again and getting rid of his wife; hence his inquiries as to whether she was still in the hospital, and hence his remarks about putting his case before a solicitor.

The reply he got made it quite clear what his wife's condition was, namely, that she was "solitary and self-absorbed, under- "standing what is said to her but never conversing. She is tidy "in habits and occupies herself usefully. She is in good physical "health." But the reply went on to say: "You would not, I "am afraid, be able to obtain a divorce since she has not been "here as a certified patient, no order justifying her detention," and further, "Well, there might be a possibility if you could "prove that she deserted you." It may be that when he received that letter his first thought was, "I had better make the best of

" a bad job and give up the idea of divorce, even give up this " other woman and try and get my wife back," because he writes the very next day, " I acknowledge my responsibility and " so my first has first claim. The information you gave has " given me some hope, so casting everything aside for the time " being I shall try and plan a return to her. As I am only an " ordinary working man having no capital or other means I shall " need a period of time to get money saved. When I think that " I have enough to start a home then I shall return to Liverpool " and hope for the best. I think I shall need about six months " at the most. It is my intention now to try and make up to " her as much as I can as fast as I can," and he finished the letter by saying, " When my holidays come I shall endeavour to " come up for a personal interview with you and also to see my " wife." Now his holidays did come, but he never went to Liverpool, he never saw the medical superintendent, and he never made any attempt to see his wife.

It is only fair to the husband to say that the letter he got back from the medical superintendent may have damped his enthusiasm for having his wife back, because the medical superintendent wrote and said, " She is still suffering from a mental " illness and would hardly be fit to leave hospital even if she " wished, which is not the case." The medical superintendent had, on December 4, 1951, personally examined the wife. That was because some other consultant thought she ought to be certified and the medical superintendent reported, " Although " mute I found her accessible. She nodded when asked " repeatedly whether she wished to remain here and said ' No ' " when asked if she wished to go home. Although confused she " retains her volition and, as I saw her today, she is fit to remain " as a voluntary patient." She said " No " when asked if she wished to go home; but what puzzles me is what home was there for her to go back to? They never had a home. There is no evidence before me that she knew of the husband having any home in London or anywhere else where he was ready to receive her.

It is a little significant that while these letters were being written, first of all the letter in which the husband quite clearly, I think, wanted to see whether he could divorce his wife because he was carrying on with another girl, then his second letter, when it looked as if a divorce was out of the question, in which there was some expression of intention, at any rate, to live with his wife, and then when he heard even that was going to be a little difficult because of her health, within a very short time on his own admission he had committed adultery with this girl with whom he had been having an affair. Then, of course, there came a complete change of front again in which obviously the husband was out once more to get a divorce, because a series of interrogatories were delivered to the medical superintendent to answer,

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which were written by the husband but obviously prepared for him by someone having legal knowledge.

I have heard the evidence of Dr. Finkleman, who has been at Rainhill Hospital ever since August, 1946, and who has been the medical superintendent there since January, 1950. There is no doubt that this woman had enough mind to say whether she wanted to remain in the home or whether she wanted to return to her husband, so she certainly had a mind which was capable of forming an intention to desert. But the first legal problem that I am faced with is this: it is clear on the evidence that when the wife went into this mental hospital as a voluntary patient the husband consented to her going, in fact it was he who persuaded her to go, maybe for her own good, maybe, as was suggested, that he had got a compassionate posting to Liverpool and preferred being there to being up in the Orkneys where he had come from. But I say nothing about that, the motive does not matter. He consented to her going into this hospital, and therefore their separation from then on was a separation by consent.

Now has anything happened since then to alter the character of that separation and turn it into one of desertion? Quite unlike *Keeley* v. *Keeley*,[1] to which I was referred, in this case after October, 1943, the husband never went near his wife, and never even wrote to her. If you look at the facts in *Keeley* v. *Keeley* [1]; during a period of two years the husband had visited the wife in the mental hospital and had tried to persuade her to return home, to a home which he had. The evidence in *Keeley* v. *Keeley* [1] showed that the wife seemed quite normal to the husband when he visited her and it was clear that he wanted her home, but she said that she preferred to stay where she was. I have got no such evidence in this case. The only evidence I have got is that at some stage or other she expressed an intention not to live with her husband. The first record I find of that is when the medical superintendent saw her on August 1, 1952, and that was obviously as a result of a letter he had from solicitors appearing on behalf of the husband. On August 1, 1952, the medical superintendent reported, " She is quite definite in her answers to " the questions which I repeated several times. She states that " she wishes to stay in hospital and that she does not want to " go to her husband, and has not wanted to go to him in the " past."

This petition was presented on July 28, 1954, and so at any rate I have got to be satisfied that she had a fixed intention never to live with her husband again prior to July 28, 1951. That is the only evidence I have got, and in August, 1952, when she was asked, that is what she said.

But the medical superintendent did write to the husband's

[1] [1952] 2 T.L.R. 756.

solicitors, "In any case I could without doubt establish a three-year period from December, 1951, or August, 1952, to date." The only reason he mentions December, 1951—and there was not any reference to the husband—is that he asked her whether she wanted to go home, and she said, "No." What that answer meant exactly I do not know, for there was no home. I do not feel that on those facts the husband has established a charge of desertion for three years immediately prior to the presentation of this petition.

But I do not think that the matter quite rests there either. There is this question of just cause. On the facts of this case (which are, as I have stated, very different from *Keeley* v. *Keeley* [1]) I have come to the conclusion that there was just cause. I do not want to recapitulate what I have already said about the husband never going near his wife since October, 1943, and never writing to her. The only information which he got in the first instance from the medical superintendent was when he was wanting to get a divorce, not to live with his wife. One must also bear in mind the medical superintendent's evidence, which I think amounted to this, that if the wife sought his advice he would not have advised her to go out from the mental home unless he felt satisfied that she was going to a home where she could be properly looked after. In this particular case although the husband in a letter said that he was going to save money and get her a home, he did not do anything of the sort. It may not have been his fault. As far as I know there never was a home to offer this woman, and even if there had been a home she was the wife of an ordinary working man and there is no evidence that the husband had found anyone who was prepared to give him a home and look after his wife when he was out. The medical superintendent made it perfectly clear that she was not fit to run a home and look after her husband, and therefore on the facts of this case I should be prepared to also say that there was just cause, which would also defeat the charge of desertion. For these reasons, and it may be regrettable, I consider that it is my duty to dismiss this petition.

Petition dismissed.

Solicitors: *Harewood & Co.; The Official Solicitor.*

J. B. G.

[1] [1952] 2 T.L.R. 756.

[COURT OF APPEAL.]

C. A.

1956
Feb. 7, 8, 9, 10, 13.

Lord Evershed M.R., Jenkins and Birkett L.JJ.

*FIRESTONE TYRE AND RUBBER CO. LTD. *v.* LEWELLIN (INSPECTOR OF TAXES).

Revenue—Income tax—Non-resident—Trade within United Kingdom—Contracts made in United Kingdom for sale of goods manufactured there—United Kingdom assessed as agent of foreign company—Whether authorized regular agent of foreign company carrying on trade or business within the United Kingdom—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, para.* 1 (*a*) (iii)—*All Schedules Rules, rr.* 5, 10.

A company registered in the United Kingdom was assessed to income tax on the profits of its business of branded tyre manufacturers within the United Kingdom. In addition it was assessed on the profits of the trade of marketing the branded tyres carried on with customers on the continent of Europe. This additional assessment was made on the footing that the company was itself carrying on that trade or, alternatively, that a foreign non-resident company of the same name, which owned all the shares in the United Kingdom company, was (a) itself carrying on the trade within the United Kingdom of selling the tyres outside the United Kingdom, or (b) was carrying on that trade through the agency of the United Kingdom company.

The foreign company had made agreements relating to the sale of its branded products with distributors on the continent of Europe, giving them lists of the suppliers from whom they might order the goods. The United Kingdom company was an authorized supplier. By agreement between the foreign company and the United Kingdom company, the latter was authorized to fulfil orders received from distributors. A subsequent agreement made between the foreign company and the United Kingdom company ostensibly altered this, the United Kingdom company agreeing to fulfil all orders obtained by the foreign company in Europe or elsewhere as and when requested by the foreign company, to forward the goods ordered to the purchaser and to give such instructions as to payment as were requested by the foreign company. In practice, however, the United Kingdom company continued to fulfil orders received direct from the authorized distributors, normally without further intervention by the foreign company. Delivery of the goods was f.a.s. and payment was in each case effected in the United Kingdom. The United Kingdom company retained out of the payments received the cost price plus 5 per cent. and remitted the balance to the foreign company (or when that became impossible owing to war-time currency restrictions, it credited the sums held on behalf of the foreign company to a separate account in its books). The foreign company was supplied with details of each order effected:—

Held, that on the acceptance by the United Kingdom company of each order received from a distributor there came into existence a contract of sale made in the United Kingdom between the United Kingdom company and the distributor. Each such contract was an incident, deliberately contrived, of the business of the foreign company of marketing and distributing the branded products in the United Kingdom and elsewhere by means of the United Kingdom company. That company was a separate legal entity and not a mere emanation of the foreign company; it was, however, wholly controlled by the foreign company and the substance of the relationship was that the trade of the foreign company was carried on by the

United Kingdom company on behalf of and for the foreign company, or, in other words, as the authorized regular agent of that company. Accordingly, (1) the foreign company was carrying on a trade within the United Kingdom in respect of which tax was chargeable under Schedule D, para. 1 (*a*) (iii) to the Income Tax Act, 1918; and (2) the United Kingdom company was its regular agent in whose name it was properly assessed to tax on profits of that trade under rules 5 and 10 of the All Schedules Rules.

Principle stated in *Maclaine & Co.* v. *Eccott* [1926] A.C. 424, 432; 42 T.L.R. 416; 10 T.C. 481 applied.

Decision of Harman J. affirmed.

APPEAL from Harman J.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on May 27 and 28, 1952, the Firestone Tyre and Rubber Co. Ltd. (hereinafter called "Brentford") which carried on the business of tyre and rubber manufacturers at Great West Road, Brentford, Middlesex, appealed against two alternative series of income tax assessments made on it for the years 1940–1941 to 1944–1945 inclusive. The first series of assessments made on Brentford under Case I of Schedule D in respect of profits as tyre manufacturers was for £5,000 for each of the material five years, except the year 1944–1945, for which the assessment was £10,000. The second series was made on Brentford as agents for an American corporation, the Firestone Tire and Rubber Co. of Akron, Ohio, in the United States of America (hereinafter called "Akron"), in respect of agency profits. In that series for each of the years in question the assessment was £10,000

These assessments were in addition to the assessments made on Brentford in respect of its own business of tyre manufacturers.

The following facts were set out in the case stated as having been proved or admitted before the commissioners: Paragraph 4: Akron, an American corporation registered in Akron, Ohio, was the head of a world-wide organization consisting of a large group of corporations operating in America and in various parts of the world. Some of its associated and subsidiary corporations manufactured and sold tyres in the countries in which they were registered, and others sold, in the countries in which they were registered, tyres which had been manufactured in America or by subsidiary corporations in other countries. For convenience, certain matters in regard to the business of the organization carried on outside the United States of America had been conducted by other subsidiary companies of Akron but for the purposes of the . . . appeal . . . it was agreed . . . Akron and any of its associated and subsidiary companies registered outside the United Kingdom should be treated as one person. . . .

Brentford was an English company registered in 1922 with an issued capital of £20,000 in £1 ordinary shares. This capital was increased to £140,000 in 1938. All the shares in Brentford were owned by Akron. The board of directors of Brentford consisted of individuals resident in the United Kingdom with the exception

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of Mr. Harvey Firestone, the chairman of the board of directors of Akron, who was a director of Brentford and occasionally attended meetings of its directors.

Following its incorporation, Brentford's business consisted in the selling of Firestone tyres in the United Kingdom which had been manufactured in America. In 1928, a factory for the manufacture of tyres was built at Brentford, and from 1929 onwards, Brentford's business consisted by agreement with Akron of the manufacture and sale of tyres under the name of Firestone tyres in the United Kingdom. Brentford had been throughout duly assessed to income tax under Case I, Schedule D, in respect of this business. The trade mark in these tyres was owned by Akron and Brentford was, therefore, unable to sell them inside or outside the United Kingdom without the consent of Akron.

5. Firestone tyres which had been manufactured by Brentford were exported to customers outside the United Kingdom by agreement with Akron in accordance with the following arrangements. They were exported only to persons approved by Akron as " distributors " of Firestone tyres, who were required to sign an agreement with Akron. A copy of a specimen of that agreement, dated May 20, 1935, and made between a Swedish corporation and Akron, formed part of the case. The material clauses are set out in the judgment of Lord Evershed M.R., their effect being summarized in the stated case as follows: Under this agreement Akron granted to the Swedish distributor the exclusive right to sell Firestone tyres and accessories in Sweden, and the latter undertook to buy, sell and distribute such Firestone branded products exclusively; to keep on hand reasonable stocks of these products; and to use its best efforts to sell these products in Sweden but not elsewhere. The distributor was entitled to buy Firestone products at prices set out in lists attached to the agreement subject to Akron's right to change the prices without notice. Akron undertook to make deliveries f.a.s. vessel and it was agreed that delivery to a carrier should constitute delivery to the distributor. The terms of Akron were 90 days sight draft documents against acceptance. Akron agreed that in the event of its reducing its billing prices it would credit the difference between the old and the new prices, not only on goods in transit to but also on stocks held by the distributor. The distributor agreed that in the event of Akron increasing prices, the former would accept a debit for the difference in prices not only on goods in transit but also on stocks held by it. It was understood and agreed between the parties to the agreement that it was not to be construed as constituting the distributor as an agent of Akron for any purpose whatever. The contract between the parties set out in the agreement was to become effective only when executed by the duly authorized representative of Akron at Akron in Ohio, it being agreed that the agreement was to be construed under the laws of the state of Ohio in the United States of America. It was also agreed that the terms of the agreement could not be

altered, waived or modified, except by written endorsement thereon executed on behalf of Akron at Akron in Ohio. At the hearing before the commissioners it was agreed between the parties to the appeal that that document could be taken as typical of the agreements entered into between Akron and its distributors outside the United Kingdom (hereinafter referred to as " master " agreements ").

6. The foreign distributors who had entered into a master agreement with Akron were given lists of the corporations which manufactured Firestone products and were empowered to order these products in accordance with the terms of the master agreement from whichever manufacturing corporation they preferred. Brentford was included in the lists of corporations furnished by Akron to its distributors outside the United Kingdom. Brentford was authorized by Akron to supply Firestone products outside the United Kingdom to distributors who had signed a master agreement with Akron and was supplied by the latter with lists of such distributors. Brentford did not seek orders from the distributors of Akron or employ travellers outside the United Kingdom, but fulfilled by manufacture or from its existing stocks orders made upon it by the distributors in accordance with the terms and conditions laid down by Akron in the master agreements.

7. Following negotiations between the two corporations an agreement was drawn up on February 8, 1936, regulating the fulfilment by Brentford on behalf of Akron of orders obtained in Europe and elsewhere by Akron. . . .

The material clauses of that agreement are set out in the judgment of Lord Evershed M.R., their effect being summarized in paragraph 8 of the case stated as follows: By that agreement Brentford undertook to use its best endeavours to fulfil either by manufacture or from its existing stock all orders obtained by Akron in Europe or elsewhere as and when requested to do so by Akron. Brentford also agreed upon receipt of an order to forward the goods ordered to the purchaser, and to give such instructions for payment of the purchase price as should be requested by Akron. (In practice, however, Brentford continued to fulfil orders received direct from the distributors, provided they appeared on the lists of authorized distributors supplied by Akron to Brentford as above mentioned, without, normally, any further intervention by Akron.) Akron, in consideration of these services, undertook to pay to Brentford a sum equal to the total cost price (as therein defined) of the goods supplied plus 5 per cent. thereof. The agreement was to continue for a period of five years, and thereafter until determined by either party. It had never been determined.

9. Until the outbreak of war in 1939, Brentford continued to supply goods to authorized distributors of Akron as ordered by them; to collect the moneys for these goods and to pay these into Akron's bank account in London. Transfers from this account to the United States of America were regularly made.

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Following the outbreak of the war money could not be remitted from the United Kingdom to the United States of America. Up to November 30, 1939, all the moneys collected by Brentford from Akron's distributors were paid into a separate bank account, and on that date the balance in this account was transferred to Brentford's own bank account. In its own books Brentford credited Akron with the amount so transferred.

From December 1, 1939, onwards, it was agreed between Akron and Brentford that the proceeds of sales to Akron's distributors should be placed to the credit of a new banking account marked "Firestone Tyre & Rubber Co. Ltd. Export Proceeds "Account." At the end of each month the balance of that account was transferred to Brentford's own current account. The sums so transferred were, pursuant to the agreement, treated in Brentford's books as sums lent to or deposited with it by Akron.

10. From September, 1939, to April, 1942, the export of tyres from the United Kingdom was prohibited except by licence of the Board of Trade. Orders from Akron's distributors abroad could therefore be fulfilled by Brentford only if it was able to obtain a licence from the Board of Trade.

11. In April, 1942, the Ministry of Supply set up a tyre control section. By virtue of S.R. & O., No. 596 of 1942, it was provided that with certain exceptions no person other than an authorized tyre depot should acquire or dispose of or agree or offer to acquire or dispose of any tyre. The statutory order gave power to deal in tyres under the authority of and in accordance with a licence granted, or a special or general direction issued by the Ministry of Supply. The effect of this statutory order was to cancel all existing export licences and, until normal export shipments were resumed for passenger car tyres in 1947 and for larger tyres in 1948, all exports were made in accordance with allocations made by the tyre control, and all goods which were sent abroad by Brentford were sent under and by the authority of a licence issued by the tyre control section of the Ministry of Supply. The tyres so exported by Brentford were sent either in response to an order originating with an Akron distributor and authorized by tyre control, or else in pursuance of a direction by the Ministry of Supply to send tyres to a certain country. In the latter event, the tyres were sent to the appropriate Akron distributor in the country, if there was one. The only exception to this practice was that sales of tyres amounting to some £12,000 and £37,000 respectively were made to the Government of New Zealand and to the Free French Delegation in London. These tyres were exported by the purchasers themselves.

The total sales abroad in the period with which the case was concerned was £782,000. Apart from the two items referred to above, amounting to £49,000, the whole of these sales were made to distributors of Akron. They were treated by Brentford as the fulfilment of orders obtained by Akron in accordance with the

agreement of February 8, 1936, and the proceeds thereof less the cost of the goods plus 5 per cent. of that cost were credited to Akron in the books of Brentford. The amounts retained by Brentford, namely, the cost of the goods plus 5 per cent. of that cost, had already been brought into account in the assessments made upon it in respect of its own business.

12. Throughout the period concerned in the case, sales were invoiced to the appropriate distributor in the name of Brentford, and a sight bill of exchange on the distributor for payment in London was drawn in the name of Brentford. Brentford arranged for the shipment to the distributors of the tyres, etc., ordered by them from Brentford. In respect of each transaction Brentford furnished to Akron copies of the export invoice, the export manifest, the sight draft and the bill of lading. Akron was also notified by the bank when Brentford received payment for the goods. These documents and this information was sent for the purpose of enabling Akron to prepare its own sales ledgers. No sales ledgers for accounts of distributors outside the United Kingdom were kept by Brentford.

In the case of the relatively small sales to the New Zealand Government and the Free French Government, although the sales were made to agents in this country, Brentford regarded them as sales to persons outside the United Kingdom and as, therefore, coming within the scope of the agreement of February 8, 1936. The proceeds of these sales, less the factory cost plus 5 per cent. thereof, were, in the books of Brentford, credited to Akron and not to the sales account of Brentford itself.

After the cessation of tyre control Akron and Brentford reverted to their pre-war practice, the only difference being that the proceeds of all sales to foreign distributors had to remain in London and could not be remitted to Akron in America.

The material part of the decision of the commissioners was stated as follows in paragraph 16 of the stated case: "(c) It "seems to us that in the relevant years the arrangements sub- "sisting between Akron and Brentford were as follows: By "virtue of the agreement of February 8, 1936, Brentford agreed "to fulfil orders obtained by Akron when requested to do so by "Akron. The orders to be fulfilled were limited to those from "customers approved by Akron and these orders were to be "fulfilled on terms laid down by Akron in master agreements "executed outside the United Kingdom. Brentford was "authorized by Akron to fulfil orders coming from Akron's "approved customers without any intervention by Akron and "all the documents for the fulfilment of the order were made "out in the name of Brentford. Moreover, the proceeds of the "sales arising from the fulfilment of the orders were paid to "Brentford in the United Kingdom. These sales moneys were "paid into a special bank account and transferred to Brentford's "bank account at the end of each month.

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"(d) We are unable to accept the proposition put forward on "behalf of Brentford that the fulfilment of each order by Brent- "ford involved a sale of goods to Akron with delivery to the "latter's orders. It seems to us that the effect of the agreement "of February 8, 1936, and the course of the dealings between "Akron and Brentford was to set up standing arrangements "whereby Brentford agreed to hold goods of its own at the "disposal of Akron and to sell the same on Akron's behalf to "customers approved of by Akron and subject to terms imposed "by Akron; and, further, to account to Akron for the proceeds "of the sales less the cost of the goods sold plus 5 per cent.

"(e) We further think that when Brentford received the "moneys payable for the goods sold to Akron's customers it was "collecting the price of the goods as such and that it later was "able to appropriate these proceeds for its own purposes as "loans from Akron. . . . In the present case, although the "'master agreements' by virtue of which the individual orders "for goods were placed were executed outside the United "Kingdom, the orders themselves were received and fulfilled in "England and payment of the price of the goods was received "in England. In all the circumstances we come to the con- "clusion that in the relevant years Akron was exercising a trade "in the United Kingdom through the agency of Brentford."

Firestone Tyre and Rubber Co. Ltd. (Brentford) appealed. Harman J. held that the business of Akron was being carried on within the United Kingdom by Brentford, who was acting as the regular agent for Akron and was properly assessed as such.

Brentford appealed.

Sir James Millard Tucker Q.C. and *G. G. Honeyman Q.C.* for the Firestone Tyre and Rubber Co. Ltd. (Brentford).

Sir Frank Soskice Q.C. and *Sir Reginald Hills* for the inspector, *Mrs. C. M. Lewellin.*

In addition to the cases referred to in the judgments the following were cited in argument: *Werle & Co.* v. *Colquhoun* [1]; *Erichsen* v. *Last* [2]; *W. H. Muller & Co. (London) Ltd.* v. *Lethem* [3]; *Nielsen, Andersen & Co.* v. *Collins* [4]; *Tarn* v. *Scanlan* [5]; *Ireland* v. *Livingston* [6]; *Wilcock* v. *Pinto & Co.* [7]; *Lovell & Christmas Ltd.* v. *Commissioner of Taxes (New Zealand)* [8]; *Scales* v. *Atalanta Steamship Co. of Copenhagen* [9];

[1] (1888) 20 Q.B.D. 753; 4 T.L.R. 396; 2 T.C. 402.
[2] (1881) 8 Q.B.D. 414; 4 T.C. 422.
[3] [1928] A.C. 34; 44 T.L.R. 53; 13 T.C. 91.
[4] [1928] A.C. 34; 44 T.L.R. 53; 13 T.C. 91.
[5] [1928] A.C. 34; 44 T.L.R. 53; 13 T.C. 91.
[6] (1871–72) L.R. 5 H.L. 395.
[7] [1925] 1 K.B. 30; 9 T.C. 111.
[8] [1908] A.C. 46; 24 T.L.R. 82.
[9] (1925) 41 T.L.R. 591; 9 T.C. 586.

Belfour v. *Mace* [10]; *Kodak Ltd.* v. *Clark* [11]; *Gramophone and Typewriter Ltd.* v. *Stanley* [12]; *Cassaboglou* v. *Gibb* [13]; *Great Northern Railway Co.* v. *Witham.* [14]

LORD EVERSHED M.R. It may be truly said as a general proposition that the bulk of those who are liable to pay income tax are the subjects of Her Majesty resident in the United Kingdom. But there are some few cases in which persons not subjects of Her Majesty, and not indeed resident in the United Kingdom, may pay the tax. Thus, to refer to the Income Tax Act which is appropriate to this case, the Income Tax Act, 1918, Schedule D, paragraph 1, of that Act provides: "Tax under "this Schedule shall be charged in respect of—(a) The annual "profits or gains arising or accruing— . . . (iii) to any person, "whether a British subject or not, although not resident in the "United Kingdom . . . from any trade, profession, employment, "or vocation exercised within the United Kingdom."

That tax liability of foreign non-residents is qualified and governed as regards assessment by certain of the General Rules —and again I refer only to those material to the present case— applicable to Schedules A, B, C. D and E. Of those rules it will be sufficient to read rules 5 and 10, which have assumed their present form as successors in title (as it were) of the original Income Tax Act, 1842, as amended by the Act of 1915. Rule 5 states: "A person not resident in the United Kingdom, "whether a British subject or not, shall be assessable and charge- "able in the name of any such trustee, guardian, tutor, curator, "or committee, or . . . "—and these are the more important words—". . . of any factor, agent, receiver, branch, or manager, "whether such factor, agent, receiver, branch, or manager has "the receipt of the profits or gains or not, in like manner and "to the like amount as such non-resident person would be "assessed and charged if he were resident in the United King- "dom and in the actual receipt of such profits or gains." But rule 10 provides: "Nothing in these rules shall render a non- "resident person chargeable in the name of a broker or general "commission agent, or in the name of an agent not being an "authorized person carrying on the regular agency of the non- "resident person or a person chargeable as if he were an agent "in pursuance of these rules, in respect of profits or gains arising "from sales or transactions carried out through such a broker "or agent."

From the paragraphs in Schedule D which I have read, and the two rules, it follows that in the case of an attempt to tax, via a "regular" agent, a non-resident person, two requirements

[10] (1925–28) 13 T.C. 539.
[11] [1903] 1 K.B. 505; 19 T.L.R. 243; 4 T.C. 549.
[12] [1908] 2 K.B. 89; 24 T.L.R. 480; *sub nom. Stanley* v. *Gramophone and Typewriter Ltd.*, 5 T.C. 358.
[13] (1883) 11 Q.B.D. 797.
[14] (1873) L.R. 9 C.P. 16.

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must be shown to be satisfied—first, the non-resident must be not merely trading with the United Kingdom but exercising, that is carrying on, a trade or profession within the United Kingdom; and, second, for the purposes of that trade there must be what is called an authorized person as regular agent of the non-resident trader.

The claim to income tax in the present case relates to the five tax years 1940/1941 to 1944/1945 inclusive. That was a period of severe war-time restriction in this country upon trading between the United Kingdom and foreign parts. That matter I have mentioned because it has, as will be seen, some bearing upon this case.

The non-resident sought to be taxed is a company known as the Firestone Tire and Rubber Export Co., being a company incorporated, I think, in the state of Maine but having its principal place of business in the city of Akron in the state of Ohio in the United States. I will call that company, hereafter, "Akron."

The alleged regular agent which is to be taxed on behalf of the non-resident Akron is an English company known as the Firestone Tyre and Rubber Co. Ltd., whose factory and offices and place of business are at Brentford in the environs of London. That company I will refer to as "Brentford." Brentford is in fact wholly controlled, as the judge pointed out, by Akron; but I agree, of course, with Sir James Millard Tucker that one cannot disregard the effect of the separate legal entity which Brentford is; one cannot answer the question raised in this appeal by treating Brentford as though it were a mere emanation of Akron.

The questions which we have to decide in the sense that I have anticipated, after my reference to the Income Tax Act and the rules, can now be restated in the terms in which I find them in paragraph 2 of the case stated. "The questions," said the Commissioners, "for determination before us were as follows ". . ."—I leave out (a)—". . . (b) whether Akron was exer- "cising within the United Kingdom a trade of selling tyres to "persons outside the United Kingdom; and, if so, (c) whether "that trade was carried on by Akron through the agency of "Brentford."

It is a trite observation that in every case which comes before the courts the answer in the end must depend upon its particular facts. The facts of the present case are undoubtedly in many respects special and peculiar. As Sir James said, the old cases in which the question of taxing non-resident persons came before the courts (for example, the cases compendiously referred to as the "champagne" cases) were cases, generally speaking, where the non-resident sold in the United Kingdom goods made abroad; and it was in particular reference to the cases of that type that

Lord Cave L.C., in *Maclaine & Co.* v. *Eccott*,[1] used language which has been quoted many times before, as it has been quoted in the present case. "The question," said Lord Cave L.C.,[2] "whether a trade is exercised in the United Kingdom is a "question of fact, and it is undesirable to attempt to lay down "any exhaustive test of what constitutes such an exercise of "trade; but I think it must now be taken as established that in "the case of a merchant's business, the primary object of which "is to sell goods at a profit, the trade is (speaking generally) "exercised or carried on (I do not myself see much difference "between the two expressions) at the place where the contracts "are made. No doubt reference has sometimes been made to "the place where payment is made for the goods sold or to the "place where the goods are delivered, and it may be that in "certain circumstances these are material considerations; but "the most important, and indeed the crucial, question is, where "are the contracts of sale made?"

The present case is on its facts very different in material respects from the type of case exemplified by the "champagne" cases. Indeed, in some respects it may be said to be the converse of them, since the goods here in question were made in the United Kingdom and were then sold abroad.

I turn to a statement of what I will call the Akron business. [His Lordship read the finding of fact stated in paragraph 4 of the stated case, and continued:] Whether the particular company sought here to be taxed, Firestone Tyre and Rubber Export Co., itself manufactures tyres is not a matter which appears to be proved in evidence, but I assume—and I base myself upon the finding of the commissioners—that this company is at any rate a member of, and an important member of, the general Akron organization; and the business of that organization is that of the marketing and distribution of Firestone tyres and other Firestone products. I observe that Firestone tyres are branded articles. The name Firestone, besides being in fact a trade mark, is part, and a valuable part, of the goodwill of Akron. I assume also that tyres which bear that mark as a guarantee of the reputation of Firestone are made in accordance with some particular process, whether patented or not, and that process again is part, and a valuable part, of the business undertaking and property of Akron.

The distribution of Firestone products outside the United States, and particularly in Europe, appears to be conducted by Akron through distributors under "distributor" agreements. I shall refer presently to the one which we have taken as a sample. But the substance of the obligation put upon such distributors was that they were bound to promote the sales in their countries of Firestone products and not to sell any competing products themselves at the same time.

[1] [1926] A.C. 424; 42 T.L.R. 416; 10 T.C. 481.

[2] [1926] A.C. 424, 432.

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In order that such a distributor should get supplies, Akron have also established, as the case mentions, as part of their organization controlled manufacturing companies (of which Brentford is one) whose function it is to make Firestone tyres and Firestone products according to the strict directions and specifications of Akron, and to dispose of those tyres subject to, and only subject to, the terms imposed by Akron.

I will now refer to the distributor agreement which has been called "the master agreement," and is typical of the type of agreement made by Akron with its distributors. I will call it the Swedish master agreement for it is made between the Firestone Tyre and Rubber Export Co. and a company situated in Stockholm. It is desirable that I should read a certain amount of this agreement because a good deal of the argument has turned upon its true effect. The first clause is this: "The company," that is Akron, "hereby grants to the distributor"—I will call the distributor "Sweden"—"upon the terms and conditions herein-"after mentioned, the exclusive right to sell Firestone branded ". . ." tyres, etc., in the territory of Sweden, and in consideration of that grant Sweden agrees to buy, sell and distribute such Firestone branded products exclusively, to keep on hand a sufficient stock to meet demand, and to use their best endeavours to promote the sale and distribution, etc.

Clause 2: "Prices: Subject to the company's right"—that is, Akron's right—"to change prices . . . the distributor shall "be entitled to the prices . . ." on the branded tyres as per attached lists. The lists in fact were not attached to our copy, but we understood from Sir James that, as is common I take it with most branded articles, there was a controlled price which Sweden had to pay and a controlled price at which Sweden had to sell. Then there was a provision for permitting Akron to change the prices.

Clause 3: "Deliveries: The company [Akron] will make "deliveries f.a.s. vessel provided always that the shipment shall "weigh . . ." so much. "Delivery to carrier shall constitute "delivery to distributor."

Clause 4: "Terms: The terms of the company [Akron] shall "be 90 days' sight draft, documents against acceptance." There are the provisions about changes in price which I can pass over, and a further obligation on the distributor to keep stocks on hand. Clause 9 provides that Akron reserves the right to sell Firestone products to companies and others who customarily purchase their tyres in the United States, etc., even though such products may be shipped to the distributor's territory, that is Sweden.

Clause 12 says that Akron "shall not be liable for delays or "failures to make delivery of goods ordered hereunder occasioned "by war, fires, the elements, labour trouble, interruption or "shortage of transportation facilities, inability to obtain goods, "or from any cause beyond the control of the company."

Clause 13: "It is understood and agreed that this agreement "is not to be construed as constituting the distributor an agent "of the company for any purpose whatever."

Clause 14: "The contract between the parties hereto is fully "set forth in this agreement and has been entered into under "the considerations herein expressed and no others, and shall "become effective only when executed by the duly authorized "representatives of the company at Akron, Ohio, it being agreed "that this agreement is to be construed under the laws of the "state of Ohio in the United States of America"; and it is not to be altered or modified except by written endorsement, and so forth. There is a power of cancellation which is irrelevant.

Upon the face of it, it seems to me clear enough that the effect of that master agreement was, although it was implicit perhaps rather than clearly expressed, that Akron would itself sell to Sweden such tyres and other products as Sweden should require, or at least would provide the tyres and so forth that Sweden would require at the prices and subject to the other conditions contained in the agreement. I pause to observe that throughout the case and in the other documents Sweden has been treated as and called a customer of Akron.

I now pass to the second master agreement, again a typical one of a kind, namely, the agreement between Akron and Brentford, which I will call the Brentford master agreement. That came into being in 1936, but, as the case shows and as one can find from the judgment of the judge, Brentford had been in existence for a good many years before that date. For present purposes I think none of the previous history matters. The Brentford master agreement was as follows: "(1) In considera-"tion of the payment by the American company 'Akron' herein-"after mentioned the English company 'Brentford' will from "time to time use its best endeavours to fulfil either by manu-"facture or from its existing stocks all orders obtained in Europe "or elsewhere by the American company as and when requested "so to do by the American company. (2) The American company "shall upon each request being made forward to the English com-"pany full particulars of such order. (3) The English company "shall upon the receipt of such order with all possible dispatch "forward the goods thereby ordered to the purchaser and shall "give such instructions for payment of the purchase price by "the purchaser as shall be requested by the American company. "(4) In consideration of the above mentioned services the "American company will pay to the English company in the "manner hereinafter mentioned a sum equal to the cost price "to the English company of the goods supplied hereunder plus "five per centum thereof." Then the expression "cost price" is defined. Clause 5 provides for there being accounts between the parties. Clause 6 states that the agreement should continue for a period, but the fact is that it has continued ever since. It is to be noted, for what it is worth, that unlike the Swedish

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master agreement the agreement does not provide that nothing in the agreement should constitute for any purpose Brentford as the agent of Akron.

Upon the face of the document it is, I think, clearly contemplated that, when Akron received from any of its customers or purchasers an order, it would or might pass that order on to Brentford for execution with such directions as to price and so on as it then gave. Brentford would be bound to execute it, or at least to use its best endeavours so to do.

The case then, upon the face of the documents, would be fairly analogous to the example given by Sir James of the man who desires to present to the lady of his choice a bunch of flowers, and orders them from a florist. The florist, not being able in fact to supply those flowers, will get another florist so to do, and the lady receives in due course the flowers in fact from the second florist. In that case (and I daresay the result would be similar if the arrangement had gone strictly according to the letter of the master agreement) it is at least probable that the second florist never enters into any contractual relations with the customer who orders the flowers.

But the fact is that things did not work out quite as the agreements, on the face of them, stated that they should. That, I think, undoubtedly was partly due to the English war-time controls which rendered Brentford unable to comply with any orders for tyres save such as the appropriate governmental authority either permitted or indeed directed them to do. The way in which the main difference in practice arose was this, that the orders were not sent to Akron by Sweden and then passed on to Brentford. They were sent direct to Brentford. It is not in doubt that the variation in procedure was authorized, and that in fact Akron gave to those customers or distributors a list of persons or firms in European and other countries to whom they could send, direct, their orders.

The method of business activity is again best found in the case itself, and I think it desirable to read from the case, particularly since one passage I am about to read constitutes a deliberate finding of fact. [His Lordship read paragraphs 12 and 16 (c) of the case, and went on:] It may be said that, since there was difficulty in transmitting money from the United Kingdom to America, the amounts for which Brentford were accountable to Akron were treated as though they were loans by Akron to Brentford.

I will dispose first of all of two particular transactions, namely, supplies of Firestone tyres first to the Government of New Zealand and, second, to the Government of France in Great Britain, the so-called Free French Government. These two orders covered goods to the value of £49,000 out of a total of goods with which this case is concerned amounting to £782,000. The supplies to the New Zealand and Free French Governments

were not in fact in accordance with the Akron/Brentford arrangements or the Akron master agreements; they were directed by the British Government. They were, however, treated by Brentford quoad Akron as though they had been within the scope of the master agreements; and the Crown has in fact—no one can say that it was not fair and just so to do—been content to treat them as though they were in consimili casu with the whole of the rest of the transactions. I say no more about those particular orders.

To illustrate my judgment let me take an imaginary order coming from Stockholm, Sweden, for, say, 1,000 tyres. They send direct to Brentford an order for 1,000 Firestone tyres. Brentford, having regard to the terms of the Brentford master agreement, may not have been bound to accept the order, and, indeed, having regard to the war-time controls, might not have been able to accept it; but I am supposing the case that Brentford accepts the order. It supplies all the tyres, and in accordance now with the terms of the written master agreements it delivers them f.a.s., and that constitutes delivery to Sweden. For the rest, the transaction is, as between Brentford and Sweden, in all respects governed by the dictates of Akron in accordance with the Swedish master agreement, that is to say, all the details as to the price to be charged, the method of collection, delivery, and so forth.

What then, on a true analysis, is the result of a transaction taking that form? Sir James has said that there are two results. Either, first, the sole trading operation was an operation between Sweden on the one hand and Brentford on the other, an English contract, becoming in due course an English sale; the arrangement between Brentford and Akron about the subsequent apportionment of the purchase price collected is something altogether outside the scope of the trading operation; it therefore follows, as night the day, that Akron is not trading or carrying on a trade within the United Kingdom. Or, second, a contract upon the giving by Sweden of the order comes into existence, a new contract between Sweden and Akron, or alternatively a contract between Brentford and Akron, with the purpose or having the effect that the 1,000 tyres which are to be delivered to Sweden become the property of Akron. In either case there is a point of time when the property passes to Akron, and from that time forward the transaction is exclusively governed by the terms of the Swedish master agreement, which is an agreement made out of England and governed by the laws of the state of Ohio; and, therefore, it follows also that Akron is not carrying on a trade within the United Kingdom at all.

As the argument developed, of the two horses (if I may use a substantial variation of the metaphor which Harman J. used) Sir James rode the former rather harder than the latter; though I think that when he opened the case, and (as I noted from the judgment of Harman J.) when he put his case in the court

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below, he presented as the favourite the second of the two horses. Certainly the way in which Sir James put the case has all the attractions of simplicity. I think, for myself, that it is too simple, and that when the matter is more closely examined very severe difficulties are found to confront Sir James on both heads of his argument, difficulties which form rocks like the rocks of Scylla and Charybdis to which Harman J. alluded. In my judgment Harman J. came to a correct conclusion, for I think that neither of Sir James's propositions can be, on examination, established.

First, to revert to my imagined simple case, I think that upon the order being given by Sweden and accepted by Brentford there arises between Brentford and Sweden a contract of sale made in England, a contract which according to the Sale of Goods Act, 1893, becomes a sale when, in accordance with the other arrangements, the tyres are delivered by Brentford f.a.s. I reject, as did the judge, the notion that there arose at some point of time what I think was aptly described by Harman J. as a philosophical contract between Brentford and Akron sufficient to pass the property in those tyres from Brentford to Akron before delivery. It is, I think, possible—the judge assumed it was the fact, but I do not myself go so far—that when Sweden sends its order to Brentford there also arises a subsidiary contract, that is, subsidiary to the Swedish master agreement, between Sweden and Akron on the footing that, properly construed, the Swedish master agreement operated as a continuing offer by Akron to sell or to provide tyres, that offer being accepted when Sweden gave an order for tyres in pursuance of and in reliance upon it. I think that if such a fresh contract came into existence it would occupy a very subsidiary and ancillary position. If, for example, to go back again to my case, Brentford committed some default, having accepted the order, I think that on my analysis Sweden would be entitled to sue Brentford for breach of contract. I think it may be that Sweden could also sue Akron under the Swedish master agreement for having failed to provide the tyres; and it may also be that Sweden could set up against Akron what I have called a subsidiary and ancillary contract also; but having stated as best I can the effect of that supposed breach I think it will be seen at once that on my analysis any such contract between Akron and Sweden is of a purely incidental character.

But its possibility has, I think, some aspects of danger about it for Sir James, and for this reason. We do not know the exact arrangements whereby communications passed, and were intended to pass, between Sweden and Akron. Assuming that there was by the Swedish master agreement a continuing offer, it may be that acceptance, so as to create contractual relations, must first be communicated to the offeror, and that it would not suffice to create a contract that Sweden merely put the order in the Swedish post office box. If that is right, then the communication in the case I suppose was—and Sir James, I think, conceded

as much—made not to Akron direct but to Brentford, and Brentford must at least be the agent of Akron to receive communication of the acceptance with the possible result (I say no more) that, even on the second of the two alternatives which Sir James put forward, there would arise a contract with Akron in England because the acceptance of the offer was communicated to Akron via its agents in England. I need not, however, pursue further that aspect of it. It suffices, in my judgment, to state, as I have done, that on the happening of the case I am supposing of Sweden sending an order for tyres to Brentford, there came into existence in England a contract for sale between Brentford and Sweden.

If that is so, is Akron carrying on a trade within the United Kingdom? In my judgment it is. In my judgment the typical English contract of sale between Brentford and Sweden which I have supposed is an incident, and an incident deliberately contrived, of Akron's business of marketing and distributing Firestone branded tyres in England and in Europe, and indeed in every country of the world. I do not repeat all the matters which I have previously mentioned as to the nature of the articles which are supplied, but merely state compendiously by way of reminder that Firestone tyres are branded proprietary articles of the Akron organization.

My conclusion does not involve the proposition that Brentford, instead of being an independent legal entity, is a mere branch of Akron; but Brentford, though a separate entity, is in fact wholly controlled by Akron, and in the making of what may be described as Akron proprietary branded articles it acts under the close direction of Akron in all respects, and in selling those articles to Akron's customers it does so on terms fixed by Akron, so that after allowing Brentford its costs and a percentage thereon the whole of the profits on the transactions go to Akron.

We were referred in the course of the argument, as was the judge, to *Weiss, Biheller & Brooks Ltd.* v. *Farmer*,[3] in which a Dutch company (which manufactured gas mantles in the Netherlands) made a business arrangement with an English company for the distribution and marketing of its gas mantles here. The substance of the arrangement was that the Dutch company sold the gas mantles first to the English company, the two companies acting as principals, vendors and purchasers, and then the English company sold them again to customers in England, again acting as principal, as vendor. Ultimately, the profits of those transactions were divided between the Dutch and the English companies, in certain proportions. I do not suggest that that case is entirely parallel with the present case, and the reference in the somewhat obscurely worded agreement between the Dutch company and the English company to del credere certainly lends much force to the view that the English

[3] [1923] 1 K.B. 226; 39 T.L.R. 118; 8 T.C. 381.

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company was, in some respects at any rate, regarded as an agent of the Dutch company. But the case does, I think, show, and it is an illustration of the principle, that the fact that the English company, when it sells particular goods, sells them as a principal to the customers does not negative a proposition that the parent company, from which in some sense or another the goods emanated, may not equally be carrying on or exercising a trade within the United Kingdom. I think that the case which I have mentioned was rightly regarded by Harman J. as lending some support to the view which he formed.

There remains the third and final question. If Akron is carrying on this trade within the United Kingdom, then for the purposes of rules 5 and 10 is Brentford its "regular" agent? To my mind, the answer to that question must be in the affirmative. If the conclusion is right that Akron is trading in the United Kingdom, then it must be doing so through someone's agency, since, admittedly, Akron is not itself here, nor are any of its officers, nor has it got here any branch or office. Indeed, as I understood him, Sir James did not really argue otherwise than that, given the premise that Akron was exercising a trade in the United Kingdom, and doing so by means of or as a result of Brentford's sale transactions, Brentford really must be treated as a regular agent within the terms of rule 10. There certainly could not be any doubt, having regard to the Brentford master agreement, that if Brentford is for this purpose an agent at all, it certainly is a regular agent, and not merely (to use the phrase to be found in the cases) an irrelevant agent.

The view of the case which I have taken makes it unnecessary for me to discuss the further question also debated before us, namely, whether, on the assumption that contracts for sale to Sweden of tyres were contracts with Akron made outside the United Kingdom and governed by United States law, Akron was still trading here—that is, exercising a trade within the United Kingdom—because so many incidents of the performance of the contract (for example, delivery, receipt of the purchase price, and so forth) took place here: in other words, the point that the exceptional facts of this case take the matter out of the general rule enunciated by Lord Cave L.C. in *Maclaine & Co.* v. *Eccott*[4] in the passage which I have already cited. The judge was inclined to the view that an affirmative answer should be given to that question, that the case was one so exceptional in its facts that he could invoke, to support his answer, the language used, for example, by Atkin L.J. in the earlier case of *F. L. Smidth & Co.* v. *Greenwood*,[5] where the Lord Justice said[6]: "I think that the question is, where do the operations take "place from which the profits in substance arise?" In the view which I have taken it is unnecessary for me to discuss that

[4] [1926] A.C. 424, 432.
[5] 8 T.C. 193.
[6] 8 T.C. 193, 204.

matter, and I, therefore, prefer, for my part, to express no conclusion about it; but for the reasons which I have earlier given I think Harman J. came to a correct conclusion, and I would dismiss this appeal.

JENKINS L.J. I agree. I need not repeat at length the facts stated in the case, or refer again in detail to the distributor agreement or the agreement of February 8, 1936, between Akron and Brentford.

The question whether Akron was during the relevant years exercising a trade within the United Kingdom through the agency of Brentford is a question of fact which the Special Commissioners have answered in the affirmative, and their decision upon that question, as the tribunal of fact, is not to be disturbed on appeal, unless the facts as found by them are incapable in law of supporting such a decision.

Sir James has argued before us with his usual persuasive force that on the facts found, and on a proper appreciation of the legal effect of the distributor agreement and the agreement of 1936, and of the course of dealing between Akron and Brentford and the various distributors whose orders were dealt with by Brentford, the only proper conclusion as a matter of law is that Akron was not at any material time exercising a trade within the United Kingdom, or at all events was not exercising a trade within the United Kingdom through the agency of Brentford.

The effect of Sir James's argument may, I think, be thus fairly summarized:

(i) Akron and all the distributors whose orders for tyres are material to the case were resident outside the United Kingdom, and the distributor agreement entered into between Akron and each of these distributors was made outside the United Kingdom.

(ii) Each of the distributor agreements amounted to a standing offer by Akron to supply the distributor concerned with tyres as and when ordered by such distributor. If the terms of the distributor agreements had been strictly adhered to, the distributors would have given their orders for tyres to Akron, and each such order would have constituted an acceptance of Akron's standing offer, and thus have given rise to a contract between Akron and the distributor concerned for the sale by the former to the latter of the tyres ordered—see Pollock on Contracts, 13th ed., at p. 141. The acceptance would be complete on the dispatch by the distributor in his own country by post or cable of his order for tyres. The contract would thus be made in the distributor's country of residence, that is to say, outside the United Kingdom.

(iii) If the terms of the distributor agreements had been strictly adhered to, the position under the agreement of 1936 between Akron and Brentford would have been that, as and when contracts for the sale of tyres by Akron to distributors were concluded in the way above described, Akron, if so minded, would

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have passed them to Brentford to carry out under the agreement of 1936; and, thereupon, as between Brentford and Akron, Brentford would have been bound, so far as it was able, to fulfil those contracts on the terms as to remuneration and otherwise contained in that agreement.

(iv) It follows that, if the terms of the distributor agreements had been strictly complied with, Akron might well have been carrying on a trade of selling tyres to distributors outside the United Kingdom, but could not have been exercising that trade within the United Kingdom because all the contracts for the sale of tyres would have been made outside the United Kingdom; and the balance of authority is strongly in favour of the view that a merchanting trade, that is to say, a trade concerned with the sale of goods, is (generally speaking) carried on in the place where the contracts are made—see, for example, *Maclaine & Co.* v. *Eccott*,[7] *per* Lord Cave L.C. The fact that a non-resident trader, who has made a contract outside the United Kingdom with another non-resident for a sale of goods to the latter, obtains those goods from a trader resident in the United Kingdom is not enough to displace the general rule so as to make the trade of either non-resident a trade exercised within the United Kingdom: see *Sulley* v. *Attorney-General*,[8] and the distinction drawn by Lord Herschell in *Grainger & Son* v. *Gough*[9] between trading with a country and carrying on trade within a country.

(v) The fact that the strict terms of the distributor agreements were departed from in practice (both before and after the date of the agreement of 1936), so as to allow distributors to order any tyres they required from any listed manufacturer of Firestone tyres selected by them, does not affect the above conclusion. The distributor's order addressed to any listed manufacturer equally raised a contract made outside the United Kingdom between Akron and the distributor concerned immediately upon the dispatch by letter or cable of the distributor's order, the listed manufacturers simply playing the role of agents empowered to receive such orders on Akron's behalf.

(vi) If the foregoing submissions in their application to the practice actually followed are wrong, and the effect of that practice was to make an order for tyres addressed to Brentford an offer requiring the acceptance of Brentford in England, so that the contract in each case was made in this country, that does not make good the contention that Akron was exercising a trade within the United Kingdom; for on this footing the contracts were contracts with Brentford for the sale by Brentford to the distributors concerned of Brentford's tyres, not Akron's tyres, and the trade exercised in the United Kingdom was Brentford's, not Akron's. This merely resuscitates the Crown's abandoned claim that Brentford was carrying on on its own account the

[7] [1926] A.C. 424, 432.
[8] (1860) 2 T.C. 149; 5 H. & N. 711.
[9] [1896] A.C. 325; 12 T.L.R. 364; 3 T.C. 462, 467.

trade of selling tyres to persons resident outside the United Kingdom, and cannot assist the case for the Crown on the present appeal.

(vii) In any case, and on any view of the matter, the tyres supplied or sold by Brentford to distributors outside the United Kingdom were Brentford's own tyres, not Akron's, as appears from the terms of the agreement of 1936; and it is a legal impossibility for a person to sell his own goods as agent for another—see the distinction drawn in *W. T. Lamb & Sons* v. *Goring Brick Co. Ltd.*[10] between the relationships of vendor and purchaser and principal and agent. It follows that Brentford cannot have been selling its own tyres to distributors as agent for Akron, and it follows further that Brentford must either have been selling on its own account to distributors outside the United Kingdom (a theory which, as appears above, cannot advance the case for the Crown) or else must be regarded as having been selling to Akron, at a price corresponding to the rate of remuneration fixed by the agreement of 1936, the tyres required by Akron to fill contracts made by Akron outside the United Kingdom with non-resident distributors. In neither alternative could it be held that Akron was exercising a trade within the United Kingdom, and Brentford has already been assessed to the whole of the tax which would be payable on the footing that it was, as part of its own trade, selling to Akron.

In my judgment, whatever the position might have been if the terms of the distributor agreements had been strictly adhered to, Sir James's argument breaks down on the course of dealing actually followed. An order placed by a distributor direct with Brentford as one of the listed manufacturers of Firestone tyres could at most only create a contract between the distributor and Akron to the effect that the distributor would purchase, and Akron would cause the manufacturer to sell to the distributor, the tyres ordered on the terms and conditions of the distributor agreement. There was no privity of contract between distributor and manufacturer quoad the distributor agreement, and it is, I think, quite impossible to hold that the mere placing of an order with any one of the listed manufacturers would, without more, oblige that manufacturer to deliver the tyres ordered. As between the distributor and the listed manufacturer the matter must have been one of offer and acceptance, that is to say, an order placed by the distributor with the manufacturer and accepted by the latter. The order and its acceptance would alone constitute the effective contract under which the distributor could call upon the manufacturer to deliver the tyres ordered, and would be bound on his own part to take and pay for them. Such contracts in the case of Brentford would be made in England as the place of acceptance. On applying this view of the contractual position to the facts found, it appears that during the

[10] [1932] 1 K.B. 710; 48 T.L.R. 160.

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material period Brentford was selling to distributors abroad, under contracts made in the United Kingdom, tyres manufactured by Brentford in the United Kingdom, and deliverable in the United Kingdom to the purchasers thereof against payment in the United Kingdom of the contract price; and, furthermore, was in fact effecting delivery of and receiving payment for such tyres in the United Kingdom.

It further appears upon reference to the agreement of 1936 that Brentford was under contract with Akron to do these things as services to Akron in return for a stipulated remuneration, subject to which all profits arising were to belong to Akron.

In these circumstances I am of opinion that there was ample evidence to justify the Special Commissioners in concluding, as they did, that Akron during the relevant years was exercising a trade in the United Kingdom through the agency of Brentford. Moreover, I cannot regard this conclusion as displaced by the circumstance that the tyres sold by Brentford were Brentford's and not Akron's. This seems to me to be mere machinery which did not affect the substance of the relationship of Akron and Brentford in regard to the trade in question, which, in my view, was Akron's trade carried on by Brentford on behalf of and for the benefit of, or in other words as agent for, Akron.

I think that the argument for the Crown on the question of agency derives some assistance from *Weiss, Biheller & Brooks Ltd.* v. *Farmer*.[11]

I entirely agree with the views as to the relations between Akron and Brentford thus expressed by the Special Commissioners in paragraph 16 (d) of the case. [His Lordship read the paragraph, and continued:] I am accordingly of opinion that the Special Commissioners and the judge came to a right conclusion in this matter, and I would dismiss this appeal

Birkett L.J. I agree with the two judgments which have just been delivered. Nevertheless, I should like to express my own view about the proper answer to this case.

When Sir James Millard Tucker opened this case, within his opening sentences he said that there were two questions, and two questions only, for the determination of the court. The first question, of course, was whether the company which we have agreed to call "Akron," the American master company, was exercising a trade within the United Kingdom. The second question was whether Brentford, that is the wholly-owned subsidiary of Akron in this country, was the authorized regular agent of Akron for that purpose?

Quite clearly, the first question is a question of the greatest importance. If it is answered in the affirmative that Akron was carrying on a trade within the United Kingdom, the second question really becomes academic on the facts of this case. But

[11] [1923] 1 K.B. 226; 8 T.C. 381.

everybody agreed that the answer to that question, propounded by Sir James and discussed for several days in this court, depended upon the view taken of the facts in the case.

As Sir James said, this question of non-resident firms and corporations carrying on business within the United Kingdom had been a matter of very fierce dispute in days past, and, indeed, had been the subject of many decisions which were cited to us. He said, with an air of slight surprise, it was curious that after a long interval of time the ancient question, which all had thought to be settled by these authorities, should be raised again.

But the facts of this case are extremely unusual, and many of the cases which were cited to us were cited to try to bring those facts within decisions which the courts had laid down. I am not going through all those. Let me take one illustration only. Sir James said that this question whether or not a non-resident trader is exercising a trade within the United Kingdom can be decided by this test, and it is a test that is a crucial and a practical one. The test is, where are the contracts of sale which are in question made? He cited in support of that the views of Lord Herschell and Lord Watson, and the concurring speech of Lord Macnaghten in *Grainger & Son* v. *Gough*.[12] That is your test. Where are the contracts made? It is not enough, for example, that on the facts of this case payment was to be made in England; it is not enough that delivery was to be made in England; it is not enough that orders for tyres were received in England. All that does not really matter. The crucial test laid down in the cases is where are the contracts made; and, of course, in support of that argument, Sir James was concerned to show that the contracts with which we are concerned were made abroad.

The distributor agreement between Akron and the firm in Sweden, which we have agreed to call "Sweden," in substance said: "We, Akron, the American company, will provide you in "Sweden with Firestone tyres. You shall have the exclusive "right to sell Firestone tyres throughout Sweden—and nobody "else. We shall provide them for you, in consideration for which "you will undertake to buy your tyres only from us." Sir James thereupon said that meant, although the word was not used, "We will sell you all the tyres," and that meant Akron was saying that to Sweden by this agreement, "We agree to sell, "and you agree to buy," and, therefore, the contract was made abroad.

Then Sir James said that by a clause of the agreement made with Brentford, which was an agreement subsequently entered into, "We arranged with Brentford merely to supply those goods "which we had sold." In support of that argument it was really necessary to say that at some moment before the delivery of the order to Sweden there had been somehow and in some form a

[12] [1896] A.C. 325.

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sale of the tyres from Brentford to Akron. If 1,000 tyres were ordered by Sweden, and the order was sent direct to Brentford, and then Brentford sent the 1,000 tyres, they were in fact the tyres of Akron; and it was all done in pursuance of a non-resident making a contract outside the United Kingdom.

I am bound to say that, as the argument developed and as its effect developed, it seemed almost impossible to maintain that position, for at some subsequent date—one was never given any very clear view about how it had happened—there was a modification of the written agreement which had been made between Akron and Brentford. The agreement had specified in the beginning, "Whereas the parties hereto are desirous of "concluding an arrangement for the fulfilling by the English "company of orders obtained in Europe and elsewhere by the "American company" and by clause 2, "The American com- "pany shall upon each request being made forward to the English "company full particulars of such order," which seemed to forecast that the course of business would have been that Sweden would say to Akron, "I want 1,000 tyres" and Akron, therefore, under the agreement would say to Brentford, "Here are "particulars of an order which we desire you to fulfil on the "terms we have agreed in this agreement as to payment, price, "delivery and so on," but there came a moment when that was clearly modified because we had to deal with the case upon the footing that there was no such communication between Sweden and Akron; that although there was undoubtedly the original agreement made between Akron and Sweden, the distributor agreement, from which everything else flowed, apart from that it was safe to say that Akron did nothing except to receive the main profit on the transaction because all that really happened was that Sweden sent direct in this case to Brentford. Although it was entitled, if it cared, to send to any other particular subsidiary company of Akron, it sent in this case to Brentford; and Brentford thereupon fufilled the order. If the order was for 1,000 tyres, Brentford, without any reference to Akron, sent 1,000 tyres; it delivered them f.a.s. according to the terms of the agreement; it charged prices which Akron had laid down that it should charge; it received the money in the form which Akron had laid down it should receive the money; it accounted for the property in the manner in which Akron had desired it should so account; and it retained for itself 5 per cent. upon the cost price which had been laid down in the agreement for the services it had rendered in the matter.

It is true in substance to say that, apart from entering into the original agreement and receiving the profits on every transaction which arose out of it, Akron did nothing; and therefore it seemed, at least to me, to be quite impossible to maintain the position which Sir James was taking up, that this was a contract made abroad, that that was the crucial test, and that delivery and price did not really matter in the result, and we ought to

say, therefore, that there was no trading within the United Kingdom. The view which I myself held was that this particular form of trading was clearly a trade within the United Kingdom. When Brentford received an order for 1,000 tyres it was an order which was being given by Sweden to Brentford, and Brentford could either accept or reject that order; but the contract which was made between Sweden and Brentford was one which I think was clearly made in England; and that contract in that form and in that way was devised and designed, I think, by Akron as part of its world-wide trade.

The case stated has set out the position, I think quite admirably, in paragraphs 4 and 5, which I do not propose to read at length. "Akron, an American Corporation registered in "Akron, Ohio, is the head of a world-wide organization con- "sisting of a large group of corporations operating in America "and in various parts of the world." If one is going to look at the facts of the case, that I think is one of the overriding and over-mastering facts which enters into every subsequent stage of the matter. Akron is the head and the trunk of all the vast organization, and Brentford a wholly-owned subsidiary of that head, on the terms of the documents before us doing that which Akron has devised and designed that it should do. "Some of "its associated and subsidiary corporations manufacture and sell "tyres . . ."—as, indeed, did Brentford—". . . in the countries "in which they are registered, and others sell in the countries "in which they are registered, tyres which have been manufac- "tured in America or by subsidiary corporations in other "countries. For convenience, certain matters in regard to the "business of the organization carried on outside the United States "of America have been conducted by other subsidiary companies "of Akron. . . . Brentford is an English company registered in "1922 with an issued capital of £20,000 in £1 ordinary shares. "This capital was increased to £140,000 in 1938. All the "shares in Brentford are owned by Akron. The board of directors "of Brentford consists of individuals resident in the United "Kingdom with the exception of Mr. Harvey Firestone, the "chairman of the board of directors of Akron, who is a director "of Brentford and occasionally attends meetings of its directors." Then it gives the history of that company which formerly used to sell the tyres manufactured in America, but then it became an economic, commercial proposition for the company to make the tyres here, and so it did. It was doing that admittedly in this case.

Lord Evershed M.R. has pointed out that the thing sold was a branded article, Firestone tyres. The trade mark, patents and processes no doubt all belong to the thing sold called a Firestone tyre, and Brentford could not sell to anybody that particular tyre without the consent of Akron because Akron was the owner of that very valuable thing which made the distinctive Firestone tyre. Here was a distributor agreement made between Akron

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and Sweden. Sweden sent this contract for these Firestone tyres to Brentford, and whilst it would be possible to analyse it in a little more detail it is not necessary because it has already been done. But it seems to me so plain that this is a contract between Sweden and Brentford, devised and designed by Akron, the overriding master company. It is quite true, as Lord Evershed M.R. has said, that one must always recognize that Brentford has a separate and a distinct entity of its own, but it was part of the regular business of Akron that this trade which we have been analysing in this case should go on. It was part of its world-wide organization. As I have pointed out, the real profits of that trade went to Akron. The only money retained above cost price was 5 per cent., expressly stated to be for services to be rendered. All the elements of delivery, price and so on were made in this country, and I cannot doubt that the answer to the first question, "Does Akron exercise a trade within the United "Kingdom?" must be given quite clearly and firmly as "Yes."

With regard to the second question, I really have nothing to add because Lord Evershed M.R. has pointed out that if that answer is right, that Akron is carrying on a trade within the United Kingdom, it must be trading through Brentford. It is not suggested that there would be anybody but Brentford, and I should hold myself that in those circumstances it follows that Brentford here was the regular authorized agent for that purpose of Akron. I feel this question should be answered in that way.

I think the judgment of Harman J. was right, and that this appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Lovell, White & King; Solicitor of Inland Revenue.*

E. D.

[PRIVY COUNCIL.]

J. C.†
1956
Mar. 19.

* THE TRUST COMPANY LIMITED . . APPELLANT;

AND

T. H. I. DE SILVA . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Vicarious Liability — Master and servant — Negligence — Motor-car — Accident—Servant in control of car for purposes of employment—Driven by third party over whom servant had right of control—Vicarious liability of master—Ceylon.

Ceylon.

† *Present*: LORD OAKSEY, LORD TUCKER, LORD COHEN, LORD KEITH OF AVONHOLM and MR. L. M. D. DE SILVA.

The appellant, an insurance company in Ceylon, transacted some of its business through canvassers who were paid a commission but received no salary; it also employed "field officers" or "field organizers" who were paid a small salary and an overriding commission on business introduced through them, and whose duty it was to supervise and control the canvassers. It was left to the canvasser or field officer to select the doctor who would examine proponents in respect of proposals for life insurance. The respondent, a doctor selected by a canvasser to examine proponents for him, went for that purpose in a motor-car belonging to a field officer, but subject to a hire-purchase agreement with the appellant company. Travelling in the car were the respondent doctor, the canvasser and the field officer. As the result of an accident due to the negligent driving of the canvasser, the doctor was injured, and he claimed damages from the appellant company:—

Held, that the field officer was a servant of the appellant company and that in making the journey in the car which had been supplied to him for the purpose of carrying out his duties he was acting in the course of and for the purposes of his employment. He was in control of the car—though not actually driving—and was liable for the negligence of the canvasser since the latter was a person over whom he had a right to exercise control. The field officer was exercising control over the car as a servant of the appellant company and on its behalf, and any consequential liability attaching to him was a liability of the company.

Canadian Pacific Railway Co. v. *Lockhart* [1942] A.C. 591; [1942] 2 All E.R. 464, *Wheatley* v. *Patrick* (1837) 2 M. & W. 650, *Samson* v. *Aitchison* [1912] A.C. 844; 28 T.L.R. 559 and *Reichardt* v. *Shard* (1914) 31 T.L.R. 24 applied.

Judgment of the Supreme Court of Ceylon affirmed.

APPEAL (No. 26 of 1955) from a judgment and decree of the Supreme Court of Ceylon (October 29, 1953) setting aside a judgment and decree of the District Court of Colombo (March 8, 1951).

The following facts are taken from the judgment of the Judicial Committee: The respondent (hereinafter referred to as "the plaintiff") suffered personal injuries by reason of the negligent driving by one Holsingher of a motor-car in which he was a passenger on a journey from Colombo to Jaffna on April 27, 1950. The question in the appeal was whether the appellant (hereinafter referred to as "the company") was responsible for Holsingher's negligence.

The plaintiffs' claim failed at the trial in the District Court of Colombo on March 8, 1951, but that judgment was reversed on appeal by the Supreme Court of Ceylon on October 29, 1953, when judgment was directed to be entered in his favour for Rs.50,000 with costs.

The company transacted insurance business in Ceylon with its principal place of business and registered office in Colombo. Some of its business came through canvassers who were paid commission on business introduced by them but received no salary. Holsingher was one of those canvassers. The company employed three "field officers" or "field organizers." Their duties were to supervise and control the canvassers and to assist

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them to bring in business. They were paid a salary of approximately Rs.100 a month and an overriding commission on business introduced through them. They were answerable to the secretary of the company who performed the duties generally carried out by a managing director. Any canvasser or field officer bringing in a proposal for life insurance must forward with it a doctor's certificate with regard to the proponent. It was left to the canvasser or field officer to select the doctor and make the necessary arrangements for medical examinations, but the doctors' fees were paid by the company. Doctors normally provided their own transport. A field officer could not function efficiently without a car. One of those field officers was named Perera. He was supplied with a car by the company under a hire purchase agreement dated July 30, 1948, by which Perera agreed to pay at least Rs.200 a month towards the full purchase price of Rs.5,875, plus interest at 6 per cent. On payment in full the car was to become the property of Perera. The agreement recited that Perera was employed by the company as one of its field officers and that under the conditions of his appointment he was obliged to discharge certain obligations and that with a view to helping him discharge those obligations the company had lent him the money to purchase a car in the name of the company.

There was a conflict of evidence at the trial as to the circumstances in which the plaintiff came to be travelling in the car at the time of the accident. Holsingher's evidence was to the effect that the plaintiff had borrowed the car for his own exclusive benefit in order to fulfil an undertaking to travel to Jaffna at his own cost and expense for the purpose of examining a number of proponents for Holsingher. It was implicit in the judgment of the District Judge that he rejected that story and accepted the plaintiff's version, which was that he had stipulated that transport should be supplied for the journey from Colombo to Jaffna, a distance of 248 miles. Holsingher agreed and arranged with Perera for the use of his car. On the journey there were present in the car the plaintiff, Holsingher, Perera and a paid driver named Gunapala. Perera, Holsingher and Gunapala took turns in driving the car. At the time of the accident Holsingher was driving and Perera was sitting in the back seat.

The plaint was framed on the basis that Holsingher was an employee of the company acting within the scope of his employment, but the case was argued on the alternative ground that Holsingher was under the control of Perera who was a servant of the company acting on its behalf. The judge dealt with the case on that basis without requiring any amendment of the pleading and no objection was taken to that course at any stage of the proceedings. He held that Holsingher was not a servant of the company nor was Perera when driving the car on that journey, and that if the accident had happened while he was driving the company would not have been liable. Consequently

no liability could attach to the company while Holsingher was driving.

The Supreme Court (Gratiaen and de Silva JJ.) reversed that judgment on the ground that Perera was a servant of the company and that at no stage had he divested himself of his character as a servant authorized to act on behalf of the company; that throughout the journey the car was through Perera's instrumentality being used on the company's business; that a contractual obligation binding on the company had been entered into by Holsingher with the knowledge and approval of Perera to convey the plaintiff to Jaffna; and that the car was being used as a means of transport which was clearly incidental to the execution of that which Perera was employed to do.

1956. Feb. 21, 23, 27, 28. *Neil Lawson Q.C.* and *R. K. Handoo* for appellant.

Sir Frank Soskice Q.C., *Phineas Quass Q.C.* and *Sirimevan Amerasinghe* for the respondent.

In addition to the cases referred to in the judgment, the following cases were cited in argument: *Van Blommenstein* v. *Reynolds* [1]; *Pratt* v. *Patrick* [2]; *Parker* v. *Miller* [3]; *Daniels* v. *Vaux* [4]; *Hewitt* v. *Bonvin* [5]; *Chowdhary* v. *Gillot* [6]; *Evans* v. *Employers Mutual Insurance Association Ltd.* [7]; *Colonial Mutual Life Assurance Society Ltd.* v. *MacDonald* [8]; *Murray* v. *Currie* [9]; *Egginton* v. *Reader* [10]; *In re Ashley & Smith Ltd., Ashley* v. *Ashley & Smith* [11]; *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.* [12]; *Ormrod* v. *Crosville Motor Services Ltd., Murphie, Third Party* [13]; *Gwilliam* v. *Twist* [14]; *Beard* v. *London General Omnibus Co.* [15]; *Ricketts* v. *Thos. Tilling Ltd.* [16]; and *Reg.* v. *Walker.* [17]

March 19. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: Their Lordships consider it is clear that Perera was a servant of the company and that in making this journey in the car which had been supplied to him for the purpose of carrying out his

[1] [1934] S.A.L.R. (C.P.D.) 265.
[2] [1924] 1 K.B. 488; 40 T.L.R. 227.
[3] (1926) 42 T.L.R. 408; 40 T.L.R. 227.
[4] [1938] 2 K.B. 203; 54 T.L.R. 621; [1938] 2 All E.R. 271.
[5] [1940] 1 K.B. 188; 56 T.L.R. 43.
[6] [1947] W.N. 267; 63 T.L.R. 569; [1947] 2 All E.R. 541.
[7] [1936] 1 K.B. 505.
[8] [1931] S.A.L.R. (A.D.) 412.
[9] (1870) L.R. 6 C.P. 24.
[10] (1936) 52 T.L.R. 212; [1936] 1 All E.R. 7.
[11] [1918] 2 Ch. 378; 34 T.L.R. 585.
[12] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.
[13] [1953] 1 W.L.R. 409; 1120; [1953] 1 All E.R. 711; 2 All E.R. 753.
[14] [1895] 2 Q.B. 84; 11 T.L.R. 415.
[15] [1900] 2 Q.B. 530; 16 T.L.R. 499.
[16] [1915] 1 K.B. 644; 31 T.L.R. 17.
[17] (1858) 27 L.J.M.C. 207.

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duties he was acting in the course of and for the purposes of his employment. (See *Canadian Pacific Railway Co.* v. *Lockhart.*[1]) Accordingly, if the accident had happened while he was actually driving there can be no doubt that the company would have been liable. Can it escape liability because Holsingher was at the wheel at the moment of accident? Their Lordships are of opinion that this question must be answered in the negative. It is now well settled that the person in control of a carriage or motor-vehicle—though not actually driving—is liable for the negligence of the driver over whom he has the right to exercise control. (See *Wheatley* v. *Patrick,*[2] *Samson* v. *Aitchison,*[3] and *Reichardt* v. *Shard.*[4]) Perera was at all times in control of this car. He was exercising that control as a servant of the company on its behalf. Any consequential liability attaching to him is a liability of the company.

Their Lordships do not consider it is necessary for the decision of this case to express any view on the question which was much canvassed at the Bar as to whether Perera had authority to delegate the driving of the car to Holsingher so as to create a direct relationship of master and servant or principal and agent between Holsingher and the company, nor do they base their decision on the view that the company was contractually bound to provide transport for the plaintiff on this journey.

For the reasons indicated above, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant company must pay the respondent's costs of the appeal.

Solicitors: *Edwin Coe & Calder Woods; T. L. Wilson & Co.*

C. C.

[1] [1942] A.C. 591; [1942] 2 All E.R. 464.
[2] (1837) 2 M. & W. 650.
[3] [1912] A.C. 844; 28 T.L.R. 559.
[4] (1914) 31 T.L.R. 24.

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* PRACTICE NOTE.

(Revenue Paper.)

Revenue—Practice—Appeal from Commissioners—Dismissal by consent —Practice in Chancery Division.

The judges of the Chancery Division have decided that while the Revenue Paper is in their charge they will in connexion with cases stated on appeal from the Income Tax Commissioners adopt the practice of the Court of Appeal for the dismissal of appeals by consent. This practice is stated at page 1262 of the

Annual Practice, 1956,[1] and is explained by Lord Greene M.R. in *In re Samuel*.[2]

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PRACTICE NOTE (REVENUE PAPER).

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[1] *Dismissal of appeals by consent.*—Where an appellant is sui juris and does not desire to prosecute an appeal, he may present a request signed by his solicitor stating that he is sui juris and asking to have the appeal dismissed, in which case (subject to the request being initialled by the President of the Court) the appeal will be dismissed and struck out of the list, and an order will, if necessary, be drawn up directing payment of the costs by the appellant, such costs to be taxed in case the parties differ. If the appellant desires to have the appeal dismissed without costs, his request must be accompanied by a consent signed by the respondents' solicitors stating that the respondents are sui juris and consent to the dismissal of the appeal without costs, in which case (subject to the request being initialled by the President of the Court) the appeal will be dismissed and struck out of the list. Where any party has no solicitor on the record, any such request or consent must be signed by him personally. All other applications as to the dismissal of an appeal and all applications for an order by consent reversing or varying the order under appeal will be placed in the list and dealt with in Court.

[2] [1945] Ch. 364, 368; 61 T.L.R. 542; [1945] 2 All E.R. 319.

[CHESTER ASSIZES.]

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Building — Safety regulations — Scaffold — Installation of lift in unfinished building — Whether part of construction of building — Erection of scaffolding by lift subcontractors — Liability of subcontractors—Building (Safety, Health and Welfare) Regulations, 1948 (1948, *S.I. No.* 1145), *regs.* 2 (1), 4, 5, 6, 7 (1) (2), 9, 21, 22 (*a*), 23 (2), 24.

Building—Safety regulations—Application. Building—Safety regulations—Subcontractor—No contractual liability to erect scaffold—Regulation 4.

Contractors for whom the plaintiff worked as foreman bricklayer were engaged on the construction of a building. They engaged the services of subcontractors for the installation of a lift in the building, the arrangement between them being that the contractors should erect the necessary scaffolding. While the main building was still incomplete the brickwork of the lift shaft was finished and the contractors' workmen had left in the lift shaft certain tubular posts running from the front to the rear of the shaft, and necessary for the work of installing the lift. The first step in the installation of the lift was the erection of the main lift runners and for this purpose two of the subcontractors' workmen, accompanied by the plaintiff and P., the contractors' foreman scaffolder, visited the site in order to mark the points at which the bricklayers should bore holes in the brickwork of the shaft. There was at the time no working platform and no planks across the tubular posts at the first-floor level. The plaintiff and P. placed a long ladder for the subcontractors' workmen to climb from the base of the shaft to the first floor level and make their marks on

[Reported by H. EIFION ROBERTS, Esq., Barrister-at-Law.]

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the walls. P. then decided to lower another ladder from the top of the lift shaft and asked the plaintiff to receive it at the first floor. By this time the subcontractors' workmen on their own initiative had erected at the first-floor level a totally inadequate working platform consisting of planks, the majority of which were too short to rest on all three of the tubular posts and which consequently had a number of "trap ends." In order to receive the ladder the plaintiff stepped on the platform, whereupon the planks tipped up, causing him to fall and suffer injury.

In his action against the contractors and subcontractors claiming damages on the ground (inter alia) of breach of statutory duty:—

Held, (1) that the lift and lift runners formed an integral part of the building under construction, that the subcontractors were accordingly contributing towards the construction of the building and were, therefore, engaged on a building operation to which the Building (Safety, Health and Welfare) Regulations, 1948, applied.

Elms v. *Foster Wheeler Ltd.* [1954] 1 W.L.R. 1071; [1954] 2 All E.R. 714 applied.

(2) That the sub-contractors, through the action of their workmen in erecting the working platform, had erected an unsafe scaffold in breach of various of the regulations relating to scaffolds; and the fact that they were not under a contractual obligation to erect any scaffolds was immaterial and did not free them from their duty under regulation 4 as "a contractor and "employer of workmen who erects or alters any scaffold" to comply with the appropriate regulations.

Per Barry J. The second part of this regulation was designed to ensure that no one, whether under a contractual obligation to do so or not, shall erect a scaffold in any building under construction which does not comply with these regulations; that is to say, to ensure that there shall be no unsafe scaffolding in any building which is being constructed.

(3) That the contractors and subcontractors were in breach of regulations 4, 5, 6, 7 (1) and (2), 9, 22 (*a*) and 23 (2).

ACTION.

The plaintiff, William Leslie Simmons, was employed by the first defendants, Bovis Ltd., as a foreman bricklayer in the construction of a new building at Wallasey, and the second defendants, Pickerings Ltd., had subcontracted with the first defendants for the installation of a lift inside this building.

The brick work of the lift shaft had been completed by the first defendants by May 4, 1954, but some of their workmen were still on the site and the construction of the building was not completed. The first defendants had left in position in the lift shaft certain tubular scaffolding which was necessary to enable the lift engineers to instal the lift. The first step in the installation of the lift was the erection of the main lift runners along the walls of the shaft; and this could not be done until the first defendants' bricklayers had bored holes in the brick work of the lift shaft at such points as the lift engineers' employees might indicate by the use of chalk marks.

On the morning of May 4, 1954, the lift engineers sent two of their employees to the building site to inform the first defendants' bricklayers, and, in particular, their foreman bricklayer.

the plaintiff, of the positions in which holes were to be bored in the brick work. The plaintiff was told by his employers' general foreman to accompany these two workmen to the bottom of the lift shaft so that they could decide what they wished the first defendants' bricklayers to do. After their arrival at the lift shaft the plaintiff asked one Payne, the first defendants' foreman scaffolder, to provide the necessary ladders and a proper platform covering the lift shaft at the first floor level.

The tubular scaffolding inside the lift shaft, which had been erected by Payne, consisted of three tubular posts running from the front portion of the shaft to the rear and clamped to a proper scaffolding which reached to the floor of the lift shaft. Payne had placed a number of scaffold boards cut to the appropriate length on the tubular posts, thereby providing a safe working platform covering the whole of the lift shaft at the first floor level. When the bricklaying operations at that level were complete these boards had been removed to a higher level in the shaft, and, therefore, there was no longer any working platform at the first floor level.

Following the plaintiff's request Payne, with the plaintiff's assistance, obtained a long ladder which would enable the lift engineers' workmen to climb from the base of the shaft up to the first floor level and make their chalk marks on the walls of the shaft. Payne did not see any planks or working platform of any kind at the first floor level as he and the plaintiff raised the long ladder from the well of the shaft up to that level, although there were some planks in position there at that time.

Having placed the long ladder in position Payne asked the plaintiff to go up to the first floor to receive a ladder which he (Payne) proposed to lower from the manhole at the top of the lift shaft. An appreciable time (estimated by Payne as 5 to 10 minutes) elapsed before Payne passed the opening of the lift shaft on the first floor on his way to the top. As he did so he observed that the lift engineers' workmen had erected a platform on the first floor level composed of planks which almost covered the lift shaft at that level. It was a temporary platform erected entirely on the workmen's initiative in their anxiety to hasten the work of chalk marking. With one exception the planks used were of insufficient length to rest upon all of the three tubular girders or poles. The lift engineers' workmen proposed to work on the left hand wall of the shaft and consequently they had laid the planks to rest on the tubular pole nearest to the left hand wall and on the centre tubular pole. Only one of the planks stretched as far as the tubular pole close to the wall on the right hand side of the lift shaft and thus a situation of acute danger had been created.

The working platform constructed by the lift engineers' workmen had a number of "trap-ends"—scaffold boards so placed that their ends overhang to such an extent that when weight

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is placed upon them they drop and tip up causing the whole board to fall.

When Payne observed this platform on his way up to the top of the shaft he warned the lift engineers' workmen to be careful of the trap-ends, but it was not suggested that the plaintiff could have heard his warning. Payne went on upwards and began to lower a ladder through the manhole at the top of the lift shaft. Meanwhile the plaintiff had reached the first floor and was talking to the workmen. As Payne lowered the ladder the plaintiff was waiting below, and Payne saw him begin to step on-to the working platform erected by the lift engineers' workmen. Payne expected that the latter would have warned anyone on the first floor not to step onto the platform without first ensuring that he was stepping on the left side. The plaintiff himself thought that the platform had been constructed by Payne, in whose competence as a scaffolder he placed complete trust. The first board upon which the plaintiff trod had a trap-end and it toppled up immediately. In an endeavour to regain his balance the plaintiff was forced to take a step forward, but in doing so he placed his foot on one or more of the other three trap-ends. He fell a distance of 18 feet and sustained severe injuries.

The plaintiff brought this action claiming damages for personal injuries against the first and second defendants on the ground of negligence and breaches of regulations 4, 5, 6, 7 (1) and (2), 9, 21 (in relation to the first defendants alone), 22 (*a*), 23 (2) and 24 of the Building (Safety, Health and Welfare) Regulations, 1948.

F. Elwyn Jones Q.C. and *W. L. Mars-Jones* for the plaintiff.

H. Edmund Davies Q.C., *W. D. T. Hodgson* and *P. L. W. Owen* for the first defendants.

H. V. Lloyd-Jones Q.C. and *R. Geraint Rees* for the second defendants.

The following cases, not referred to in the judgment, were cited in argument: *Sexton* v. *Scaffolding (Great Britain) Ltd.*[1]; *Hartley* v. *Mayoh & Co.*[2]; *Hughes* v. *McGoff and Vickers Ltd.*[3]

Barry J. This is a claim for damages for most grievous personal injuries which were suffered by the plaintiff as a result of an accident which took place on May 4, 1954. On that date the plaintiff was employed by the first defendants as a foreman bricklayer at a new building which these defendants were constructing at Wallasey. This building was designed to contain a lift, for the erection and installation of which the second defendants were responsible under a contract made between them and

[1] [1953] 1 Q.B. 153; [1952] 2 T.L.R. 986; [1952] 2 All E.R. 1085.

[2] [1954] 1 Q.B. 383; [1954] 1 W.L.R. 355; [1954] 1 All E.R. 375.

[3] [1955] 1 W.L.R. 416; [1955] 2 All E.R. 291.

the first defendants. On the day of the accident the plaintiff stepped upon a highly dangerous working platform which had been erected in the lift shaft of the building at the first floor level and fell over 18 ft. into the well of the shaft. As a result of his fall he sustained injuries, which unfortunately must inevitably cause him to be a hopeless invalid for the remainder of his life.

The plaintiff's case is that his fall and the injuries which resulted from it were caused by breaches of statutory duty or negligence on the part of both or alternatively one or other of the two defendants.

[His Lordship then stated the facts and continued:] When one considers the very stringent statutory regulations concerning the erection and construction of all forms of scaffolding, this is clearly an accident which never should have happened. No one suggests that the plaintiff was in any way responsible for this defective platform, and it would certainly require a very bold advocate to suggest that he was wholly responsible for the disaster which befell him. Indeed, no such suggestion has been made.

On behalf of the first defendants, Mr. Edmund Davies, with great candour, has said that he cannot seek to escape all responsibility on the part of his clients. Mr. Lloyd-Jones, on the other hand, contends that, whatever may be the first defendants' position, no part of the blame for what occurred rests upon the second defendants, although their men did in fact erect a platform in such a way as to infringe almost every relevant provision of the Building (Safety, Health and Welfare) Regulations, 1948.

I need not occupy time in considering in any detail the regulations, which were clearly broken. The plaintiff relies on breaches of regulations 4, 5, 6, 7 (1) and (2), 9, 22 (*a*), regulation 21 in relation to the first defendants alone, and regulations 23 (2) and 24. The latter regulation is immaterial in so far as the present case is concerned, although no doubt it also was infringed. I am not satisfied either that, in the circumstances of this case, regulation 21 has any real application even as against the first defendants. However, no one has contended that this platform complied with any of these regulations, and the only real question is whether the regulations applied to the operation. That, of course, depends on whether the work that was going on on the day of the accident, or that part of it which was being undertaken by the second defendants' men, can be described as a "building operation." This point has not been argued at length by Mr. Edmund Davies. No doubt he adopted in spirit at least the argument that was submitted to me by Mr. Lloyd-Jones as to the inapplicability of the regulations as a whole to anything that was going on in this particular building on the day in question.

If the regulations do apply, it is quite clear that the first defendants, as the plaintiff's employers, are responsible to him in damages for the undoubted breach of those regulations which

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have been established. The first defendants are also clearly liable to the plaintiff in respect of what I am bound to find was the negligence of their otherwise extremely careful and competent scaffolder, Payne.

Payne placed too great a reliance upon his hope that the second defendants' workmen would prevent anyone stepping onto this platform, and I am afraid he took an unjustifiable risk in carrying out the work in this way. He could have moved the proper scaffold boards from the top of the building to construct a proper working platform at the first floor level, but he decided to lower the ladder onto this temporary and unsafe structure erected by the second defendants' men before he did so. That was a grave error of judgment, because he ought to have anticipated that some other employee of the first defendants might step onto that platform while the ladder was being lowered, and, in particular, knowing that the plaintiff was assisting in placing the ladder in the lift shaft, he ought to have been aware that the plaintiff was on the first floor—as I think he was—awaiting the ladder, and might at any moment step onto the platform to receive it. What he should have done was to postpone the lowering of the ladder until he had provided a safe working platform at the first floor level. No one suggests any moral blame on his part. He was doing what he thought was his best, and he was trying to kill two birds with one stone, to lower the ladder, and then, while he was up there, collect the scaffold boards and erect a safe platform after the ladder had been lowered. If he had exercised proper care and had envisaged, as a reasonably careful person ought to have done, the prospect of anyone, in the lowering of the ladder, stepping on the platform, then I am sure that he would have adopted a different method of carrying out the work, and this accident would have been avoided.

In those circumstances I am satisfied that there was negligence on the part of this otherwise extremely careful scaffolder, and for that negligence the first defendants are quite clearly responsible. Therefore, on two grounds, on the ground of the breach of the Building Regulations, if they be applicable to this work, and on account of their vicarious liability for Payne's negligence, it is clear in my mind, as Mr. Edmund Davies admitted, that the first defendants are, in part at least, responsible for this disaster.

I now turn to the submissions of the second defendants made with great ability by Mr. Lloyd-Jones. He says that the Building Regulations were in no way applicable to his clients while they were carrying on the work of erecting this lift, and he further submits that there was no negligence of any kind on the part of either of their workmen.

The submission that the Building Regulations were inapplicable to the work which his clients were undertaking in this building was based upon a number of separate grounds. Under regulation 4 the duty of complying with the regulations is only

imposed upon contractors or employers of workmen who are undertaking any of the operations to which these regulations apply. Regulation 2, insofar as it is relevant to the present case, provides that the regulations shall apply to the construction or structional alteration of a building.

Mr. Lloyd-Jones' first submission is that the installation of a lift does not form part of the construction or structional alteration of a building. He contends that, even if it can be said that his clients were erecting the lift and installing it on this particular day, none the less at most what they were engaged on was the installation of plant in this building, and that they were not engaged in any building operation. He referred me to certain authorities on this point, and in particular to *Elms* v. *Foster Wheeler Ltd.*[1] I do not propose to read at any length the judgments in that case. What emerges from them is that the mere fact that an operation can, in one sense, be properly and accurately described as the installation of plant does not necessarily prevent it from being a part of a building operation. I refer in particular to a very short passage in the judgment of Somervell L.J., where he says[2]: "Leading counsel for the "defendants based his argument on a contrast between installa- "tion of plant and construction of a building. That was not "based on any words in the Regulations or in any Act of Parlia- "ment and I do not myself find it a helpful or satisfactory "contrast, because I think that the installation of plant may "involve the operation of the construction of a building." He went on to refer to the manner in which it had been put by the judge in the court below, and expressed his approval of the way in which he had described the law. Summarizing the judgment of Romer L.J., as I understand it, he considered that the appropriate test is whether a building was being constructed, and, if so, whether the defendants were contributing to its construction.

There is no hard and fast line in cases of this kind. The facts of each particular case must be considered on their own merits. Here certain considerations bear strongly in favour of the view that the second defendants were engaged in the construction of a building. It is quite clear that a building was being constructed at the time when they began their work. The first defendants' men, bricklayers and others, were still at work, and the building was by no means complete. Secondly, the building was designed and constructed in such a way as to enable a lift to be provided, and it was clearly an essential part of this building as designed that a lift should be installed. The lift was an integral part of the building, or certainly the lift runners were an integral part of the building just as much as were the walls of the lift shaft. For those runners to be attached to the wall, the wall had to be altered in that holes had to be bored into it in order to enable

[1] [1954] 1 W.L.R. 1071; [1954] 2 All E.R. 714.

[2] [1954] 1 W.L.R. 1071, 1074.

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the runners to be bolted, and I am satisfied that the persons engaged in the attachment of the runners to the wall were as much engaged upon a building operation and the construction of a building as the bricklayers who were responsible for the laying of the bricks which formed the walls of the shaft itself.

By Romer L.J.'s test in *Elms* v. *Foster Wheeler Ltd.*[3] I think the finding clearly is, on the facts of this case, that a building was being constructed and that the second defendants, as lift engineers, were contributing towards its construction.

Mr. Lloyd-Jones has contended that, even though the erection of the lift, or the attachment of the lift runners to the wall of the lift shaft, was a building operation, that operation had not yet been begun on the day when this accident occurred: that all that was being done on that day was the making of chalk marks on the walls of the lift shaft, and that no reasonable person could contend that chalking on a wall was a building operation.

I consider that argument to be unsound. The work must be taken as a whole. It cannot be said that, because on one particular day a workman is not engaged on something which is obviously a building operation, that prevents the regulations from applying to the work as a whole. Here the second defendants had undoubtedly started to carry out their contract to instal a lift in this building. The placing of the chalk marks upon the walls of the lift shaft necessitated the use of ladders and scaffolding, and I am satisfied that, once this work of erection had started, the regulations applied and they applied throughout the work including its inception, which was the marking of the walls or the tapping of the walls for the runners.

Mr. Lloyd-Jones submitted that, even if the regulations apply to this operation, as I have held them to do, neither subsection (1) nor subsection (2) of regulation 4 have any application to his clients. Subsection (1) requires contractors and employers of workmen who are undertaking any of the operations to which these regulations apply to comply with the requirements of certain regulations, including all those regulations relied on by the plaintiff in the present case, as they affect any workman employed by them. The plaintiff was not employed by the second defendants, and although Mr. Elwyn Jones sought, I think, to keep the point open, I am not satisfied that any cause of action against the second defendants can be founded upon this part of the regulation. Similarly, regulation 4 (2) has no application, as none of the regulations there referred to are relied upon by the plaintiff in the present action.

Therefore, I must turn to the second portion of regulation 4, which begins with the words: "and it shall be the duty of every "contractor and employer of workmen who erects or alters any "scaffold to comply with such of the requirements of Regulations "5–30 as relate to the erection or alteration of scaffolds having

[3] [1954] 1 W.L.R. 1071, 1077.

" regard to the purpose or purposes for which the scaffold is " designed at the time of erection or alteration; . . ."

As I understood the argument, Mr. Lloyd-Jones submitted that this portion of regulation 4 applies only to subcontractors or employers of workmen whose work entails the erection of scaffolding. That means, I assume, an employer who is under some contractual duty to a head contractor or building owner to perform certain work in respect of which he is under an obligation to erect the necessary scaffolding. It has been pointed out that in the present case the second defendants did not, under their contract with the first defendants, undertake any responsibility for the scaffolding required for installing and erecting the lift. The first defendants under their contract, as I understand it, were required to provide all the necessary scaffolding for that purpose. Therefore, said Mr. Lloyd-Jones, these provisions have no application to the second defendants.

I am not satisfied that that is the true position. The second defendants' employees did erect scaffolding on this occasion, and they erected it in the course of their employment with the second defendants. I am not satisfied that they acted in any way improperly in so doing. The fault lay in the working platform, which infringed almost every known building regulation. If their employers had been asked by them: " Shall we stand about " until the first defendants' men have got everything ready for " us, or shall we do all we can to get on with our work with the " least possible delay," I have little doubt as to what the answer would have been. They acted perfectly properly in getting on as quickly as they could with their work, and for that purpose using the planks which were available to provide a platform from which their work could be carried out. The fact that the employers were not under a contractual obligation to provide that platform seems to me to be immaterial. I find that, through their workmen, the second defendants did erect or alter a scaffold in this building. The second part of this regulation was designed to ensure that no one, whether under a contractual obligation to do so or not, shall erect a scaffold in any building under construction which does not comply with these regulations; in other words, to ensure that there shall be no unsafe scaffolding in any building which is being constructed.

The second defendants having through their workmen erected this working platform which is a part of the scaffolding in the building and falls within the regulations concerning scaffolding in the Building (Safety, Health and Welfare) Regulations, are in those circumstances bound by the provisions of the regulations and liable to anyone employed on the premises, whether by them or not, for any damage which may arise through a breach of the regulations with which they are bound to comply.

One final point on this aspect of the case was made by Mr. Lloyd-Jones, which I am bound to say did not seem to me to be quite so formidable as some of his other arguments. He

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suggested that, even if every other point were found against him, for some reason which I found it difficult to appreciate, his clients' workmen were not erecting or altering scaffolding, they were only engaged on what he called "a temporary placing of a "few planks in a position to serve an immediate purpose." The distinction between that operation and the erecting or alteration of a scaffold I am bound to say escapes me. I think that the regulations apply, however temporary and however fortuitous the erection of the scaffolding may be. They were erecting a working platform on which these defendants' men themselves actually worked before this accident happened, and having been in breach of the regulations through their workmen, I think that the second defendants are bound by the regulations and must pay damages if those regulations are infringed.

[After finding in addition that the second defendants were liable to the plaintiff at common law for the negligence of their workmen, and after assessing the plaintiff's own contributory negligence at 10 per cent., his Lordship continued:] I now turn to the question of damages, and on that question I shall say very little. It is not necessary for me to dwell upon the severity of these injuries, on the gross and almost total lack of all the amenities of life which result from them, and the humiliation and difficulties with which a man in the plaintiff's position is faced in view of his inability to control his natural functions.

In this case the plaintiff was earning an extremely high wage. If he had remained uninjured his present rate of pay would have amounted to £15 10s. 2d. per week, but I have to take income tax into account, and for that reason his net present earnings would have been reduced by approximately 15s. per week. None the less, £14 15s. net is a very substantial wage, and a larger wage than those which have been earned by a number of unfortunate plaintiffs in cases of this kind. On the other hand, I have to remember that, when the accident happened, the plaintiff was 46, and did have the enjoyment of 10 or 11 years of healthy existence between the mid-thirties and the mid-forties, an important period in the life of any man, which in many other cases has been destroyed on account of an accident of this kind. Owing to his age being greater than that of the plaintiff in *Smith* v. *Alexander Findley & Co. Ltd.*,[4] his prospects of continuing working life were, of course, somewhat less than those of the plaintiff in that case. Furthermore, he has considerably fewer years in which to endure the very many afflictions which have now fallen upon him. He has the sort of earning capacity which any person confined to a wheelchair and requiring special lavatory facilities might be said to have. Some sympathetic employer may be found to employ him in the manufacture of small articles with his hands, but from the point of view of the open labour market, his earning capacity is almost non-existent. One hopes

[4] The Times, February 27, 1954.

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that, being a man of great courage, he will find some occupation which will provide him with some measure of happiness and earning capacity during the coming years, but one cannot be at all optimistic in that respect.

This is a case which obviously warrants the award of heavy damages, but in view of all the circumstances I am bound to make them substantially lighter than the award in the case to which I have referred. I think I shall award here the sum of £15,000 by way of general damages, to which has to be added the sum of £557 8s., which I understand is the net amount of special damage, after making all proper allowances, agreed between the parties. There must be a deduction of 10 per cent. from that figure. There will be judgment for £14,002 against both defendants, and, as I have been told there is an agreement between the two defendants as to the contribution of each, I need say nothing further about that.

Judgment for the plaintiff against the first and second defendants.

Solicitors: *O. H. Parsons, Esq., London; James Chapman & Co., Manchester; Laces & Co., Liverpool.*

[HOUSE OF LORDS.]

* CHLORIDE BATTERIES LTD. . . . APPELLANT;

AND

GAHAN (INSPECTOR OF TAXES) . . RESPONDENT.

H. L. (E.)†

1956

Feb. 27;

Mar. 26.

Revenue—Profits tax—Principal and subsidiary company—Grouping notice—Sums paid to principal company by subsidiary "by way "of reimbursement of profits tax"—Amount deductible for income tax—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 22—*Finance Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 38 (3).

A grouping notice having been given by a company under section 22 of the Finance Act, 1937, it paid £209,437 profits tax in respect of its own profits and those of a subsidiary, But for the notice its own liability would have been £131,742. The companies having jointly elected to take advantage of section 38 (3) (*b*) of the Finance Act, 1947, the subsidiary paid the principal company £191,420 "by way of reimbursement of profits tax" as being the amount "which by virtue of the notice having been given is pay-"able by that company."

Held, that the amount which the subsidiary could deduct for the purpose of assessment to income tax being that sum of profits tax which was payable by the principal company by virtue of the grouping notice having been given, it was the amount which was

† *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE and LORD SOMERVELL OF HARROW.

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attributable solely to the giving of the notice and which would not have been payable by the principal company if the notice had not been given, viz., £77,695, the difference between what it actually paid and its own liability apart from the grouping notice.

Decision of the Court of Appeal [1955] 1 W.L.R. 277; [1955] 1 All E.R. 633 affirmed.

Appeal from the Court of Appeal (Evershed M.R., Jenkins and Morris L.JJ.).

This was an appeal from an order of the Court of Appeal made on February 18, 1955, allowing an appeal by the respondent, F. A. Gahan (Inspector of Taxes), from an order of the High Court (Upjohn J.) dated October 22, 1954. By the order of the High Court an appeal by the respondent on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed. The effect of the order of the Court of Appeal was to reverse the determination of the Commissioners. The appeal arose on three assessments to income tax made on Chloride Batteries Ltd., the appellant company, for the years 1949–1950, 1950–1951 and 1951–1952 under Case I of Schedule D of the Income Tax Act, 1918, in respect of the profits arising from its trade.

The facts are stated in the opinion of Viscount Simonds.

Sir Andrew Clark Q.C., *F. Heyworth Talbot Q.C.* and *H. Major Allen* for the appellant company.

Sir James Tucker Q.C., *Sir Reginald Hills* and *E. B. Stamp* for the respondent.

No cases were cited in argument.

Their Lordships took time for consideration.

March 26. Viscount Simonds. My Lords, the appellant company is a subsidiary of another company called Chloride Electrical Storage Co. Ltd., which I will refer to as "the principal "company." For the purpose of the Acts, which I must examine, a company is the subsidiary of another company if the latter holds 25 per cent. or more of its shares. But in fact the principal company held all the shares of the appellant company.

The appeal arises upon three assessments to income tax made upon the appellant company for the years 1949–1950, 1950–1951 and 1951–1952 under Case I of Schedule D of the Income Tax Act, 1918, in respect of the profits arising from its trade.

The matter in dispute is whether a payment of £191,420 made by the appellant company to the principal company was a deductible outgoing in computing the profits of the appellant company for the purpose of income tax, or whether only £77,695 of that amount was so deductible. The answer to this question depends on the true construction of a very few words in the Finance Act, 1947, but it is necessary first to look at the Finance

ERRATUM

Page 393, line 8 et seq. from bottom of page, should read as follows:—

"by way of profits tax if the notice dealt with under section 22 of the Act of 1947 had not been given.

Section 38 of the Act of 1947, to which I now refer, is the material section. The . . ."

Act, 1937, by which profits tax (then called "national defence contribution") was first imposed.

This tax, which I will continue to call profits tax, was, by section 19 of the Finance Act, 1937, imposed on the profits arising in each accounting period from the trades or businesses therein described. During the relevant chargeable accounting period the appellant and the principal company each carried on a trade falling within the charging provisions and each had profits arising from its trade. This enabled them to take advantage of the provision to which I now refer.

By section 22 of the Act it was enacted as follows: "(1) Where "a body corporate resident in the United Kingdom is a subsidiary "of another body corporate so resident (hereafter in this section "referred to as 'the principal company') the principal company "may, by notice in writing given to the Commissioners of Inland "Revenue before the expiration of any chargeable accounting "period of the subsidiary or within two months thereafter, "require that the provisions of subsection (2) of this section "shall apply to the subsidiary as respects that period and all "subsequent chargeable accounting periods throughout which it "continues to be a subsidiary of the principal company: . . . "(2) Where such a notice is given, the profits or losses arising "in any chargeable accounting period to which the notice relates "from the trade or business carried on by the subsidiary shall "be treated, for the purpose of the provisions of this Act relating "to the national defence contribution . . . as if they were profits "or losses arising in the corresponding chargeable accounting "period from the trade or business carried on by the principal "company. . . ."

By section 25 (1) of the same Act it was provided that the amount of profits tax payable in respect of the profits arising from a trade or business in a chargeable accounting period should be allowed to be deducted as an expense in computing for the purpose of income tax the profits and gains arising from that trade or business in that period.

The Finance Act, 1947, introduced important changes into the law. With one of them, a change of great practical importance, by which the rate of tax was made to vary according to whether profits were or were not distributed by way of dividend, your Lordships are not concerned. I mention it only to explain that the sum of £191,420, which I mentioned at the beginning of this speech, is the sum which the appellant company would have paid by way of profits tax if the notice dealt with under section 38 to which I now refer had not been given.

Section 38 of the Act of 1947 is the material section. The relevant parts of it are as follows: "(1) Where a notice under "subsection (1) of section 22 of the Finance Act, 1937 (which "relates to subsidiary companies) is in force . . . (3) Where— "(*a*) such a notice as aforesaid is in force; and (*b*) the subsidiary "to which the notice relates pays to the principal company *an*

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"*amount by way of reimbursement of profits tax which by virtue* "*of the notice having been given is payable by that company* "for any chargeable accounting period ending after December 31, "1946; and (*c*) the principal company and the subsidiary jointly "so elect by notice in writing given to the Commissioners of "Inland Revenue within six months from the end of that "chargeable accounting period or such longer time as those Com- "missioners may in any case allow, the amount so paid, and any "amount so paid in relation to a subsequent chargeable account- "ing period, by the subsidiary to the principal company shall for "all the purposes of the Income Tax Acts be treated—(i) as "regards the subsidiary, as an amount of profits tax payable in "respect of its profits arising in the chargeable accounting period "of the subsidiary corresponding to the chargeable accounting "period to which the payment relates; and (ii) as regards the "principal company, as reducing the amount of the profits tax "payable by the principal company for the chargeable accounting "period to which the payment relates. . . . (6) This section "shall be construed as one with the said section 22."

I have italicised the important words upon whose construction the issue depends. But before considering them I will state the material facts which are undisputed.

The appellant company commenced business on January 1, 1950, as a manufacturer of storage batteries and made up its first accounts to December 30, 1950, which thus constituted or included the basis period for the years of assessment under appeal. The principal company duly gave notice pursuant to section 22 (1) of the 1937 Act requiring that subsection (2) of that section should apply to the appellant company. Therefore, profits tax became payable by the principal company in respect of its own and the appellant company's profits. This tax was assessed at £209,437 12s. 0d. If the notice had not been given, the principal company would have had to pay the sum of £131,742 8s. 0d. by way of tax on its own profits only, a difference of £77,695 4s. 0d. Taking advantage of section 38 (3) (*b*), which I have set out, and purporting to do so by way of reimbursement as therein mentioned, the appellant company paid to the principal company the sum of £191,420 (that sum being calculated in the way I have already described), and then under section 39 (3) (*c*) the principal company and the appellant company jointly elected that the sum should, for all the purposes of the Income Tax Acts, be treated as provided for in paragraphs (i) and (ii) of subsection (3) of section 38, or, in other words, that as regards the appellant company it should be treated as the amount of profits tax payable in respect of the profits arising in the chargeable accounting period of twelve months to December 31, 1950. The Revenue authorities did not accept the view that £191,420 or any larger sum than £77,695 could be reimbursed to the principal company by the appellant company and assessed the latter company to income tax accordingly. From these assessments the appellant

company appealed to the Commissioners for the Special Purposes of the Income Tax Acts, who allowed their appeal. From their determination the respondent, the Inspector of Taxes, appealed by way of case stated to the High Court, Upjohn J., who upheld their determination. From his order the respondent appealed to the Court of Appeal, which allowed the appeal. From their order the appellant company brings this appeal.

I state again the short question in this case. What is the meaning of the words " an amount by way of reimbursement of " profits tax which by virtue of the notice having been given is " payable by that company " where they occur in section 38 (3) (*b*) of the Act?

The notice to which reference is made is the notice given under section 22 of the Act of 1937, and I do not dissent from the contention of the appellant company that the effect of that notice was to create a single liability in the principal company in respect of profits tax. It was a single liability computed on the aggregate of its own and the appellant company's profits. Nor would I dispute that in the judgments of the Master of the Rolls and Jenkins L.J. there are to be found expressions which suggest that after the notice the principal company became subject to two separate liabilities, the one in respect of its own profits, the other an additional one in respect of the appellant company's profits. But these are, I think, verbal criticisms only and do not affect the substance of their reasoning, with which I find myself in complete agreement.

The structure of section 38 (3) is not to be disregarded. It does not purport to authorize any payment by a subsidiary to a principal company. But it provides that, where certain conditions are satisfied, including a payment by a subsidiary to a principal company, then certain results for tax purposes shall follow. It assumes that such a payment is authorized by the general law. This throws some light upon the construction of the vital words; for a subsidiary company may have as many as 25 per cent. minority shareholders and it may have trade and other creditors. I do not understand how, under the general law, a subsidiary could by way of reimbursement pay to a principal company a sum which it, the subsidiary, was never liable to pay. Learned counsel urged that it was purely a domestic arrangement between the two companies how much one should pay the other, but this argument ignores the position of minority shareholders and creditors and it ignores, too, the salient fact that, while the payment may be a domestic arrangement, the purpose of the section is to give to that payment certain consequences for tax purposes. It is with this background that the material words must be considered.

It is possible, too, that some light may be thrown on the problem by the use of the word " reimbursement." It suggests to me, as it did to Morris L.J., that the sum paid by the subsidiary company was one for which the principal company

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would not, but for the notice, have become liable. This consideration leads me at once to the ground upon which, in effect, the Court of Appeal decided against the appellant company. "What profits tax," they ask,[1] "can answer the description of "being payable by the principal company by virtue of the "notice?" I take the answer of Jenkins L.J.: "Surely only "such profits tax as is payable by the principal company by "reason of the notice having been given, and which would not "have been payable by the principal company if the notice had "not been given." This he describes as "the natural and "inescapable meaning of the language used." I agree with him.

The principal company paid £209,437 12s. 0d. profits tax in respect of the relevant accounting period. Notice or no notice, it incurred a liability to pay profits tax under section 19 of the Act of 1937. If there had been no notice, its liability would have been £131,742 8s. 0d. As a result of the notice its liability was £209,437 12s. 0d. What amount of profits tax became payable "by virtue of the notice"? No other sum than the difference between those amounts, namely, £77,695 4s. 0d. Even here there is in the last analysis a misstatement. For it is not by virtue of any notice that liability to tax arises. The liability arises under the Act. But the quantum of liability both as between the subsidiary and principal company and as between the companies and the Revenue authorities may be affected by the notice. It is therefore legitimate, though not entirely accurate, to speak of profits tax "which by virtue of the notice having been given is payable." It is at least true that, quoad the profits of the subsidiary company, the liability of the principal company arises from section 19 of the Act of 1937 combined with the notice under section 22. It would be untrue to speak of the liability of the principal company in respect of its own profits as arising from a notice. That liability arose under the Act alone, though the quantum might be affected by a notice. It would be increased if the subsidiary company made a profit or reduced if it made a loss. This latter possibility may throw some light on the relevant words. For it would, as it appears to me, be plain nonsense to speak of the subsidiary company paying an amount by way of reimbursement of profits tax which by virtue of the notice having been given is payable by the principal company, when the only result of the notice was to reduce the amount of tax so payable.

For these reasons, which are intended only to supplement those of the Court of Appeal, with which, as I have said, I am in full agreement, I am of opinion that this appeal should be dismissed with costs.

Lord Reid. My Lords, I agree.

Lord Radcliffe. My Lords, I am in full agreement with

[1] [1955] 1 W.L.R. 277, 286–7; [1955] 1 All E.R. 633.

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Lord Radcliffe.

what has fallen from my noble and learned friend on the Woolsack. I, too, think that the decision of the Court of Appeal was correct. The point is a very short one and it does not need elaboration from me.

I would like to make it plain, however, that I do not regard a construction of section 38 (3) of the Finance Act, 1947, which limits the appellant company's deduction for income tax purposes to £77,695 as a construction which introduces into subsection (3) (*b*) any words not already there. On the contrary, I think that this construction offers the only tenable meaning of the words used.

Even though the tax enactments in question relate to "group" assessments and to inter-company transfers of money from a subsidiary (though not necessarily a wholly owned subsidiary) to a principal company, the payment by the subsidiary which we are supposed to envisage cannot just be a transfer to the principal of as much cash as it may need to make good whatever it has had to pay in satisfaction of its own liability for profits tax as a whole. It must be a payment to the principal of some amount which the giving of the notice under section 22 (1) of the Finance Act, 1937, has made it reasonable and fair that the one company should pay over to the other. Against this background the words "reimbursement" and "by virtue of the notice" acquire an obvious significance, and, in my opinion, they limit the ranking amount to such an amount as that by which the profits tax bill of the principal company has been increased in consequence of the notice.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack, and have nothing I wish to add to it.

Solicitors: *Simpson, North, Harley & Co. for March, Pearson & Green, Manchester; Solicitor of Inland Revenue.*

F. C.

[COURT OF APPEAL.]

C. A.
1956
Mar. 8, 9, 12.
Lord Evershed M.R., Jenkins and Birkett L.JJ.

* *In re* PARKES' SETTLEMENT. MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD. AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS AND OTHERS.

[1955 P. 1518.]

Revenue—Estate duty—Property chargeable—Property passing on death—Settlement—Settlement of freeholds, investments and assurance policy—During settlor's lifetime income to daughters while unmarried, subject to maximum amount—Surplus divisible equally

C. A.

1956

PARKES' SETTLEMENT, *In re.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.

between children—At settlor's death daughters' annuities charged on appropriated funds—No significant change in amount—Corpus divisible amongst surviving children—Whether beneficial interest arising or accruing on the death—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2 (1) (*d*)—*Finance Act,* 1934 (24 & 25 *Geo.* 5, *c.* 32), *s.* 28.

By a settlement made in 1929 a settlor, who died in 1952, directed his trustees to stand possessed of the settled property on trust during his lifetime to pay the income of the trust fund equally to his two daughters so long as they both remained alive and unmarried, but so that the amount paid to each daughter was not to exceed £250 in any year, or if one of them died or married, the income payable to the other should not exceed £410 in any year. Subject to this trust the income of the surplus of the fund was to be paid equally between the surviving children of the settlor. After the death of the settlor the trustees were directed to appropriate, in respect of such of the daughters as should then be unmarried, a fund sufficient at that time to produce an annuity of £250 each year for her life, to be paid so long as she continued unmarried. The trustees were empowered to resort to the capital of the appropriated fund to make good any deficiency of the annual income of that fund. Subject to those trusts, the capital and income of the trust fund, including any surplus income of the appropriated fund, was to be held on trust for such of the settlor's children as should survive him and if more than one in equal shares absolutely.

All the four children of the settlor survived him and both the daughters had remained unmarried. The Crown claimed estate duty under section 2 (1) (*d*) of the Finance Act, 1894, first in respect of the annuities which became payable to the daughters out of the appropriated funds on the death and, second in respect of the corpus of the settled property to which the four children of the settlor became absolutely entitled at his death:—

Held, that duty was payable under section 2 (1) (*d*) in respect of the absolute interest taken by the four children in the corpus of the settled property at the death of the settlor for that interest was distinct and different in kind and quality from their right to share in surplus income during the settlor's lifetime and the beneficial enjoyment of that absolute interest was contingent on surviving the settlor.

(2) That, as regards the daughters' annuities, duty was not payable under the section. On the death of the settlor, assuming that at all material times the income of the trust fund could be treated as having amounted to not less than £250, there was no significant change in the beneficial enjoyment of the sum payable to each daughter, which before as well as after the death was to be taken in priority to all other interests. After the death of the settlor there was a right to have recourse to capital if the income in any year was insufficient, but that change only concerned the security for the annuities and not their amount or duration. It could not be said that on the death of the settlor each daughter became for the first time entitled to a new and different beneficial right.

D'Avigdor-Goldsmid v. *Inland Revenue Commissioners* [1953] A.C. 347; [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403 applied.

Decision of Danckwerts J. varied.

APPEAL from Danckwerts J.

The following statement of the facts is taken substantially from the judgment of Lord Evershed M.R.

On January 4, 1929, Ebenezer Thomas Parkes, hereafter called "the settlor," made a settlement in favour of his four children, two sons and two daughters. Having transferred certain freehold property and investments to his trustees by a conveyance of even date, the settlor assigned to them a policy of insurance on his life. By clause 3 of the settlement, during the lifetime of the settlor, or until the earlier receipt of the policy moneys (including moneys received in respect of any policy or policies issued in substitution for the original policy), the trustees were to stand possessed of the income of the premises settled and the investments for the time being representing the same upon trust: (1) to pay the same unto and equally between the settlor's two daughters "so long as they shall remain unmarried and after the "death or marriage of either of them then to the other so long "as she shall remain unmarried but so that the income so to be "paid to each or either of the said daughters under this pro-"vision shall not exceed £250 in any year during which they "shall both be alive and unmarried or in case either of them shall "have died or married then the income so payable to the other "shall not exceed £410; (2) subject to the trust aforesaid, to pay "the said income or the surplus arising in each year of the trust "unto and equally between . . . " the four children of the settlor, "or such of them as shall from time to time be living."

By clause 4 it was provided that, on the death of the settlor, or the earlier receipt of the policy moneys, (1) the trustees should appropriate and retain out of the trust fund "in respect of each "or such of the before-mentioned daughters of the settlor who "shall then be unmarried a fund sufficient at the time of appro-"priation to produce out of the annual income thereof an annuity "of £250 which annuity shall be paid by the trustees to each "such daughter respectively during her life and so long as she "shall continue unmarried and so that if the income of the "funds or fund so appropriated shall at any time prove insuffi-"cient for payment in full of the annuities or annuity so payable "thereout respectively resort may be had to the capital thereof "from time to time to make good such deficiency but the surplus "income (if any) of the said appropriated funds or fund from "time to time remaining after the payment of the said annuities "or annuity shall be applicable as income of the remainder of the "trust fund; (2) as and when the said annuities or annuity shall "cease the funds or fund appropriated in respect thereof shall "revert to and become subject to the trusts hereinafter declared "concerning the trust fund; (3) subject to the trusts aforesaid "the trustees shall stand possessed of the capital and future "income of the trust fund upon trust for such one or more "of . . . " the four children of the settlor "as shall be living "at the death of the settlor and if more than one in equal shares "absolutely."

By clause 5 each of the daughters covenanted with the settlor and separately with the trustees that so long as they should both

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remain unmarried they would pay in equal shares between them, and on the death or marriage of either of them the other so long as she should continue unmarried would pay the whole of the premiums on the settled life policies as they became due, and they also charged the income payable to them under clause 3 (1), that is, their prior right to income up to the maximum of £250 each, with payment by them of the premiums.

Clause 10 was expressed to empower the settlor to bring further life policies on his own life into the settlement, on the terms (1) that, if he did so, the rights of the daughters under clause 3 (1) to the first £500 between them of the income of the settlement should be increased by the amount of the premiums on the additional policies brought into the settlement; and (2) that the covenants on the daughters' part for payment of premiums and the charges on their priority income rights should extend also so as to be applicable to the premiums on the additional policies.

By the terms of certain later memoranda and deeds, the income of the daughters was wholly released from the charges above mentioned. The settlor did in fact bring into settlement further policies, and the daughters' priority income rights were augmented accordingly. The daughters remained liable to pay all the premiums on all the settled policies under their covenants to that effect, and they paid all such premiums down to the date of the settlor's death.

During the lifetime of the settlor the income of the settled property barely sufficed to provide for the daughters' income rights, and during the whole of that period the total of the surplus income divisible among all four of the settlor's children amounted to no more than about £77.

The settlor died on February 13, 1952, and all his four children survived him though one of the sons had since died. Both daughters remained unmarried.

It was contended by the Crown that estate duty under section 2 (1) (*d*) of the Finance Act, 1894,[1] became exigible on the death of the settlor (*a*) in respect of the annuities, so expressly described, payable to the two daughters under clause 4 (1) of the settlement, and (*b*) in respect of the shares of corpus of the settled property to which the four children of the settlor, all having survived him, became absolutely entitled by virtue of clause 4 (3) of the settlement; the annuities in the one case and the absolute interests in possession in the other constituting beneficial interests in the subject-matter of the settlement, which arose to the two daughters and the four children respectively for

[1] Finance Act, 1894, s. 2 (1): "Property passing on the death of the "deceased shall be deemed to include "the property following, that is to "say: . . . (*d*) Any annuity or other "interest purchased or provided by "the deceased, either by himself alone "or in concert or by arrangement "with any other person, to the extent "of the beneficial interest accruing or "arising by survivorship or otherwise "on the death of the deceased . . ."

the first time on the settlor's death, within the meaning of section 2 (1) (*d*) of the Act.

Danckwerts J. accepted these contentions and decided in favour of the Crown under both heads. The trustees appealed. For the purposes of the appeal it was common ground that the terms of the settlement relevant for consideration were those set out in clauses 2, 3 and 4 of the settlement, and that no question arose on the actual figures or on the daughters' covenants to pay premiums or on the charges on their priority income rights.

John Pennycuick Q.C. and *S. M. Young* for the trustees.
E. Blanshard Stamp for the Crown.

In addition to the cases referred to in the judgments the following were cited in argument: *In re Barbour's Policies of Assurance* [2]; *Attorney-General* v. *Lloyds Bank* [3]; *In re Fuller's Settlement* [4]; *Inland Revenue Commissioners* v. *Scott's Trustees* [5]; *Skinner* v. *Attorney-General.* [6]

LORD EVERSHED M.R. stated the facts and continued: As regards the second of the two heads of claim, I entertain no doubt that the view of Danckwerts J. is correct. It was the submission of Mr. Pennycuick, for the trustees, that the joint effect of clause 3 (2) and clause 4 (3) of the settlement was, as regards the interests thereunder of any one of the settlor's four children, in substance entirely the same as an immediate and absolute gift in favour of A, subject only to the liability of being divested in the event of A not surviving the happening of a particular event, for example, the death of the donor—a kind of gift which in fact, it was said, had never given rise to a claim for duty upon the donor's death. Mr. Pennycuick submitted further that the existence of a right in possession to an aliquot share of surplus income during the settlor's life distinguishes this case from *Adamson* v. *Attorney-General.* [1] But whatever the "sub-"stance" of the children's interests might be in the sense in which Mr. Pennycuick used that term, it is to my mind incontrovertible that the legal effect of the settlement was to confer or give rise for the first time on the death of the settlor to an absolute interest in capital in favour of each of the settlor's four children, contingently upon their surviving the event of the settlor's death. Those interests were, to my mind, distinct and different in kind and quality from the rights of the four children to share in surplus income during the life of the settlor.

I, therefore, agree with the view of Danckwerts J. which he expressed as follows: "It seems to me that, as regards the "capital, the interests which the beneficiaries got were interests

[2] [1956] 2 W.L.R. 735; [1956] 1 All E.R. 627.
[3] [1935] A.C. 382.
[4] (1952) 31 A.T.C. 179.
[5] 1918 S.C. 720.
[6] [1940] A.C. 350; 55 T.L.R. 1025; [1939] 3 All E.R. 787.
[1] [1933] A.C. 257; 49 T.L.R. 169.

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"which arose only upon the death of the settlor. Until then "they had merely contingent interests in the capital, dependent "upon them surviving his death and it was upon the death of "the settlor that they obtained vested interests in equal shares "in the rest of the capital, and upon that event fresh interests "came into being."

But the question in regard to the daughters' annuities given by clause 4 (1) of the settlement is, to my mind, far more difficult. Mr. Stamp argued with great force that, by parity of the reasoning applied in answering the question of the head of claim relating to capital, the legal effect of the settlement was in this regard to create and give rise for the first time on the settlor's death to two annuities of £250 in favour of the daughters for the remainder of their respective spinsterhoods; and that these interests, being properly speaking "annuities" (as that term is commonly used), are quite distinct and different not only in their incidents but also in kind and in quality from any beneficial interests in the settled property which the daughters had during the settlor's life, particularly from their priority income rights to the extent of £250 each during that period. The daughters' rights to receive the last-mentioned sums of £250 were not, according to Mr. Stamp's argument, in truth annuities as that word should be understood at all. During the settlor's life, said Mr. Stamp, the rights of the daughters were to receive certain shares of the total annual income of the settled property, the fractions varying with the amount of the income received. Put simply, they were each entitled to one half of the first £500 of such income and to one quarter each of the balance (assuming, of course, that both daughters remained unmarried and that both sons continued to live). After the settlor's death, each unmarried daughter would be entitled to get each year £250, no more and no less: before the settlor's death, she would never receive that sum, except in the very improbable event of the income of the settled property being in any year exactly £500. Except in that event, each daughter would in fact receive from the trustees a cheque for a varying sum, either less or greater than £250. According to this argument, it follows that, since the interests of the daughters ceased altogether on the settlor's death and were replaced by the new annuities, the latter fall within the scope of section 2 (1) (*d*) of the Act.

Notwithstanding the force and attraction of the argument, I have, on the whole, come to the conclusion that it ought to be rejected. I do not, of course, forget that, according to the rule laid down for us by the House of Lords in *Inland Revenue Commissioners* v. *Duke of Westminster*,[2] it is the duty of the court to determine the question of liability to duty according to the legal effect of the settlement or other transaction which gives rise to the claim. The court is not entitled to decide the question

[2] [1936] A.C. 1; 51 T.L.R. 467.

by reference to the substance of the matter, if by that term is meant according to the process of treating the rights created as equivalent to rights of a well-recognized and similar character which would or might have been created in some other or more usual way, and which those responsible are to be presumed to have intended, and by disregarding the true legal effect of the deed or other transaction which is before the court.

On the other hand, the words in the section, "beneficial "interest," ought not to be construed as referring exclusively to the technical forms of conveyancing. (See per Lord Reid in *Coutts & Co.* v. *Inland Revenue Commissioners.*[3]) Nor ought the word "annuity" for this purpose to be confined to a beneficial disposition expressly so called or to one having specific incidents, providing for its security. (See the language of Jenkins L.J. in *In re Duke of Norfolk.*[4])

In the present case, as I think, the legal effect of the settlement was to provide for each unmarried daughter a first right—that is, a right in priority to all other interests created or conferred—to the personal enjoyment of the yearly sum of £250. There was, of course, this difference in the incidents of that right during the settlor's life and after his death. During the former period the yearly sum was payable exclusively out of the income of each year and was supported by no charge on capital and by no continuing charge on income. After the settlor's death the yearly sum was charged on the corpus of a fund specially appropriated for the purpose; but in point of beneficial enjoyment there was no essential difference, in my judgment, before and after the settlor's death. The difference was that of incidents (particularly security) in accordance with the provisions in the settlement which were, in their nature, administrative in kind; that is, directing the appropriation of specific sums to provide and secure the yearly sum to the exoneration of the rest of the settled property.

In my judgment, the fact that, save in the very exceptional case mentioned, the sum paid in any year to each daughter was some sum other than £250 is not significant. In any year in which the income of the settled property exceeded £500, a strict statement accompanying the trustees' cheque would show it to be made up, as to £250, of a sum payable under clause 3 (1) and, as to the balance of one quarter, of a share or surplus income under clause 3 (2).

The case in this respect is not different from that commonly met with, where an annuitant, in the ordinary sense, is also one of the residuary legatees of income. The present case, in my judgment, has to be determined as if the surplus income under clause 3 (2) were divisible among a class of persons which did not include either of the daughters.

[3] [1953] A.C. 267, 283; [1953] 2 W.L.R. 364; [1953] 1 All E.R. 418.

[4] [1950] Ch. 467, 488; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.

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Danckwerts J. accepted the argument of Mr. Stamp. He said: "I must look at the terms of the settlement. What each "of the two sisters had during the lifetime of the settlor was "not, as it seems to me, in truth an annuity at all. They were "entitled to the income of the settled fund in equal shares. "There was a top limit of £250 which would prevent them "getting more than £250 a year so long as they both remained "unmarried, but, in fact, during most of the time what happened "was that the top limit never came into consideration at all "because the fund produced less than £500 a year. There were "some years in which the fund produced more than £500 a "year and then, of course, the top limit would apply. Other-"wise, what they got was simply an annual share in the income "of the trust fund. If one of them married or died, then the "survivor had a different limit." Then there is a reference to what that limit was.

The judge continued: "Now, what happened upon the death "of the deceased? Those arrangements, as it seems to me, "came to an end and instead you find that the trustees are "required to set aside two appropriated funds; each of them "is to be sufficient to produce £250 a year and out of that "£250 a year an annuity in the proper sense of the term "is to be provided in each case for the relevant daughter; "then, subject to that, the whole capital and income of the trust "funds becomes divisible among the four beneficiaries, the four "children of the settlor. Therefore, it seems to me, there comes "into being an interest of quite a different nature from that "which was created during the lifetime of the settlor, to wit, "two definite annuities of £250 with different rights from any-"thing the daughters had before."

With all respect to the judge, I have come to a different conclusion. In my judgment, during the settlor's life each daughter was entitled to receive and was in beneficial enjoyment and possession of a yearly sum of £250 in priority to all other interests, subject only to the limitation that, if the income of the settlement did not extend to £500 altogether, each daughter would pro tanto go short.

I should perhaps state again that I am proceeding throughout on the hypothesis conceded by Mr. Pennycuick and Mr. Stamp before us that we are to judge the matter on the footing that all the relevant provisions of the settlement are those in clauses 3 and 4 and that we are not concerned with actual figures.

The daughters being in beneficial enjoyment of that right, there was, as it seems to me, no change in the beneficial enjoyment and possession such as would give rise to a claim for duty. I agree with Mr. Pennycuick that prima facie there must, in order to give rise to a valid claim for duty, whether under section 1 or under section 2 of the Finance Act, be a change, not merely of source or title, but of possession or enjoyment.

Mr. Stamp conceded that there must be some limits on the

full rigour of his argument. Suppose a case where under a settlement an annuity, expressly so called, of £X per annum is given to A during a settlor's life, also expressed to determine on the settlor's death, and thereafter another annuity of exactly similar amount is given to A for the rest of A's life; or suppose an annuity of £X to A charged on income only during the settlor's life and after his death on corpus also, or an annuity charged after the settlor's death on different funds from those funds designated to support the annuity during the settlor's life. In all these cases Mr. Stamp conceded, rightly and inevitably, as I think, that no claim for duty could arise on the settlor's death.

Mr. Stamp was challenged by Mr. Pennycuick to indicate where in such cases the line should be drawn, so that all these cases falling on one side of the line could be recognized as exempt for duty. Mr. Stamp declined to accept the challenge, quite properly and justifiably. We are not here concerned with the attempted formulation of principle or rule of thumb for the determination of all cases of this character, but with the question, aye or no, whether on the facts of this case, on the true interpretation and legal effect of this settlement made on January 4, 1929, duty became exigible on the settlor's death in respect of annuities given to his daughters by clause 4 of the settlement.

Cases of this kind are always difficult (and I have found this case no exception), some on their special facts falling on one and some falling on the other side of the so-called dividing line. There will no doubt be fine distinctions; but, for the reasons that I have tried to state, in the present case I have come to the conclusion that no duty is payable in respect of the daughters' annuities. On this point, therefore, I would allow the appeal; but, on the other point, I think it should be dismissed.

JENKINS L.J. I am of the same opinion. In the course of the hearing before us it was, as I understood it, agreed on both sides that the provisions of the settlement as regards the payment by the daughters of the premiums on the original and additional policies, and the compensating increase of the maximum yearly sum of £250 payable to each daughter under the primary trust of income by the amount of the premiums on the additional policies as and when brought into the settlement, could be ignored; that £250 per annum could be treated as the relevant maximum figure in respect of each daughter; and that one half of each year's income of the trust fund could be treated as having amounted, at all material times during the life of the settlor, to not less than £250.

With the above-mentioned simplifications, the legal effect of the settlement may be thus summarized: (1) During the life of the settlor: (a) each of the two daughters, so long as both were living and unmarried, was entitled to receive year by year out of the income of the trust fund one half of the amount of such income or the sum of £250, whichever should be the less, with

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no right of recourse to the income of any future year or to the capital trust fund to make good any amount whereby one half of such income for any year might fall short of £250; (b) in the event (which did not in fact happen) of either daughter marrying or dying, her interest in income as above described was to cease and the other daughter was thenceforth until her death or marriage to receive year by year the whole of the income of the trust fund or £410, whichever was the less, with the same absence of recourse to the future income or to capital as in the case of the £250; (c) in the event of the income for any year being more than sufficient to provide for each daughter the sum of £250 or, for the surviving unmarried daughter, the sum of £410, as the case might be, the surplus income for that year was to be divided equally amongst all the four sons and daughters of the settlor or such of them as should for the time being be living.

(2) After the death of the settlor: (a) the trustees were to appropriate out of the trust fund in respect of each daughter, provided she should then be unmarried, a fund sufficient at the time of appropriation to produce out of its income an annuity of £250, which was to be paid to such daughter so long as she should be living and unmarried, and, in the event of the income of such appropriated fund proving at any time insufficient to pay such annuity in full, resort might be had to the capital thereof to make good such deficiency; but any surplus income of such appropriated fund remaining after payment of such annuity was to be applicable as income of the remainder of the trust fund; (b) the trust fund remaining after the appropriation as above of the funds or fund required to provide the annuities or annuity payable to the daughters, or either of them, and also each or any fund so appropriated after the annuity to which it related should have ceased to be payable, were to be held both as to capital and income, in trust absolutely for all the four sons and daughters of the settlor or such of them as should be living at his death and, if more than one, in equal shares.

It thus appears that from the date of the settlement until the death of the settlor each of the daughters was entitled to receive, in respect of each year during her life, or until her marriage, out of the income of the trust fund for such year the sum of £250, or one half of the income of the trust fund for such year, which ever was the less: whereas on the death of the settlor she became entitled during her life or until her marriage to a yearly sum of £250 payable out of the income for each year or, if need be, out of the capital of a part of the trust fund appropriated for the purpose; and that, during the life of the settlor (but not after his death), the yearly sum payable to either of the daughters as above might be increased to £410 or to the whole of the income of the trust fund, whichever might be the less, in the event of the other daughter dying or marrying.

It further appears that, from the date of the settlement until

the death of the settlor, the four children, or such of them as should for the time being be living, were entitled in equal shares to any surplus income of the trust fund for any year remaining after payment of the two yearly sums of £250 payable to the two daughters respectively, or the sum of £410 payable to the sole surviving and unmarried daughter, as the case might be, in respect of that year; and each of the four children was further contingently entitled in the event of his or her surviving the settlor to share equally in the capital of the trust fund with the others or other of them so surviving, subject, as regards the funds or fund appropriated to provide the annuities or annuity of £250 payable to both or either of the daughters, to the trusts for payment of such annuities or annuity out of the income or, if need be, the capital thereof; whereas, from and after the death of the settlor, in the events which happened, all four children became entitled, subject as aforesaid, to immediate and absolutely vested interests in the capital and future income of the trust fund in equal shares, including the two funds appropriated to provide the two daughters' annuities as and when those annuities should respectively cease to be payable, and any surplus income arising from those funds in the meantime.

Such being the effect of the settlement, the question in the appeal is whether each or either of the following interests—that is to say, (a) the annuities of £250 each provided for the daughters on the death of the settlor by means of the appropriations directed to be made for that purpose, and (b) the absolute vested interest in one-fourth of the capital and future income of the trust fund (subject, as regards the appropriated funds, to the trusts for payment of the annuities) attained on the death of the settlor by each of his four children—attracted estate duty on the death of the settlor under the provisions of section 2 (1) of the Finance Act, 1894, which, so far as relevant, is in these terms: "Property passing on the death of the deceased shall be "deemed to include the property following, that is to say:— . . . "(*d*) Any annuity or other interest purchased or provided by the "deceased . . . to the extent of the beneficial interest accruing "or arising . . . on the death of the deceased."

Mr. Pennycuick, for the trustees of the settlement, admits that the investments and, for the purposes of this appeal, the policies comprised in the settlement must be taken to have constituted an "interest" within the meaning of the subsection, though I understand him to reserve this point so far as the policies are concerned for possible argument to the contrary in the event of the matter going higher. On the footing that the settled investments and policies constituted an "interest," it is, of course, plain that they were an interest provided by the deceased. It follows that the interest so provided (that is, the investments and policies) attracted estate duty on the death of the deceased to the extent of any beneficial interest accruing or arising on such

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death, and the point at issue is whether any beneficial interest did so accrue or arise within the meaning of the subsection.

I agree with the judge that, so far as decided cases are concerned, the whole of the guidance available on this question is to be found in *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*,[5] and in particular in the passages referred to by him from the speeches of Lords Porter [6] and Reid.[7]

Lord Porter said [8]: "In *Adamson's* case [9] there was, as the "majority of their Lordships held, a change in the interest of "the beneficiaries: before the death they had a contingent "interest which might have been divested; after it they had a "vested interest. The reasoning is best seen in the observa- "tions of Lord Warrington.[10] He says: 'In the present case "'the interest of each child was unquestionably provided by the "'deceased, and is therefore to be deemed to be included in the "'expression "property passing on the death of the deceased," "'but only to the extent of the beneficial interest accruing or "'arising on the death of the deceased. Before his death each "'child had a beneficial interest, but one that might be "'destroyed either by an exercise of the power of appointment "'or by the death of the child in the lifetime of the deceased: "'on his death without exercising his power the beneficial "'interest of each child became absolute and indefeasible.' "Your Lordships' House so decided in *Adamson's* case,[11] and "Lord Warrington's words set out the ground upon which the "decision was based. On that reasoning there was as a result "of the death a change in the rights which each child enjoyed. "Until it occurred he might have got all or nothing or some "intermediate sum: afterwards his rights were finally deter- "mined."

Lord Reid said [12]: "In the cases where the Crown has "succeeded it has been because it was held that some right or "property of a different kind from that previously enjoyed by "the beneficiary arose or accrued on the death, or the right of "the beneficiary was in some way enlarged or altered and not "merely because the beneficiary's existing right became more "valuable after the death."

On the death of the deceased in the present case, was there such a change in the rights enjoyed by the two daughters or in the rights enjoyed by all the four children of the deceased as to justify the conclusion that a beneficial interest then accrued or arose within the meaning of the section? First, as to the position of the two daughters; apart from her interest in any surplus income, the rights of each daughter during the life of the settlor did not materially differ from those of the recipient of an annuity

[5] [1953] A.C. 347; [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403.
[6] [1953] A.C. 347, 365.
[7] Ibid. 374.
[8] Ibid. 365.
[9] [1933] A.C. 257.
[10] Ibid. 277.
[11] [1933] A.C. 257.
[12] [1953] A.C. 347, 375.

of £250 payable as regards each year out of the income of a given fund for that year and not further or otherwise, with no right of recourse to future income or to capital, to make good any deficiency. Such an annuitant, if the designated income for any year exceeded £250, would be entitled to receive out of such income the sum of £250 and no more; and, if the designated income for any year fell short of £250, would be entitled to the whole of such income. It is true that the primary trust of income in favour of the two daughters in the present case is expressed as a trust to divide the income equally between them, with a proviso to the effect that the income payable to each or either of them is not to exceed £250 in any year, but this seems to me to be no more than a somewhat periphrastic method of achieving the same result as if each of them had in form been given a yearly sum of £250 payable as regards each year out of and to the extent of one half of the income of the trust fund for that year and not further or otherwise. Like the annuitant referred to above, each daughter was, when the designated income (that is, as regards each daughter, one half of the income of the trust fund) for any year was equal to or exceeded £250, entitled to receive £250 out of such income; and, apart from the trust for division of any surplus (which I am for the moment ignoring) nothing more. If, on the other hand, the designated income for any year were to fall short of £250, she was, again like the annuitant referred to above, entitled to receive in respect of that year the whole of such income and nothing more. In other words, each daughter was entitled during the life of the settlor, so long as she was living and unmarried, to receive in respect of each year a sum of £250 out of the designated income for each year or the whole of such designated income, whichever was the less; and I think I was accurate in so describing her position earlier in this judgment.

If I am right so far, then it seems to me to follow that each daughter is to be regarded as entitled, as from the date of the settlement and before as well as after the settlor's death, to receive during her life or until her marriage the yearly sum of £250, payable as regards each year during the settlor's life out of and to the extent of one half of the income of the trust fund for that year, with no right of recourse to future income or to capital to make good any deficiency, and payable as regards each year after the settlor's death out of the income of a part of the trust fund appropriated for the purpose, with a right of recourse to the capital of the appropriated fund to make good any deficiency in such income.

If the rights of each daughter under the primary trust of income are accurately thus described, it follows that the only changes in the character of her interest on the settlor's death were (1) that the possibility of her yearly payment being increased to £410 or the whole of the income of the trust fund, whichever might be the less, through the death or marriage of her sister,

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came to an end, which, as it seems to me, is wholly immaterial; and (2) that her yearly sum of £250, instead of being payable as regards each year only out of and to the extent of one half of the income of the trust fund for such year, was thenceforth provided for by the income of a fund appropriated for the purpose, with a right of recourse to capital to make good any deficiencies in such income.

In deciding this part of the case in favour of the Crown, the judge expressed his reasons thus: "I must look at the terms of "the settlement. What each of the two sisters had during the "lifetime of the settlor was not, as it seems to me, in truth an "annuity at all. They were entitled to the income of the settled "fund in equal shares. There was a top limit of £250 which "would prevent them getting more than £250 a year so long as "they both remained unmarried, but, in fact, during most of "the time what happened was that the top limit never came "into consideration at all because the fund produced less than "£500 a year. There were some years in which the fund produced "more than £500 a year and then, of course, the top limit would "apply. Otherwise, what they got was simply an annual share "in the income of the trust fund. If one of them married or "died then the survivor had a different limit. She then, of "course, received the whole income of the trust fund, but the "limit in her case was not twice £250 but was £410 a year; and "subject to those payments to be made to the two daughters, "then the four children were to receive the surplus income, if "there was any surplus income, after providing for the daughters' "rights, in equal shares. Now, what happened upon the death "of the deceased? Those arrangements, as it seems to me, "came to an end, and instead you find that the trustees are "required to set aside two appropriated funds; each of them "is to be sufficient to produce £250 a year and out of that £250 "a year an annuity in the proper sense of the term is to be "provided in each case for the relevant daughter; then, subject "to that, the whole capital and income of the trust funds becomes "divisible among the four beneficiaries, the four children of the "settlor. Therefore, it seems to me, there comes into being an "interest of quite a different nature from that which was created "during the lifetime of the settlor, to wit, two definite annuities "of £250 with different rights from anything the daughters had "before. Now, the daughters will not suffer any diminution if "the income of the funds is insufficient, and the ultimate "beneficiaries cannot touch the income of the appropriated fund, "but the daughters are to get annuities of a definite sum of £250 "each which are, if necessary, to be made up not only out of "the income of the appropriated funds, but out of the capital "of those appropriated funds if the income is insufficient for the "purpose of paying the annuities. It seems to me that these "are interests of quite different kinds which arise upon the death

"of the settlor and, therefore, it seems to me, must fall within "the terms of section 2 (1) (*d*)."

So far as the judge's reasoning is based on his statement to the effect that in fact most of the time the top limit never came into consideration at all because the fund produced less than £500 per annum and that, accordingly, save in the exceptional years when it produced more, what the daughters got was a share in the annual income of the trust, this no longer holds good; for, as mentioned at the beginning of this judgment, I understand that it was in the course of the hearing before us agreed on both sides that one half of each year's income of the trust fund could be treated as having amounted at all material times to not less than £250.

So far as the judge proceeds on the ground that, apart from any question of deficiencies, a share of the income of a trust fund with a top limit is not an annuity, I think, with respect to him, that he takes too narrow a view. I have endeavoured earlier in this judgment to show that a trust in this form confers on the beneficiary rights not distinguishable, in any material respect, from those conferred by a trust for payment of an annuity out of the income of a particular fund, where the annuity is payable as regards each year only out of the income of that year with no right of recourse to future income or to capital.

So far as the judge founds himself on the difference between an annuity secured by the income of an appropriated fund with a right of recourse to capital, and an annuity (though he would not so term it) of the kind taken by each daughter in the present case, where the payment in respect of each year is limited to the designated income for that year and there is no right of recourse to capital, I do not think this change, which only concerns the security for the annuity, and not its amount or duration, is of such a character as to justify the conclusion that, as from the death of the settlor, each daughter became entitled to a new and different right to receive £250 per annum, which accordingly constituted a beneficial interest accruing or arising on the death of the deceased within the meaning of section 2 (1) (*d*). A provision for appropriation to answer an annuity is an administrative provision whereby the annuitant's rights are limited to a particular part of a fund in order that the remainder of the fund may be set free for distribution; and I do not think the use of such a provision in the present case makes the position any different for the present purpose from what it would have been if the settlement had simply directed that from and after the settlor's death each of the daughters, so long as she was living and unmarried, should receive an annuity of £250 payable as regards each year only out of one half of the income of the trust fund for that year. Such a direction could, in my view, hardly have been held to attract duty under section 2 (1) (*d*). The appropriation merely limits the

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Jenkins L.J.

annuitant's rights against income to the income of a particular fund, and makes up for that by giving a right of recourse to the capital of such fund.

Mr. Stamp argued that the right of the two daughters to share equally with the two sons in any surplus income for each year during the life of the settlor remaining after payment to each daughter of £250 for that year in some way affected the character of the maximum yearly sum of £250 so as to make it different from an annuity. I cannot follow this. An annuity in the strictest sense may well be given in conjunction with a provision to the effect that the surplus income for any year remaining after payment of the annuity is to be divided amongst a class which includes the annuitant.

The judge rightly took the view that the question at issue is not to be resolved by loose references to the substance as distinct from the form of the settlement; but that does not mean that it is not permissible to ascertain the true nature and effect of the rights conferred by the settlement, whatever forms of words or machinery of conveyancing the draftsman may have employed to confer them.

As regards the interest of each of the four children in the capital of the trust fund, I think the judge was clearly right in holding, as he did, that section 2 (1) (*d*) applied. Before the death of the settlor, each child had a future interest in the capital of the fund contingent on him or her surviving the settlor and uncertain as regards its amount, which depended on the number of children who might survive him. After the death of the settlor, each child had an absolutely vested interest in one-fourth of the capital of the trust fund, and the future income thereon. I find it impossible consistently with the ratio decidendi in *Adamson's* case,[13] as explained by Lord Porter in *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*,[14] to hold that such vested interest in capital was not a beneficial interest accruing or arising on the death of the deceased within the meaning of section 2 (1) (*d*).

It is further, to my mind, quite plain that, in arriving at the extent or value of such beneficial interest, no deduction can be made in respect of the four children's interests pur autre vie in the surplus income during the life of the settlor, for these interests came to an end on his death. Any deduction in respect of their interests in expectancy is, of course, precluded by section 28 of the Finance Act, 1934.

For these reasons, I would allow this appeal, to the extent only of excluding from the property chargeable with duty under section 2 (1) (*d*) the funds appropriated to provide the two annuities.

[13] [1933] A.C. 257.

[14] [1953] A.C. 347, 365.

BIRKETT L.J. I agree with the judgments which have been delivered by the Master of the Rolls and Jenkins L.J., and have nothing further to add.

Appeal allowed in part.

Solicitors: *Baddeleys & Co.; Solicitor of Inland Revenue.*

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PARKES' SETTLEMENT, *In re.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.

[QUEEN'S BENCH DIVISION.]

* PETER LONG & PARTNERS *v.* BURNS.

1956
Mar. 21.
Lord Goddard C.J.

[1955 L. No. 573.]

Agency — Estate agent — Commission — Payable upon introduction of person "ready, willing and able to enter into a binding contract "to purchase my business" — Contract to purchase signed by purchaser — Rescinded before completion owing to innocent misrepresentation by agents' representative — Meaning of "binding "contract" — Whether agents' commission payable.

By a contract in writing contained in a commission note and entered into between the defendant, the owner of a garage, and the plaintiffs, who were estate agents, it was agreed that the plaintiffs' commission should be payable upon their "introducing "a person ready, willing and able to enter into a binding contract "to purchase" the property. A purchaser signed a contract to purchase the property and paid a deposit after being informed by a representative of the plaintiffs that a town planning scheme then in force would affect the property only to a very limited extent. The purchaser, who subsequently discovered that the scheme would affect the property substantially and would in fact result in the buildings on the site being demolished, resiled from the contract before completion, and the contract was eventually cancelled by agreement between the parties on payment of a certain sum by the purchaser to the defendant. The plaintiffs claimed their commission, but the defendant refused to pay.

In an action by the plaintiffs for damages for breach of contract, it was agreed that the purchaser had been induced to sign a contract by, inter alia, the statement made by the plaintiffs' representative:—

Held, (1) that the words "binding contract" when used in relation to a contract for the sale of property meant a contract which could be enforced by the vendor against the purchaser; that, on the true construction of the contract which was contained in the commission note, the plaintiffs' commission was payable when the contract to purchase the property had been shown to be a binding contract, and not necessarily at the moment that the contract to purchase was signed, as it might not be possible to say at that date or until completion whether the contract was binding or not.

(2) That as the purchaser had been induced to sign the contract by, inter alia, the innocent misrepresentation made by the plaintiffs' representative as to the effect of the town planning scheme, the

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purchaser was entitled to resile from the contract while it was still executory, and, therefore, the contract entered into was not a binding contract and the plaintiffs were not entitled to succeed.

Midgley Estates Ltd. v. *Hand* [1952] 2 Q.B. 432; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394 distinguished.

Action.

In 1954, the defendant, Mrs. Beatrice A. Burns, the owner of a garage at Three Mile Cross, near Reading, put the property in the hands of the plaintiffs, Peter Long and Partners, estate and business agents, and on August 8, 1954, she signed the following commission note: "I hereby appoint you my sole "agent for the sale of my business and property the details of "which are truly stated above and overleaf, at the price of "£9,750 and trade stocks at valuation. In consideration of your "services I undertake not to revoke this agreement and agree "to pay your commission in accordance with the terms stated "herein on the total purchase price (including stock) upon your "introducing a person ready, willing and able to enter into a "binding contract to purchase my business referred to above. "In further consideration of your services I agree to leave the "disposal of my business and property with you as my sole "agent for a period of three months from the date hereof, nor "will I consent to my business being sold except to a person "introduced by you." The following day, August 9, 1954, the plaintiffs wrote to the defendant stating that they accepted "the appointment to act as your sole agents in the disposal of the "above business for a period of three months from the 8th "instant, and confirm your valued instructions to introduce a "person able, ready and willing to purchase your concern at the "price of £9,750, or any other such price as you may hereafter "accept."

On September 12, 1954, a prospective purchaser, a Mrs. Pritchard, who had first heard that the garage was for sale through her husband's employers, and who had had no previous dealings with the plaintiffs, met the defendant at the garage premises, a representative of the plaintiffs, one Wade, being present at the meeting. A statement subsequently made by Wade, which was accepted by the defendant as a true account of the events which took place at the meeting, stated that Mr. Pritchard, who was also present at the meeting, asked him, Wade, if he knew of any town planning schemes, and Wade informed him that two or three feet would be taken from the forecourt of the garage. Mrs. Pritchard agreed to buy the property for £7,750, and signed the contract, paying to Wade a deposit of £300. On November 4, 1954, Mrs. Pritchard having discovered that a road widening scheme was in existence which, when put into force, would involve the acquisition by the county council of almost the entire site of the garage property and the demolition of the buildings upon it, informed the defendant through her solicitor that she could not continue with the

purchase. Eventually, agreement was reached between the defendant and the purchaser to cancel the contract on payment by the purchaser to the defendant of £150. On January 12, 1955, the plaintiffs, at the request of the defendant, returned the £300 deposit to the purchaser but requested the payment of the commission which they alleged to be due to them. This the defendant refused to pay.

In this action, the plaintiffs, relying on the agreement contained in the commission note of August 8, 1954, claimed that they had negotiated on the defendant's behalf the sale of the property to Mrs. Pritchard, who had entered into a binding contract to purchase the property for £7,750; that their commission amounting to £387 10s. thereupon became due; that the defendant had refused, in breach of contract, to pay that sum; and that they were entitled to damages.

The defendant claimed that the contract was contained in the commission note signed on August 8, 1954, together with the letter from the plaintiffs dated August 9; alternatively, if the contract was contained in the commission note it had been varied by the letter and a further document dated October 16, 1954. She admitted that Mrs. Pritchard had entered into a contract to purchase the property, but denied that in the events which had happened it was a binding contract. She alleged that by reason of the innocent representation made by Wade, the plaintiffs' representative, acting for and on behalf of the defendant, Mrs. Pritchard had rescinded the contract before completion as she was entitled to do, and denied that the plaintiffs were entitled to the commission claimed or that they had suffered damage.

By their reply the plaintiffs contended, inter alia, that at all material times the contract was binding on Mrs. Pritchard; alternatively, that it was binding upon her until she rescinded it, which they did not admit she had a right to do.

At the trial it was agreed (1) that the writer of the letter of August 9, 1954, intended only to bring the name of the plaintiffs' firm before the defendant, and to emphasize that the rate of commission due to the plaintiffs was 5 per cent.; (2) that the plaintiffs asked the defendant to sign the document of October 16, 1954 (which related to commission), for the purpose only of insuring that their commission was secured; (3) that Mrs. Pritchard was induced to sign the contract to purchase the property, inter alia, by the statement made by Wade on September 12, 1954.

Peter Dow for the plaintiffs.
James Stirling Q.C. for the defendant.

The following cases were cited in argument: *Midgley Estates Ltd.* v. *Hand* [1]; *Dennis Reed Ltd.* v. *Goody* [2]; *Hinckley and*

[1] [1952] 2 Q.B. 432; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394.

[2] [1950] 2 K.B. 277; 66 T.L.R. (Pt. 1) 918; [1950] 1 All E.R. 919.

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South Leicestershire Permanent Benefit Building Society v. *Freeman.*[3]

LORD GODDARD C.J. This is a claim by a firm of house and business transfer agents for commission under the terms of a commission note given to them by the defendant on August 8, 1954. It is curious how many difficult points arise in cases relating to house agents' commission. I think it is largely due to the fact that agents, not unnaturally, try to frame the commission notes for their clients to sign in such a way as to avoid the decisions which are given by the courts from time to time in these cases. It has been laid down clearly and concisely by the Court of Appeal that the general understanding involved in the employment of a house or property agent to sell property is that he is to be remunerated only if the sale goes through, so that the vendor will receive the purchase price out of which he will pay the commission. That is the general principle, which applies in the absence of special circumstances or special terms. House agents try to frame their commission notes so that they will get commission although the actual sale may not materialize but may go off for one reason or another.

In the present case on August 8, 1954, the defendant, the owner of a garage at Three Mile Cross, a village three miles outside Reading, put the property into the hands of Messrs. Peter Long & Partners and signed this commission note: "I hereby "appoint you my sole agent for the sale of my business and "property the details of which are truly stated above and over-"leaf, at the price of £9,750 and trade stocks at valuation. In "consideration of your services I undertake not to revoke this "agreement and agree to pay your commission in accordance "with the terms stated herein on the total purchase price "(including stock) upon your introducing a person ready, willing "and able to enter into a binding contract to purchase my "business referred to above. In further consideration of your "services I agree to leave the disposal of my business and "property with you as my sole agent for a period of three months "from the date hereof, nor will I consent to my business being "sold except to a person introduced by you."

That commission note having been signed, the agent no doubt did something in the way of circularizing people; but in September a Mr. and Mrs. Pritchard came along as prospective buyers of the property. They were not introduced to the defendant by the plaintiffs at all, but that does not matter for the purpose of this action because the defendant had undertaken not to sell her property to anybody except a person introduced by the plaintiffs. She had bound herself so that she could not sell it to a friend of her own who came along; and therefore, if she sold the property to Mr. and Mrs. Pritchard, although they

[3] [1941] Ch. 32; 57 T.L.R. 71; [1940] 4 All E.R. 212.

came along without any effort on the part of the plaintiffs, she would have to pay the plaintiffs' commission if the conditions of the commission note were to be fulfilled. [His Lordship stated the facts and continued.] The agents now claim that they are entitled to their commission, a very considerable one, because a person ready, willing and able to enter into a binding contract to buy the property did come forward, and a binding contract was entered into.

The day after the commission note was signed the plaintiffs wrote a letter to the defendant in which they said that they accepted "the appointment to act as your sole agents in the "disposal of the above business for a period of three months "from the 8th instant, and confirm your valued instructions to "introduce a person able, ready and willing to purchase your "concern at the price of £9,750, or any other such price as "you may hereafter accept." Mr. Stirling contended that that letter varied the terms of the commission note. The difficulty is that it does not seem to have been treated in that way by the parties. The defendant had already appointed the plaintiffs on the terms in the commission note and I do not think I can hold, in the circumstances, that that letter of August 9 varied the contract. It shows clearly what the plaintiffs had in mind, namely that they had to produce a purchaser. I am going to assume that the contract between the parties was as stated by the commission note, and that the commission was payable if the plaintiffs produced a person ready, willing and able to enter into a binding contract.

The first thing I have to consider is: What is the meaning of the words "binding contract"? I have to give a meaning to the word "binding." I think it means a contract which is enforceable. Every contract entered into freely between two persons, provided that it is not one of a class of contracts which is void, as, for instance, a contract entered into by an infant, or one entered into for some immoral or illegal purpose, is a binding contract, although it may be voidable. Mr. Dow, who argued this case very carefully and well, said that, whether the contract is induced by fraud or by innocent misrepresentation, unless and until it is set aside, it is a binding contract. But it may not be binding in one sense, because, until it is acted upon, it may not have any legal effect. In the present case, for instance, putting aside the question of misrepresentation for the moment, if the parties had completed, as the representation is not alleged to have been fraudulent, upon discovering the wide effect of the town and country planning scheme, the purchaser could not have avoided the transaction and demanded her money back. A party can only rescind on the ground of innocent misrepresentation while the contract is executory; but it was executory at the time when the purchaser resiled in the present case.

Mr. Dow argued that the commission note gave him a cause of action the moment that the contract was signed and said that

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he could have issued his writ there and then. I do not think that is so. I think that "binding contract" means, in a case concerned with the sale of property, a contract which can be enforced by the vendor against the purchaser. There are many contracts entered into with regard to the sale of land which, because of difficulties of title, or for some other reason, cannot be enforced and completion cannot be insisted upon. Sometimes the vendor can resile because some requisition is made with which the vendor is unable or unwilling to comply. Sometimes the purchaser discovers some fact which he had not known but which he had a right to know, or because there has been misrepresentation to him, albeit innocently, he has the right to rescind the contract. I think that the true construction of the present contract is that the commission is payable when the contract has been shown to be a binding contract; and it may be that it cannot be shown to be a binding contract until completion has taken place. In so holding I am not in any way departing from what was laid down in *Midgley Estates Ltd.* v. *Hand*,[1] in which the term "legally binding contract" was used. I do not think that the term "legally" makes any difference. "Binding" means "binding in law." In *Midgley Estates Ltd.* v. *Hand* [1] a purchaser having been introduced, the agents claimed that they were entitled to commission, and it was held that they were so entitled because the purchaser had signed a contract and no one disputed that that contract was binding upon him. He failed to complete because he had not got the money; but, nevertheless, the contract was a binding contract. The difference between *Midgley's* case [1] and the other cases which have been decided on matters regarding agents' commission was that the law now is that, if no special condition is imported, the agent is only entitled to his commission if the transaction really goes through and money is received by the vendor. In *Midgley's* case [1] the agent stipulated that he was entitled to receive his commission if a binding contract was executed; a binding contract was executed and no one suggested that it was a contract which could be rescinded. The reason why the vendor did not get the money was that the purchaser failed to pay because he had not got the money. The stipulation as to the legally binding contract which had been introduced enabled the agent to recover, although the principal did not receive the purchase price.

In the present case the words used are the same. The word "legally" makes no difference. The expression used is "a "binding contract." But this is not a case in which the purchaser says "I am bound by the contract but I cannot fulfil "it." It is said that this was not a binding contract. I have to consider whether it was a binding contract. As the parties have agreed that the purchaser was induced to sign the contract, among other things, by the statement made by the plaintiffs'

[1] [1952] 2 Q.B. 432; [1952] 1 All E.R. 1394.

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representative, as to the effect of the town planning scheme, I am bound to hold that it was a contract induced by an innocent misrepresentation, and I cannot say that the representation was not made with reference to a substantial matter, and, although it was an innocent misrepresentation, it was a representation of which the purchaser was entitled to take advantage while the contract was still executory and say that she would not carry out her bargain because she had been induced to enter into it by the representation. It is true that the representation was an honest one, but it was one of the matters that induced her to enter into the contract. As I understand the law, a person is not bound to show that the innocent misrepresentation was the only representation made. If it was one of the representations made and was of a substantial nature and it affected her mind (and it is agreed that it did) I think she was entitled to say that she was entitled to resile from the contract. That is what she said. It is true that the defendant took up the attitude that the purchaser was not entitled to resile, and that the parties reached a settlement among themselves, but I cannot say that this was a binding contract, if it was one from which the purchaser was entitled to resile; and, on the agreed facts, I think she was entitled so to resile. Therefore, in my opinion, the true meaning of this commission note is that the money does not become payable at the moment the contract of sale was signed, because, until completion, one cannot say whether it was a binding contract of sale or not. If completion has taken place, well and good. It has been shown that this is not a binding contract of sale, because the purchaser had a right to rescind the contract and to say that it was not a contract binding upon her.

For these reasons I have come to the conclusion that the plaintiffs cannot recover in this action, and the claim is dismissed with costs.

Judgment for defendant.

Solicitors: *J. J. Dunnett; Torr & Co.*

E. M. W.

[COURT OF APPEAL.]

* W. F. HARRISON & CO. LTD. *v.* BURKE.

C. A.

1956
Mar. 15.

[Plaint No. H. 283.]

Denning, Morris and Parker L.JJ.

Assignment — Legal — Debt — Notice to debtor — Date of assignment wrongly stated—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 136 (1).

Notice to a debtor of assignment of the debt is not valid if the date of the assignment is wrongly stated in the notice.

On December 6, 1954, the defendant owed some £33 unpaid

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instalments under a hire-purchase contract, and was further liable to pay in due course some £170 in respect of future instalments. On December 7, the creditors assigned to the plaintiffs a purported debt of £203 said to be owed by the defendants. The plaintiffs sent to the defendant a notice, dated December 6, but not dispatched until December 8, stating that "the debt amounting to £203" had been assigned to them by "an indenture dated December 6":—

Held, that the notice failed to comply with the requirements of section 136 of the Law of Property Act, 1925,[1] and was invalid, as the date of the assignment was misstated.

Stanley v. *English Fibres Industries Ltd.* (1899) 68 L.J.Q.B. 839 approved.

Semble, that the misstatement of the amount presently due also invalidated the notice.

Appeal from His Honour Judge Harold Brown, sitting at St. Helens County Court.

The facts are stated in the judgment of Denning L.J.

W. G. O. Morgan for the plaintiffs.

The defendant did not appear.

Denning L.J. Mrs. Burke carries on a confectioner's business in Wigan, and she arranged with dealers called Harrisons to supply her with a refrigerated counter. She could not pay the money down, so it was arranged on hire-purchase terms. The hire-purchase company was the Woodcock Hire-Purchase Co. In the result, Woodcocks let to her a refrigerated counter on a payment of £30 down and 24 instalments of £8 9s. 6d. a month until a total of £233 8s. would be paid; and her husband guaranteed the payments. The first £30 was paid, but no more, because there was a dispute as to the quality of the article. Nothing now turns on that. That hire-purchase agreement was dated August 19, 1954. By an assignment of December 7, 1954, the Woodcock Co. purported to assign to the Harrison Co. "All those the "several debts or sums of money now legally due and owing to "'the vendor'"—that was to the Woodcock Co.—"by the "persons whose names and addresses and amounts of their "respective debts are set forth in the schedule hereunder "written"; and in the schedule was put the names of Mr. and Mrs. Burke, and the amount £203 8s. That is the date of the assignment. The date when it was executed, as appears from the document, was December 7, 1954. But apparently the day before that, on December 6, 1954, a letter, purporting to be a notice of assignment, was drawn up by Harrisons, dated

[1] Law of Property Act, 1925, s. 136: "(1) Any absolute assign- "ment by writing under the hand of "the assignor . . . of any debt or "other legal thing in action, of which "express notice in writing has been "given to the debtor . . . is effectual "in law . . . to pass and transfer "from the date of such notice—(*a*) "the legal right to such debt or thing "in action; (*b*) all legal and other "remedies for the same; and (*c*) the "power to give a good discharge for "the same without the concurrence "of the assignor: . . ."

December 6, 1954, and addressed to "Mrs. A. V. Burke." "Dear Madam, We hereby give you notice that by an indenture "dated December 6, 1954, the debt amounting to £203 8s. owing "by you to Woodcock Hire-Purchase Co. of Woodcock Street, "Wigan, has been assigned to us absolutely and the debt is now "due and owing to us. Also take notice that if you pay the "amount or any part thereof, to any person other than ourselves "or our authorized agent after receipt of this notice, you will still "be liable to us for the amount. Yours faithfully, for W. F. "Harrison & Co. Ltd." That letter was not dispatched to Mrs. Burke on December 6. It was sent by Harrisons to their solicitors, who sent it off to her on December 8, and it reached her on December 9.

The whole question in this case, as it comes before us, is whether that is a valid notice of assignment such as to transfer to Harrisons the legal right to sue for the debt. I ought to point out at once that the sum owing at that date of December 7, 1954, was not £203 8s., as stated in the assignment, but only the instalments which had then accrued due—£33 18s., and so the notice of assignment did not give the right figure for the debt. Further, apart from that, it gives the wrong date of the assignment: it said that the indenture was dated December 6, 1954, whereas the only assignment produced to the court is one dated December 7, 1954. The question is whether that error in giving the date of the assignment makes the notice bad.

In 1899, in *Stanley* v. *English Fibres Industries Ltd.*,[1] it was held by Ridley J. that if the date given for the assignment is bad, the notice does not comply with the requirements of the statute. I find myself in agreement with that decision. It is only necessary to read section 136 of the Law of Property Act, 1925, to realize that the notice in writing of the assignment is an essential part of the transfer of title to the debt, and, as such, the requirements of the Act must be strictly complied with, and the notice itself, I think, must be strictly accurate—accurate in particular in regard to the date which is given for the assignment; and even though it is only one day out, as in this case, the notice of assignment is bad.

I need not say anything about the amount of the debt, which in this case was put at £203 8s. when it was in fact only £33 18s.; but, as at present advised, I should have thought the notice of assignment ought to state the debt accurately too, because, after all, we are dealing with a transfer of title and the requirements of the Act must be strictly complied with. I find myself in agreement with the judgment of the county court judge that the assignee in this case did not prove a right or title in himself to this debt in accordance with the statute, and I think the appeal must fail.

[1] (1899) 68 L.J.Q.B. 839.

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Morris L.J. I agree. A question might be raised in regard to the assignment itself, which is an assignment of the debts or sums of money referred to in the schedule. The schedule refers to a debt owing from Mrs. Burke of £203. At the date of the assignment there was not a debt of £203. But we have not had argument in regard to the validity of the assignment itself, and so I express no opinion in regard to it. We have been concerned with the question as to whether there has been a valid notice in writing of the assignment. The section requires express notice in writing, and the section provides that after the giving of "express" notice in writing, the assignment "is effectual in "law . . . to pass and transfer from the date of such notice— "(*a*) the legal right to such debt or thing in action," etc.

Now, my Lord has read the terms of the notice in writing in this case, and it refers to the debt amounting to £203. If this is a good notice in writing, it would seem to be a notice as from the date of which there would be a "legal right to such debt," namely, a debt of £203. But there was not a debt of £203.

But again I do not think it necessary to decide this case on a consideration of the points that arise in regard to that aspect of the matter. I think the case can be decided by reference to the question of the date. The notice is dated December 6. Whether the purported assignment was good or not, it was not in existence on December 6. The purported assignment came into existence on December 7. But it seems to me that it is necessary to comply with the section, and I think that a notice given on December 6 purporting to be a notice in reference to an assignment dated December 6, when there was no such assignment in existence, was, therefore, not a good notice to enable the assignment that came into existence the following day to be effectual to pass the legal right to the debt assigned. I therefore agree that the judge came to a correct conclusion.

Parker L.J. I also agree.

Appeal dismissed.

Solicitors: *R. I. Lewis & Co., for Goldrein & Co., Liverpool.*

F. R. D.

[Court of Appeal.]

C. A.
1956
Mar. 22, 23.
Lord Evershed M.R., Birkett and Romer L.JJ.

*MOUNTFORD and Others *v.* HODKINSON.

[1955 L. 129A.]

Agriculture—Agricultural holding—Notice to quit—Tenant's counter-notice—Form—Truculent letter—Whether notice invoking statutory protection—Agricultural Holdings Act, 1948 (11 & 12 *Geo.* 6, *c.* 63), *s.* 24 (1).

Practice—Notice.

The landlord of an agricultural holding served a notice to quit on the tenant who replied by letter: "I don't intend to go I shall "appeal against it and take the matter up with" the Agricultural Executive Committee:—

Held, that notices of this sort, whatever their form or language, should be held to be effective if they indicated so clear an intention to invoke the right which the Agricultural Holdings Act, 1948, gave that a landlord could not reasonably mistake what was meant; but that the tenant's letter in the present case did not reveal a sufficiently clear intention and was, therefore, not an effective counter-notice for the purposes of section 24 (1) of the Act.

APPEAL from Judge H. A. Tucker, sitting at Leek County Court.

George Martin was the landlord of an agricultural holding known as Bank Top Farm, Leekfrith, near Leek, Staffordshire, which was let on a ladyday tenancy to the defendant, Edward Hodkinson. On March 12, 1954, the landlord served on the tenant a notice determining the tenancy on March 25, 1955. On March 15, 1954, the tenant wrote to the landlord as follows: "In "reply to your notice that I received on Saturday I don't intend "to go I shall appeal against it and take the matter up with the "A.E.C." [the Agricultural Executive Committee] "As you "have no grounds on which to evict me I don't owe you any "thing if you did not have your rent direct you had it indirect "you had bills amounting to just over £60 that I paid for material "to the place last year and now you are prepared to be dirty "you can begin sharp and make an application for a government "grant for some stone for the road its your job and I shall have "the sanitary inspector to the house and the milk production "officer to the building and put you to a bit of expense now you "are not satisfied having it done for nothing." On January 4, 1955, the landlord died, and on February 23, 1955, probate was granted to the plaintiffs, Wilfred Mountford, William Read and Cuthbert Eric Herbert.

After the notice to quit expired the plaintiffs, as landlords, brought proceedings in the county court for possession. It was not disputed that the notice to quit was appropriate in all respects but the tenant sought to rely on his letter of March 15, 1954, as constituting an effective counter-notice for the purposes of section 24 (1) of the Agricultural Holdings Act, 1948.[1] The county court judge decided in favour of the landlords and ordered that possession should be given to them in three months.

The tenant appealed.

R. E. Megarry for the tenant.

Peter A. Ferns for the landlords.

[1] Agricultural Holdings Act, 1948, s. 24: "(1) Where notice to quit an "agricultural holding . . . is given "to the tenant thereof, and not later "than one month from the giving of "the notice to quit the tenant serves "on the landlord a counter-notice in "writing requiring that this subsec- "tion shall apply to the notice to quit, "then, subject . . ." [as provided] "the notice to quit shall not have "effect unless the Minister consents "to the operation thereof."

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In addition to the cases referred to in the judgments, the following was cited in argument: *Black & Black* v. *Mileham*.[2]

Lord Evershed M.R. The question raised in this appeal is in truth, as Mr. Megarry said, within a very small compass. The question is whether a letter written by the tenant, and written (I think it may fairly be said) in the heat of the moment, is, within the terms of section 24 (1) of the Agricultural Holdings Act, 1948, a counter-notice in writing of the character there mentioned. I conclude, in agreement with the judge, that, applying the ordinary standards of common sense and of the significance of language, the answer to the question should be in the negative.

The question turns on the effect of this particular letter, which is not likely to be a model or precedent in other cases. [His Lordship stated the facts, referred to section 24 (1) of the Act of 1948, and continued:] The practical result is that if such a counter-notice is given [that is, a counter-notice within the scope of section 24 (1)], the landlord must apply to the Minister, whose powers and discretion in the matter have in fact been relegated by appropriate regulation to the appropriate Agricultural Executive Committee. [His Lordship read the tenant's letter of March 15, 1954, and went on:] I have said that, in my judgment, according to the ordinary standards of language and common sense, that document cannot fairly be treated as a counter-notice in writing requiring that section 24 (1) of the Agricultural Holdings Act should apply to the notice to quit which the tenant received.

The matter is, I think, not capable of much elaboration. I observe, however, that the terms of the subsection do not state (as they might) that if within a month the tenant gives a notice in writing *objecting* to the notice to quit, then certain consequences follow. The provision of section 24 (1) is that the tenant must serve a counter-notice in writing *requiring that this subsection shall apply*.

Mr. Megarry's argument rested, I think, in the main on the two phrases which appear early in this somewhat unpunctuated epistle: "I shall appeal against it and take the matter up with "the Agricultural Executive Committee." Mr. Megarry says that that is a sufficient indication to a well-informed and cautious landlord that the tenant was intending to invoke the right which he had under this section, the practical effect of which would be that, by the regulations, the Agricultural Executive Committee would have to give, so to speak, its imprimatur to the notice to quit. But I observe that when the tenant said that he would appeal against the matter and would take the matter up with the Agricultural Executive Committee, he was not in fact referring at all to the procedure which section 24 (1), if invoked,

[2] 58 T.L.R. 13; [1941] 3 All E.R. 269.

would bring into being. As I have indicated, if that provision is invoked, then it is for the landlord to invite the Minister (acting through the Agricultural Executive Committee) to give his confirmation to the notice to quit which has been given.

During the argument many examples were suggested to Mr. Megarry of letters in most informal or even vituperative terms, and the question was put: would this, that, or the other example be a counter-notice within this section? I do not refer to those examples because, as Mr. Megarry fairly said, we are here concerned, not with hypothetical cases, but with the effect of this particular letter. I, of course, agree with Mr. Megarry, and it is well established, that notices or counter-notices of the kind here in question are not to be construed with great strictness. It will suffice if, whatever the language or form of the letter, it indicates a clear intention to invoke the right which the Act gives. I have used deliberately the two words "clear intention" which I borrow from the judgment of Lord Greene M.R. in *Price* v. *Mann*,[1] to which Mr. Megarry referred. But I am bound to say that Mr. Megarry's argument really seems to me to amount to this, that any reference to legal rights or possible remedies, however ill-informed the writer is (and even if he did not know that he had such rights) would constitute a counter-notice requiring that section 24 (1) should operate. I cannot for myself think that the rules of these courts or of justice require or justify so very loose and indulgent a construction of the terms of the statute in favour of an agricultural tenant. I agree with the careful judgment of the county court judge. He said: "It is "said here that this particular section is a restriction on the "rights of the landlord and, therefore, that the provision must "be construed against the tenant. I do not in this case intend "to construe it against the tenant any more than against the "landlord. I am looking at the subsection itself. I turn again "to this letter which is the vital matter and there is certainly "no question of the defendant saying that he required this "section 24 to apply." With all of that I entirely agree. The county court judge continued: "I do not think it is clear that "he is requiring that this subsection should apply to the notice "to quit. I certainly should not have suspected from the letter "that he was requiring that the notice to quit should be dealt "with under the provisions of this subsection or that the letter "actually referred to it. There must be some reasonable "intimation by the tenant that he requires the subsection to "apply."

I agree with the judge and with the reasons which he gave. I think that this appeal should be dismissed.

BIRKETT L.J. I agree with the judgment of my Lord, the Master of the Rolls, and also with the judgment of the county court judge. I am bound to say that I feel sympathy with the

[1] [1942] W.N. 87; 58 T.L.R. 197; [1942] 1 All E.R. 453.

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Birkett L.J.

argument of Mr. Megarry to this extent, that I think when one is dealing with people like tenant-farmers one must make some allowance for the kind of language which they may happen to employ. As no particular form of words is required for the counter-notice under section 24 (1), I think that the court should regard with a benevolent eye any document which could reasonably be said to be a proper counter-notice within the section. But, after listening to the argument with considerable sympathy, I am driven to the conclusion that there was no other course which the judge could take other than he did in this case. I feel that the notice to quit sent by the landlord on March 12, 1954, was a very careful notice in perfectly legal form, and I think that it may be a reasonable inference that Mr. Martin knew the provisions of the Agricultural Holdings Act, 1948, which in the year 1954 had been in operation for a long time.

As I said in the course of the argument, one can conceive a kindly landlord saying, when a letter of this kind is received: "The man is very angry and he obviously wants the committee "to intervene. This is no counter-notice, but I think I will just "put him right about the legal form." There is, of course, no obligation on the landlord to do anything of that kind. We have to decide the simple question whether a notice in the terms of this letter can possibly be said to be a compliance with the section in this sense, that it can be interpreted as saying: "I "require section 24 (1) of the Act of 1948 to apply to this "notice." I think it is quite impossible to do so.

One other point I think is also rather important. Since 1948 the Agricultural Executive Committee have played a very important part in what I may call the general scheme of agricultural holdings. Section 24 was then an entirely new thing. [His Lordship read section 24 (1) and continued:] There is no provision in the Act for an extension of that period; the counter-notice must be served within the month or, so far as I know, the remedy has gone. I should have thought it was of the first importance to tenants that they should make themselves acquainted with a section which was intended to give them some measure of security of tenure.

The only question here is whether the county court judge was right in saying, in effect: "I cannot construe this rather angry "letter—even though it contains reference to an appeal to the "Agricultural Executive Committee—as being a compliance with "the section, or interpret it as a counter-notice within the mean-"ing of the subsection." I think that it was quite impossible for the judge to say that it was. I entirely agree with what he said, and I agree with the judgment of my Lord in this case.

Romer L.J. I also agree. It is quite clear that, although according to the actual language of section 24 (1), a tenant who wants to serve a counter-notice at all must serve a counter-notice in writing requiring that the subsection shall apply to the

notice to quit, the tenant can plainly indicate his intention that he desires to take advantage of the subsection without exactly following that language. But the question is how far he can depart from it.

For my part, I think that the position was put accurately by Mr. Miles who was acting for the tenant in *Ward* v. *Scott*,[2] to which Mr. Megarry referred us. In that case the tenant of an agricultural holding was given notice to quit, and he served a counter-notice which was perfectly right in form except that it referred to the Act of 1947 instead of the Act of 1948, section 31 of the Act of 1947, by the time he served his notice, having been replaced by section 24 of the Act of 1948. It was objected on behalf of the landlord in that case that the notice was not a valid counter-notice. Apparently, according to the judgment which Danckwerts J. delivered, Mr. Miles for the tenant had said: "The court is indulgent in respect of notices of this kind and does "not in effect care for merely technical points, and if the mean- "ing is so plain that the landlord cannot mistake what is meant, "then effect should be given to the notice." That proposition, I think, commended itself to Danckwerts J., though he actually decided the case on another point. For my part, I think that is right, though perhaps subject to this, as Mr. Megarry pointed out, that one should add the word "reasonably" so as to make it read: "and if the meaning is so plain that the landlord cannot "reasonably mistake what is meant, then effect should be given "to the notice." It seems to me to be the proper test to apply to notices of this sort. The reason why the tenant has to make his intention reasonably clear is that the landlord has to take action upon the counter-notice. Under the Agricultural Regulations, 1948,[3] he has, within one month of being served with a counter-notice, to make application to the Minister for his consent. It is, therefore, quite obvious that he has to have served upon him some notice which he understands, that is to say, a notice which reasonably indicates that the tenant is intending to invoke, and is in fact invoking, the operation of section 24 (1). Unless the notice sufficiently enables the landlord to understand that, I think that it is a bad notice.

For the reasons which the county court judge stated in his judgment, it seems to me quite impossible to say that the counter-notice now in question satisfied that criterion, and I, accordingly, agree that this appeal fails.

Appeal dismissed.

Solicitors: *Gibson & Weldon for Bowcock & Pursaill, Leek, Staffs.; Collyer-Bristow & Co. for Wilkins & Thompson, Uttoxeter, Staffs.*

E. D.

[2] [1950] W.N. 76; 66 T.L.R. (Pt. 1) 340.

[3] Agriculture (Control of Notices to Quit) Regulations, 1948 [S.I. 1948, No. 190] regs. 1, 2 and 3 made under s. 31 (8) of the Agriculture Act, 1947 and preserved in force by s. 100 (1) of the Act of 1948.

[CHANCERY DIVISION.]

1956
Mar. 16.

Upjohn J.

*FULLERTON *v.* RYMAN.

[1954 F. No. 123.]

Practice—Trial—Venue—Transfer of action from London to Palatine Court after date of hearing in London fixed—Power of district registrar and of court to order transfer—Motion to discharge district registrar's order—Court of Chancery of Lancaster Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 49), *s.* 1.
Palatine Court of Lancaster—Transfer of action.

After an action had been set down for hearing in the Chancery Division of the High Court in London, the date of the hearing had been fixed and the action was in the warned list, the plaintiff applied for and obtained an order from the district registrar transferring the action to the County Palatine Court of Lancaster in Liverpool. The defendant sought by motion to have the district registrar's order discharged:—

Held, (1) that in the circumstances the district registrar ought not to have heard the application for the transfer but ought to have adjourned it to the judge.

(2) That, accordingly, the court could entertain a motion to discharge the district registrar's order.

Harrington v. *Ramage* [1907] W.N. 137 distinguished.

(3) That while the court had power under section 1 of the Court of Chancery of Lancaster Act, 1952, to transfer the action to the County Palatine Court of Lancaster at any stage of the proceedings, it was not expedient to do so in the present case and that accordingly the district registrar's order must be discharged.

MOTION to discharge order of district registrar.

The applicant, Madeline Phyllis Ryman, of Colwyn Bay, was the defendant in an action brought by Christina Brown Fullerton for a declaration that certain land at Colwyn Bay which had been conveyed to the defendant but for which the plaintiff had provided the purchase money was held by the defendant on trust for the plaintiff. The action was set down for hearing in London on November 7, 1955, and the date originally fixed for the hearing was January 16, 1956. On January 4, 1956, on an order for further directions, the plaintiff was given leave by the district registrar to amend her pleadings. In these circumstances an application was made by the plaintiff to postpone the hearing and the new date fixed by the judge was March 5, 1956. On February 22, 1956, the defendant applied for a further postponement because of the illness of one of her witnesses, and the new date fixed by the judge for the hearing was April 10, 1956. On February 28, 1956, the plaintiff applied to, and obtained from, the district registrar an order transferring the action from the Chancery Division of the High Court in London to the County Palatine Court of Lancaster in Liverpool on the ground that since

[Reported by P. G. GALLICHAN, Esq., Barrister-at-Law.]

the parties and witnesses all lived at Colwyn Bay, which was only 50 miles from Liverpool, Liverpool was a more convenient venue. The defendant now sought by this application to have this order of the district registrar discharged.

H. E. Francis, for the defendant applicant, submitted that while it was within the jurisdiction of the district registrar to transfer the venue on the summons for directions he had no power to do so once the date of the hearing had been fixed. He referred to *Spring* v. *National Amalgamated Stevedores and Dockers Society*.[1]

A. C. Sparrow, for the plaintiff respondent, contended that the proper course for the defendant would have been to ask the district registrar before his order was drawn up to adjourn the matter to the judge, but that, as the defendant had failed to do so, the court had no jurisdiction to entertain the present motion. He referred to *Harrington* v. *Ramage*.[2]

UPJOHN J. stated the facts and continued: Mr. Sparrow has very properly called my attention to the decision of Kekewich J. in *Harrington* v. *Ramage* [2] to the effect that a motion to set aside or vary a master's order ought to be dismissed with costs without going into merits since the proper course for a party who wanted a matter to be dealt with by the judge was to ask the master, before his order was drawn up, to adjourn the matter to the judge. However, that case does not cover the present case, since here the date of the hearing had already been fixed and the action was in the warned list when the application to transfer the action was made to the district registrar. In these circumstances, in accordance with the usual practice, the district registrar should not have heard the application but should, of his own motion, have immediately adjourned it to the judge.

I must, therefore, deal with the present application on its merits. I have no doubt that under section 1 of the Court of Chancery of Lancaster Act, 1952, I have jurisdiction at any time or at any stage to transfer the action to the County Palatine Court of Lancaster, but the question is whether I ought to do so. Mr. Sparrow has contended that Liverpool is a more convenient forum for the action to be heard since the parties and witnesses all live at Colwyn Bay, which is only 50 miles from Liverpool. However, what weighs with me is the fact that it is clearly most desirable, after the many postponements of the hearing of the action that have already taken place, that the matter shall be disposed of as soon as possible. As things stand at present the case is due to be heard on April 10. I think that it is likely that, if the action were now to be transferred to Liverpool,

[1] The Times, December 8, 1955. [2] [1907] W.N. 137.

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it would not be heard so soon. I will therefore grant the defendant's motion and discharge the order of the district registrar.

Motion granted.

Solicitors: *T. D. Jones & Co. for J. R. Williams, Davies & Co., Colwyn Bay; Bell, Brodrick & Gray for Henderson & Hallmark, Llandudno.*

[COURT OF APPEAL.]

C. A.

1956

Feb. 22, 23, 24, 27, 28.

Denning, Morris and Romer L.JJ.

*REGINA *v.* STAFF SUB-COMMITTEE OF LONDON COUNTY COUNCIL'S EDUCATION COMMITTEE AND ANOTHER. *Ex parte* SCHONFELD AND OTHERS.

PRACTICE NOTE.

Crown Practice—Appearance of applicant in person—Right of—Court of Appeal.

Court of Appeal—Appellant appearing in person—Right to be heard—Prerogative writ—Appeal from refusal of certiorari—Right of appellants to appear in person.

PRELIMINARY OBJECTION on appeal from Divisional Court.

Eight out of the twelve governors of a voluntary school, the Avigdor Secondary Grammar School, Stoke Newington, including their chairman, Dr. Solomon Schonfeld, appeared in person on an appeal from the dismissal by the Divisional Court (Lord Goddard C.J., Ormerod and Barry JJ.) on October 28, 1955, of their application for an order of certiorari to quash the decision of the staff sub-committee of the Education Committee of the London County Council, refusing consent to the dismissal of the headmaster, Jacob David Crystal. Counsel for the headmaster sought to make a preliminary objection that the appellants were not entitled to appear in person.

Geoffrey Lawrence Q.C. and *H. E. Francis* for the staff sub-committee.

Viscount Hailsham Q.C., *A. L. J. Lincoln* and *Quintin J. Iwi* for the headmaster.

Viscount Hailsham Q.C. for the headmaster. The Divisional Court dismissed with costs the application by the governors of the school as a body. The governors are the only parties to the appeal and their interest is joint only. The eight individual appellants are not parties to these proceedings in their personal capacity but only as governors; and though the board of governors is not a corporation, the governors, or some of them, cannot each

appear individually in a suit in which they are joint parties. Further, on November 22, 1929, Scrutton L.J., as reported only in The Times newspaper for November 23, 1929, observed that the Court of Appeal had made it a rule and had acted on it for a hundred years, that persons coming for prerogative writs must do so by counsel. It is conceded that since 1947 (see *Practice Note* [1947] W.N. 218) the Divisional Court has established the practice that an individual applying for a prerogative order may appear in person; but the practice in the Court of Appeal has not been changed since the dictum of Scrutton L.J.; and if this court now decides that that practice is to be altered, the court will be creating a precedent.

[DENNING L.J. I am not sure that on these prerogative writs a person aggrieved should not be allowed to come in person. If each of these eight governors is personally liable for the costs in the Divisional Court, has not each of them a locus standi to appeal in this court?]

They must have a joint interest. The individuals now seeking to appeal are only a majority of a board who dissent from the minority and seek to appeal, not as a board, but through a person who happens to be the chairman of the board, but expressly disclaims his representative capacity.

[ROMER L.J. But unless Dr. Schonfeld was expressly authorized by the other governors to act for them, the other governors could not have been held liable for the costs in the court below.]

The court, after conferring, decided that they would hear the appeal on the merits and rule on the preliminary objection later. They directed that all the eight appellants should attend before the court so that if any desired to address the court individually they might do so.

(The following extracts from the judgments of the court were concerned specifically with the point of practice.)

DENNING L.J. The foundation governors did not instruct counsel to appear before us, but appeared individually in person. The only one of them who put forward sustained arguments was Dr. Schonfeld, who, of course, could speak only for himself and not for the others. Mr. Weil, the vice-chairman, also addressed us for a few minutes. It was submitted by counsel for the headmaster that the foundation governors could not appear in person, but only by counsel on such an application; and he referred to the observations of Scrutton L.J. on November 22, 1929 (The Times newspaper, November 23, 1929, "Colonel Kynaston's "Appeal") that ". . . [the] court had made it a rule, and "had acted on it for a hundred years, that persons coming to "apply for the prerogative of mandamus must do so by counsel, "and must be represented by counsel." Lord Hailsham told us, however, that the Divisional Court in 1947 had departed from that rule. Lord Goddard C.J. said that the judges had decided

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that prerogative orders might be moved for by litigants in person (*Practice Note* [1947] W.N. 218). I think we should do the same. Much as we value the help of the Bar, we must never go so far as to refuse an applicant simply because he is in person.

Morris L.J. The application is brought by eight of the twelve governors, namely, the eight foundation governors. Those eight have appealed. There are often reasons why it is helpful from the point of view of the court that there should be appearance by counsel in cases of this kind. The eight appellants, however, appeared personally. Their interest in this case is a joint one, and we have heard two of the appellants. In fact none of the other appellants wished to address us. I see no reason for not allowing Dr. Schonfeld and his colleagues to appear in person, though, the interest being a joint one, we would not have arguments from each one separately.

Romer L.J. I quite agree. On the preliminary point taken by Lord Hailsham for the headmaster, I have nothing to add to what my Lords have said. Having regard to the established practice of the court it is quite plain that Dr. Schonfeld could not appear on behalf of the other governors as well as on behalf of himself; but he was entitled to address us on his own behalf, and he did so. The substance of his arguments and submissions was adopted in effect by his fellow governors.

Solicitors: *Solicitor, London County Council; Edward F. Iwi.*

M. M. H.

[Derby Assizes.]

1956
Feb. 17, 20.
Pilcher J.

* CROOK *v.* DERBYSHIRE STONE LTD. and Another.

[1954 C. No. 745.]

Vicarious Liability—Master and servant—Negligence—Accident while lorry driver crossing road for refreshment during break in journey—Liability of master.

T., a lorry driver employed by D. S. Ltd., was engaged in driving loads of stone from the company's quarries to a building site. His journey was of about four hours' duration and it was his practice to stop for refreshment en route. The company was aware of this practice and impliedly authorised it. T. left the driving cab of his employer's vehicle to go into a café to obtain refreshment. In crossing the road he was involved in a collision with the plaintiff, a motor-cyclist, who sought to establish the liability of the company for the negligence of T. their servant:—

Held, that, although employed at the time on his master's business and permitted to do what he was then doing, T. was a

[Reported by R. J. Toyn, Esq., Barrister-at-Law.]

stranger to his master from the moment when he left the lorry and had no further duty to perform on his master's account until he returned to the lorry and resumed his journey; accordingly, as T. was not in fact discharging his duty to his employers at the moment of the accident, they were not vicariously responsible for the consequences of his negligence.

Century Insurance Co. Ltd. v. *Northern Ireland Road Transport Board* [1942] A.C. 509; [1942] 1 All E.R. 491 distinguished.

ACTION.

The first defendants, Derbyshire Stone Ltd., were engaged in fulfilling a contract for the supply of stone from their quarries near Matlock to a building site near Birmingham. The second defendant, Bertie Thorpe, was one of their regular drivers. On occasions he left Matlock at about 4 a.m., arriving at his destination at 8 a.m. In accordance with his practice and that of other drivers, known to the employers and impliedly sanctioned by them, he would stop in the course of his journey to obtain refreshment. On June 30, 1952, shortly before 8 a.m., Thorpe was crossing one section of a dual carriageway to get to a café on the other side of the road when the plaintiff, John Crook, riding his motor-cycle, collided with Thorpe, and both Thorpe and the plaintiff sustained injuries. It was not in dispute that Thorpe was in part to blame for the collision. The plaintiff claimed damages against the first defendants and against Thorpe. As regards the first defendants, it was alleged that, in the circumstances, Thorpe was acting in the course of his employment so as to render the company responsible to the plaintiff for Thorpe's negligence.

A. E. James for the plaintiff.
Patrick Bennett for the first defendants.
A. J. Flint for the second defendant.

Cur. adv. vult.

February 20. PILCHER J. stated the facts and continued: The first defendants have never forbidden their lorry drivers to stop at wayside cafés for refreshment, and I am assuming for the purposes of this case that this practice, and it is a necessary practice, was well known to the first defendants, and was one which was sanctioned by them impliedly. It was common ground that the accident occurred during Thorpe's working hours. There was no evidence as to how he was paid, whether by the hour or by the journey, but in the ordinary sense of the word the accident occurred in working hours; and Mr. James contended that, in walking across the road as he did and for the purpose which he did, Thorpe was doing something which his employers knew their drivers did, and did reasonably, especially when doing early runs. He contended that in so crossing the road to get refreshment for his own purposes Thorpe was doing an act which was incidental to his employment and that, in those circumstances, in law his employers were vicariously responsible for any

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Pilcher J.

act of negligence which he might commit whilst engaged in this incidental action. Whilst an employer is no doubt vicariously responsible for the negligent acts of his servants committed in the course of their employment, he is not, in my view, necessarily responsible for the consequences of acts committed by his servants during their period of employment, unless the particular act which is negligently performed was an act which the servant was employed to perform.

In the present case, if Thorpe had been employed by his employers to deliver some portable goods at the café in question and had, through his own negligence, sustained exactly the type of accident which he did sustain, and had done the injuries to the plaintiff which he did do, no doubt the argument advanced by Mr. James would be almost bound to succeed, because, assuming that it was reasonable for him to draw up his lorry where he did and cross the road at the place where he did, if he does that negligently in the course of delivering goods to their destination, no doubt his employers have got to answer for the consequences of his negligence, because he was actually engaged in doing what he was employed to do. But, to my mind, Thorpe was in no sense of the word employed to cross the road. He did it primarily for his own purposes, though, no doubt, with the complete approval of his employers. He had left his lorry and was no longer engaged in the ordinary sense of the word upon his employers' business.

Mr. James cited, and Mr. Bennett, on behalf of the first defendants, relied upon, *Century Insurance Co. Ltd.* v. *Northern Ireland Road Transport Board.*[1] That was a case in which a number of matters came up for decision, but I need only refer to one particular point which was dealt with by the noble Lords. In that case a lorry driver employed to drive a petrol lorry and deliver petrol from that lorry into the underground tank of a garage, whilst so transferring the petrol from the lorry to the tank, having opened the tap in the lorry and put the nozzle down into the tank, struck a match to light a cigarette, threw the match on the floor, as a result of which there was a conflagration and explosion and a great deal of damage was done. Claims were made upon the lorry driver's employers on the ground that, in doing the negligent act, the lorry driver was acting in the course of his employment and thus that his employers were vicariously responsible for the consequences of his negligence.

The case came before the House of Lords on appeal from the Court of Appeal in Northern Ireland, who had held that the driver's employers, in the particular circumstances of that case, were responsible for their driver's negligence in relation to the cigarette and the match. The House of Lords affirmed the decision of the Court of Appeal.

In the course of his speech Viscount Simon L.C. said[2]: "On

[1] [1942] A.C. 509; [1942] 1 All E.R. 491.

[2] [1942] A.C. 509, 514.

"the second question"—and this was the second question—"every judge who has had to consider the matter in Northern "Ireland agrees with the learned arbitrator in holding that "Davison's careless act which caused the conflagration and "explosion was an act done in the course of his employment. "Admittedly, he was serving his master when he put the nozzle "into the tank and turned on the tap. Admittedly, he would "be serving his master when he turned off the tap and withdrew "the nozzle from the tank. In the interval, spirit was flowing "from the tanker to the tank, and this was the very delivery "which the respondents were required under their contract to "effect. Davison's duty was to watch over the delivery of the "spirit into the tank, to see that it did not overflow, and to turn "off the tap when the proper quantity had passed from the "tanker. In circumstances like these, 'they also serve who "'only stand and wait.' He was presumably close to the "apparatus, and his negligence in starting smoking and in "throwing away a lighted match at that moment is plainly "negligence in the discharge of the duties on which he was "employed by the respondents. This conclusion is reached on "principle and on the evidence, and does not depend on finding a "decided case which closely resembles the present facts." Then he went on to deal with *Jefferson* v. *Derbyshire Farmers Ltd.*,[3] which is a case to which I do not find it necessary to refer, because it was considered by the noble Lords in the *Century Insurance* case.[4]

Lord Wright, in the course of his speech, said[5]: "On the "other question, namely, whether Davison's negligence was in "the course of his employment, all the decisions below have been "against the appellants. I agree with them and need add little. "The act of a workman in lighting his pipe or cigarette is an act "done for his own comfort and convenience and, at least gener-"ally speaking, not for his employer's benefit, but that last "condition is no longer essential to fix liability on the employer." He then referred to *Lloyd* v. *Grace, Smith & Co.*,[6] which decided that the tortious act of the servant need not be an act done by the servant for the benefit of his employers, and continued: "Nor is such an act prima facie negligent. It is in itself both "innocent and harmless. The negligence is to be found by "considering the time when and the circumstances in which the "match is struck and thrown down. The duty of the workman "to his employer is so to conduct himself in doing his work as "not negligently to cause damage either to the employer himself "or his property or to third persons or their property, and thus "to impose the same liability on the employer as if he had been "doing the work himself and committed the negligent act. This "may seem too obvious as a matter of common sense to require "either argument or authority. I think what plausibility the

[3] [1921] 2 K.B. 281.
[4] [1942] A.C. 509.
[5] Ibid. 519.
[6] [1912] A.C. 716; 28 T.L.R. 547.

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" contrary argument might seem to possess results from treating " the act of lighting the cigarette in abstraction from the " circumstances as a separate act."

Whilst clearly permitted to stop for refreshment and, if necessary, to cross the road for that purpose, Thorpe was not, in my view, employed to do this. Even though employed at the time on his master's business and permitted to do what he did in crossing the road to get refreshment, he was a stranger to his master from the moment when he left the lorry. He had no further duty to perform on his master's account until he returned to the lorry and resumed his journey. In this respect his position was, in my view, completely different to that of Davison, the driver in the *Century Insurance* case,[7] because, when Davison negligently threw down the match, he was engaged on his master's business, namely, supervising the discharge of the petrol. No doubt it is difficult upon the particular facts of each individual case to draw the line between the circumstances in which it may be proper to say that a servant is discharging his duty as a servant, and circumstances in which he is with the permission of his employer doing some act incidental to his employment.

Examples are seldom helpful, but perhaps one may be permitted to consider two or three cases which might have to be determined in facts almost similar to the facts of this case. It is interesting to inquire (and might be very difficult to resolve) what the position would be if a lorry driver in Thorpe's position crossed the road to ask the way, or crossed the road to get a tin of petrol to put into his lorry; or, indeed, what the position might have been if, returning from the café, Thorpe had seen somebody getting into his lorry and about to drive it off and had hurried across the road to stop him and had been involved in the collision which he was involved in. Those are all matters which may fall on one side or the other of the line; but perhaps it is sufficient for me to say that in the present case, on the admitted facts, I am not satisfied that it would be proper to say that, although permitted to do what he did, Thorpe was in fact discharging his duty to his employer at the time when the accident occurred. I think he was not. I think at that moment of time he was a stranger to his employer and that his employer was not, therefore, vicariously responsible for the consequences of Thorpe's negligence.

I conclude what I have to say by quoting a passage from Clerk and Lindsell on Torts. The only edition that I have here is the 10th edition, and the passage to which I want to refer is at p. 122. It is in the following terms: " A master will not usually " be responsible for the servant's negligence in doing something " which he is merely permitted to do or does for his own purposes, " but is not employed to do. If a servant does an act for his

[7] [1942] A.C. 509.

" own pleasure, quoad that act he is a stranger to his master, " although he may be in other respects engaged at the time upon " the master's business, and the mere fact that the master does " not prohibit the doing of the act ought not to render him " liable."

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It is on that principle and for the reasons that I have given that I find, on the facts of this particular case, that the first defendants are not responsible for the consequences of the negligence of their servant Thorpe.

Judgment for the plaintiff against the second defendant.
Judgment for the first defendant against the plaintiff.

Solicitors: *T. H. Ekins & Son, Birmingham; Hewitt, Woollacott & Chown; John Whittle, Robinson & Bailey, Manchester.*

[CHANCERY DIVISION.]

* MACLEAN (INSPECTOR OF TAXES) *v.* TREMBATH.

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Mar. 15, 16.

Roxburgh J.

Revenue—Income tax—Expenses—Travel expenses—Husband and wife company—Company dealing in refrigeration—Visit to Australia to study refrigeration methods—" Personal equipment "—Husband's travel expenses allowable—No evidence wife's visit for purposes of company's business—Wife's expenses not allowable—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), 9*th Sched., para.* 7.

A taxpayer and wife were the sole directors of, and owned all the shares in, a private limited company which dealt in refrigerators and refrigeration equipment. The taxpayer worked full time in the company's business, but the wife, who was also the secretary of the company, did not attend the company's business premises in the year of assessment, and any documents requiring her signature were signed at home.

The taxpayer and his wife went to Australia to study refrigeration methods there. The taxpayer undertook engagements relating to the company's business throughout the tour, but that the wife accompanied him only on some four occasions. There was no resolution of the company providing that she should go to Australia on the company's business, but merely a statement by the taxpayer that he thought she should go with him.

The Special Commissioners found as a fact that the expenses of the taxpayer and his wife incurred in travelling to Australia were " wholly, exclusively and necessarily " in the performance of their office as directors within paragraph 7 of the Ninth Schedule to the Income Tax Act, 1952.

On appeal by the Crown from that decision, it was contended on behalf of the Crown that the expenses were incurred by the taxpayer in acquiring " personal equipment " in respect of his business as a dealer in refrigerators:—

Held, (1) that as there was evidence on which the commissioners were entitled to find that the husband's expenses were incurred for the purposes of his business within paragraph 7, the appeal should be dismissed in respect of his expenses.

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(2) That there was no evidence that the company required the wife's visit to Australia or that she was occupied with the company's business while she was there, and although there was a business element in her visit it was not on the evidence "wholly "and exclusively" for the company's business, and similarly the expenses of her visit were not incurred "necessarily" for the company's business; her travel expenses were not, therefore, a deductible expense within paragraph 7, and the appeal would be allowed in respect of her expenses.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The question for the determination of the commissioners was whether an amount of £1,220 was allowable as a deductible expense under paragraph 7 of the 9th Schedule to the Income Tax Act, 1952,[1] to a taxpayer, N. L. Trembath.

The following facts were found on the case stated: Sums totalling £1,220 were claimed by the taxpayer in connexion with a visit by him and his wife to Australia; of this amount, the assessment under appeal had made allowances for £66. At the hearing of the appeal before the commissioners, the inspector of taxes proposed to withdraw this allowance of £66, while the taxpayer claimed that the whole sum of £1,220 was properly allowable under paragraph 7.

The taxpayer attended and gave evidence before the commissioners—and it was stated at the hearing before the court although it was not stated in the case—he was cross-examined before them.

[1] Income Tax Act, 1952, s. 161: "(1) Subject to the following provi- "sions of this Chapter, where a body "corporate incurs expense in or in "connection with the provision, for "any of its directors or for any per- "son employed by it in an employ- "ment to which this Chapter applies, "of living or other accommodation, "of entertainment, of domestic or "other services or of other benefits "or facilities of whatsoever nature, "and, apart from this section, the "expense would not be chargeable to "income tax as income of the director "or employee, paragraphs 1 and 7 "of the 9th Schedule to this Act, and "section 27 of this Act, shall have "effect in relation to so much of the "said expense as is not made good to "the body corporate by the director or "employee as if the expense had been "incurred by the director or employee "and the amount thereof had been re- "funded to him by the body corporate "by means of a payment in respect "of expenses.

"(2) The provisions of subsection "(1) of this section shall not apply "to expense incurred by the body "corporate in or in connection with "the provision for a director or "employee, in any of its business "premises, of any accommodation, "supplies or services provided for the "director or employee himself and "used by him solely in performing "the duties of his office or employ- "ment."

S. 162: "(1) Any expense incurred "by a body corporate in the acquisi- "tion or production of an asset which "remains its own property shall be "left out of account for the purposes "of the last preceding section."

Ninth Sched.: "Rules applicable to "Schedule E." 7: "If the holder "of an office or employment of profit "is necessarily obliged to incur and "defray out of the emoluments there- "of the expenses of travelling in the "performance of the duties of the "office or employment, or of keeping "and maintaining a horse to enable "him to perform the same, or other- "wise to expend money wholly, "exclusively and necessarily in the "performance of the said duties, "there may be deducted from the "emoluments to be assessed the "expenses so necessarily incurred and "defrayed."

The company, Trembath & Co. Ltd., was a private limited company incorporated in November, 1946, and its principal objects as set out in its memorandum of association were: "(1) To carry on the business of refrigeration and electrical "engineers and manufacturers of and dealers in refrigeration "and cold storage equipment, plant and apparatus of every "description including housings and fixtures, shop equipment "and domestic and electrical appliances and all things capable "of being used therewith or in the maintenance, repair and "manufacture thereof. (2) To enter into hire-purchase agree-"ments with the purchasers of such articles and goods aforesaid "and to negotiate, assign, mortgage or pledge such agreements "for cash or otherwise or the payments due or rights accruing "thereunder."

At all material times the taxpayer and his wife between them held all the issued shares in the company, and were its only directors.

The company had at all material times been an authorized dealer in the products of the Frigidaire Division of General Motors Ltd. (hereinafter called "Frigidaire"), a company associated with General Motors Corporation, a company incorporated in the U. S. A. (hereinafter called "General Motors"). These products fell into two categories, "Commercial Products" (i.e., equipment and installations of the kind used by commercial undertakings, including cold storage display installations for retail shops) and "Domestic Products" (i.e., those of the kind used for domestic purposes). The commercial products accounted for about three-quarters of the company's business, and the domestic products for about one-quarter. In addition to selling the products, the company undertook the installation, repair and maintenance of commercial products which it had sold.

The company's business in connexion with Frigidaire Commercial Products was regulated by an agreement between the company and Frigidaire, dated May 6, 1948, by which the company was appointed sole authorized dealer in the commercial products for a territory covering the major part of South London and Surrey.

Under clause 4 of the agreement the company was prohibited from selling Frigidaire Commercial Products abroad; and under clause 7, except as otherwise provided by the agreement, the company was prohibited from selling such products outside its own territory and from selling, either within or outside its own territory, any goods in competition with Frigidaire products.

The company's business in connexion with Frigidaire domestic products was regulated by a separate agreement (which, mutatis mutandis, was in the same terms as the above-mentioned agreement) and consisted in buying goods from Frigidaire at a discount and re-selling them at a reduced discount to retail dealers within the company's territory. There were about thirty other

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authorized dealers, each operating in their own territories under similar agreements with Frigidaire, covering the whole of the British Isles.

Clause 13 of that agreement provided that: "The Dealer" —which in this context meant the company—"shall maintain "within the territory such one or more places of business and "such sales staff, service staff and transport facilities as the "company [Frigidaire] shall consider necessary to ensure "adequate and efficient selling coverage and service facilities "throughout the territory. When reasonably requested to do so "by the company [Frigidaire] the dealer [the company] shall at "its own expense send representatives to Hendon or some other "convenient place designated by the company for the purpose of "instruction in the sale, application, installation and servicing "of 'Frigidaire' Commercial Products. . . ."

In connexion with clause 13, all of the company's staff had attended instructional courses at the Frigidaire instructional establishment at Hendon, at Frigidaire's request and at the company's expense. The company had also sent members of its staff to other dealers to gain experience, on its own initiative. Frigidaire had not formally requested any dealer to go abroad in pursuance of clause 13, but some had gone on their own initiative, and their visits to Frigidaire establishments abroad had been planned for them by Frigidaire. The taxpayer had himself been to Holland and Paris to visit factories; he did so at the suggestion (but not on the formal request) of Frigidaire. He had not been requested by Frigidaire to visit Australia.

The taxpayer worked full time in the direction and management of the company's business. The company had two warehouses and a showroom, and about half of his time was spent on the company's premises and about half on outside jobs, discussing proposals for installations with customers and supervising installations. In order to make the company's business in connexion with the commercial products successful, it was necessary for him not only to have the technical knowledge required for the installation of the products, but also to have the experience and imagination which would enable him to recommend types and arrangements of plant most suitable for the requirements of the individual commercial customer, particularly in connexion with the use of refrigeration in connexion with goods on display. As regards the commercial products the company had been faced with (and had met successfully) considerable competition in its territory; part of its success was due to the taxpayer's ability to "sell an idea."

In 1952 the taxpayer made up his mind to visit Australia in order to gain experience of refrigeration methods and distribution methods there, and in particular of the use of refrigeration in connexion with goods on display.

Australia being a very progressive country as regards refrigeration, and the trading conditions there being similar to

those in the United Kingdom, he thought that by the visit he would gain knowledge and experience which would be of great assistance to the company's business. He had close family connexions with Australia—two brothers and a sister lived there—and he himself was born there, and that had influenced him a little in his decision, but apart from that he considered that the company would profit from a visit by him to Australia, and would profit more by a visit to Australia than to any other country.

By 1952 the company's business had become well established and the taxpayer wanted to get new ideas in order to maintain the company's progress.

The taxpayer decided that his wife should accompany him to Australia. Mrs. Trembath did not attend and give evidence before the Special Commissioners. She was a director and secretary of the company. She had no technical qualifications. She had been engaged (but not full time) in the company's office work, but during the year of assessment 1953–1954 she did not attend the company's premises, and any documents which needed her signature as secretary were dealt with by her at home. She was of assistance to the taxpayer in forming ideas as to ways in which commercial products could be used, and she was a good conversationalist, which the taxpayer was not.

The taxpayer discussed his projected visit to Australia with officials of Frigidaire, and (after being satisfied with the arrangements for the management of the company's business during his absence) they approved of it and made arrangements for him to visit General Motors installations and officials at Melbourne, Sydney and Brisbane.

The taxpayer and his wife left England in September, 1953, and returned on February 1, 1954. The journeys, by sea in both directions, occupied eight weeks, and eleven weeks were spent in Australia. The taxpayer kept no detailed diary of their eleven weeks in Australia, but the following was a summary of their movements.

They disembarked at Sydney, where they stayed five days with friends. Two of these days the taxpayer spent at the General Motors offices with the director in charge (his wife accompanying him on one day) and he spent about half a day with a distributor of General Motors products (unaccompanied by his wife).

They then spent seven days at Rockhampton, where they stayed with friends. There the taxpayer visited an abattoir (said to be the largest in the world), accompanied (on one day) by his wife.

They then spent six days at Brisbane, where they stayed with the taxpayer's brother. There the taxpayer spent three days at the General Motors distribution centre (accompanied by his wife on one day) and spent a further day with a dealer looking over installations and discussing distribution methods. General Motors placed a car at his disposal during his time at Brisbane.

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They then went via Sydney (where they spent two days with friends) to Albury, where they stayed five days with a cousin, and where the taxpayer visited an abattoir and another installation.

They then spent four or five days at Melbourne, staying with another brother, where the taxpayer spent two days at a General Motors factory (accompanied on one day by his wife).

They then spent three days on a private visit at Hobart.

They then returned via Melbourne and Albury to Sydney where they stayed five days with friends, and where the taxpayer spent one day (unaccompanied by his wife) in final talks with General Motors officials. They then embarked for the United Kingdom.

The journey from Brisbane to Sydney was by car, and took four days, the nights being spent at hotels. The journey from Albury to Melbourne was by a borrowed car. The final journey in Australia from Melbourne to Sydney was by car as far as Albury and then by train. The other journeys were by air.

The cost of the sea passages to and from Australia for the taxpayer and his wife was £730, which sum was paid by the company. The taxpayer had kept no detailed records of his expenditure in Australia and on board ship. Ths Special Commissioners found that he had expended £200 on air travel (excluding the cost of the return journey from Melbourne to Hobart which was a private journey) and £50 on hotel accommodation; he spent a further £240 during the whole period of four and a half months, which he was unable to account for in any detail. All these moneys (£490 in all) were provided by the company.

On his visits to General Motors installations at Sydney, Brisbane and Melbourne the taxpayer and his wife spent more time in discussions with General Motors staff than in inspecting plant. The discussions ranged over what they sold, how they sold it, and why. He learned that they sold things in Australia which had never been used in England. These discussions were very useful to him as director of the company, as he learned a great deal which he could not have learned otherwise. The knowledge and experience he acquired had enabled him to do business better and in consequence the company had got business which it would not otherwise have got.

The tour cost the company £1,220 and if the company could increase its turnover by about £5,000 in any one year, it would get that £1,220 back.

The following table showed the company's annual turnover since it commenced business:

Year to January 31.			
1948	£ 49,730	1952	£133,640
1949	£ 71,489	1953	£113,954
1950	£109,825	1954	£121,901
1951	£118,283	1955	£132,624

The taxpayer was not able to say specifically that the increased turnover for the year to January 31, 1955, was due to his Australian visit; in that period some of Frigidaire's authorized dealers had a reduced turnover.

The commissioners found on consideration of the whole of the evidence that "the expenditure of the taxpayer on sea "passages, on his travel in Australia (excluding the journey to "and from Hobart on a private visit), and on his hotel accommo- "dation, was incurred wholly, exclusively and necessarily in the "performance of his duties as director of the company" . . . i.e., they found that one moiety of the £730, one moiety of the £200 and one moity of the £50, had been wholly, exclusively and necessarily incurred in the performance of the taxpayer's duties as a director of the company.

"As regards the expenditure on the sea passages, travel in "Australia (excluding the journey to and from Hobart) and "hotel accommodation of the . . . [taxpayer's] wife [i.e., the "other moiety of those sums] we had rather more doubt, but "on the balance of the evidence we found that this also was "expended wholly, exclusively and necessarily in the perform- "ance of the duties of her office. As regards the rest of the "moneys expended by the appellant [the taxpayer] in the course "of his visit to Australia, we found (in the absence of any firm "evidence to the contrary) that it was not expended wholly "exclusively and necessarily in the performance of the duties of "the appellant's office.

"Accordingly we held that the appellant was entitled to a "deduction under paragraph 7 of the Ninth Schedule to the "Income Tax Act, 1952, of the cost of the sea passages"—for himself and his wife—"(£730), the cost of the travel in "Australia as aforesaid (£200) and the cost of hotel accom- "modation (£50) making £980 in all. We disallowed the "remaining expenditure, i.e., £240."

The Crown appealed in relation to the allowance of £980 as a deductible expense; there was no cross-appeal by the taxpayer.

Frank Heyworth Talbot Q.C., *Sir Reginald Hills* and *Montagu Temple* for the Inspector of Taxes.

P. J. Brennan for the taxpayer.

Cases cited in argument not referred to in the judgment: *Simpson* v. *Tate* [2]; *Ricketts* v. *Colquhoun* [3]; *Nolder* v. *Walters* [4]; *Blackwell* v. *Mills* [5]; *Lomax* v. *Newton* [6]; *Smart* v. *Inland Revenue Commissioners* [7]; *Mitchell* v. *Mayhew*.[8]

[2] [1925] 2 K.B. 214; 41 T.L.R. 370; 9 T.C. 314.

[3] [1926] A.C. 1; 42 T.L.R. 66; 10 T.C. 118.

[4] (1930) 46 T.L.R. 397; 15 T.C. 380.

[5] [1945] 2 All E.R. 655; 26 T.C. 468.

[6] [1953] 1 W.L.R. 1123; [1953] 2 All E.R. 801; 34 T.C. 558.

[7] (1949) 29 T.C. 338.

[8] (1954) 33 A.T.C. 159.

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Roxburgh J., having stated the facts, continued: First of all, I will consider the husband's case, that is to say, the expenditure attributable to the husband. If the finding of the commissioners stands, rule 7 has been complied with so far as his expenditure is concerned. It has not been contended before me that his visit was wholly, or even partly, for the purposes of visiting relations or having a holiday. That would certainly have been a possible finding, but that has not been contended and I may well believe for good and sufficient reasons. It might not have helped the Crown even if they had succeeded on that contention. What is said is that the husband went to improve his "personal equipment." That might have been a possible finding, but I think it unlikely. The real question is whether he did not go primarily for personal reasons.

However that may be, there was evidence before the commissioners pointing in more than one direction, and, having heard him examined and cross-examined (which I have not done), they made a finding of fact which was open to them on the evidence. I cannot interfere, and their finding stands.

But I cannot take the same view with regard to the wife. It is, in my view, a fallacy to suppose that, if the husband's expenses are allowable, the wife's are necessarily allowable too. I am not saying that anybody actually supposed that, but the case seems to have been conducted before the Special Commissioners somewhat on that tacit assumption.

Some of the contrasts may be considered. The taxpayer's fees as director of Trembath & Co. Ltd. were £5,000; the wife's fees as director of the company were £480. She never attended the company's premises at all in the year in question; she had no technical qualifications. Unlike the taxpayer, she did not attend and submit herself for cross-examination and, therefore, the Special Commissioners and I stand in the same position in that regard. I attach great importance to that; I doubt if I should have done what I am going to do had she given evidence and been cross-examined and they had accepted her evidence, but she did not.

The only thing found that might be said to be an asset about her is that she was a good conversationalist, and I find great difficulty in seeing what value that could have in connexion with a woman who did not attend the business premises at all during the year of assessment, making a visit to Australia, a country in which the company was debarred from selling its products. Moreover, it was conceded by the husband that, so far as he was concerned, he was to some extent influenced by the desire to see his family; no doubt that, so far as he was concerned, was qualified by a "but" of importance and the "but" was apparently accepted as paramount by the Special Commissioners, but there is no such qualification in connexion with the wife. Indeed, nothing is said as to whether she wanted to see her relations by marriage, nor is anything said about what I should

have thought was her natural desire to accompany her husband on the very pleasant trip to the country of his birth where many of his relations were established; nothing is said about that at all.

Even so, I might have hesitated to reverse this finding of the commissioners if any sort of explanation had been given as to what she was supposed to be doing in Australia on behalf of the company, but there is not a word about that. I am, of course, drawing a distinction between her and her husband; there is plenty of evidence as to what he was doing in Australia, but I cannot find any evidence of what she was doing. The fact that she visited some three or four places and took part in some discussions seems to me to be altogether too vague to give me any real assistance at all.

The one thing of which I am quite certain is that the finding of the commissioners is wrong in so far as it is said that the expenditure on her behalf was expended wholly and exclusively in the performance of the duties of her office; that is quite an impossible finding on the evidence before me. But that does not mean—and this is where the case has caused me quite a little difficulty—that the expenditure may not have been necessarily incurred in the performance of the duties of her office. I am inclined to think that the Special Commissioners must have there misread the rule in relation to travelling expenses. I am not going to treat the £50 for hotel expenses as a separate item because it only looks like stopping a night or two in the course of a journey and, for practical purposes, it is fairly to be treated as travelling expenses and not, as it would be if it had been for a long period of time, something quite different.

The rule in regard to travelling expenses contains nothing about "wholly" or "exclusively"; what it says is: "If the "holder of an office or employment of profit is necessarily obliged "to incur and defray out of the emoluments thereof the expenses "of travelling in the performance of the duties of the office or "employment . . ." There is nothing about "wholly and "exclusively" at all; that comes in the later part of the rule which seems to be directed to things other than travelling expenses. I think that the Special Commissioners must have omitted to notice that because of the form of their finding: they do not in terms refer to it at all.

The first contention which was put before me on behalf of the wife's expenses arises out of the complicated legislation which now affects the matter, and particularly section 161 of the Income Tax Act, 1952. I have already mentioned that this ticket to Australia, which is a substantial and quite the largest item, was purchased and paid for by the company. It would not be treated as an emolument at all if it fell within the first subsection of section 162 of the Income Tax Act of 1952, because that subsection says: "Any expense incurred by a body corporate in the "acquisition or production of an asset which remains its own

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"property shall be left out of account for the purposes of the "last preceding section."

I am afraid I cannot regard the benefits or facilities conferred by that ticket as falling within the exception in section 162. It seems to me that it plainly falls within the ambit of section 161, that is to say, provision of benefits or facilities, and, therefore, is properly to be treated as an emolument. This point was not taken before the Special Commissioners, but was taken with leave before me and I reject it. This being, therefore, an emolument, it is plain that it would be allowable as a deduction if the wife was necessarily obliged to incur and defray out of the benefits or facilities the expense of travelling in the performance of the duties of her office or employment.

There is a grave danger in a lax construction of that part of that rule, and I will give an example of what I mean: if a public company, acting with all proper formalities, required a director to travel to Australia for the performance of one single duty occupying but a single day, I feel no doubt that the whole of the passage money would be allowable as a deduction, notwithstanding that he spent several further months in Australia doing nothing but visiting his friends and relations. After a good deal of discussion, I think that Mr. Heyworth Talbot was prepared to accept that as the right construction of this rule, but, whether he accepted it or not, that is, in my view, the right construction, and it only shows how careful one must be to see that the person claiming the allowance was really performing the duties of the office, otherwise the opportunities for swindling would be vast, especially in the case of a "man-and-wife" company in which nobody is interested as a shareholder except the man and his wife.

Having satisfied myself that the finding of the commissioners that the expenditure was wholly and exclusively expended for the purposes of the company's business is wrong, I do not feel unduly saddled by their finding that it was "necessarily expended," because their finding must, I think, be treated as a whole, and if two of its ingredients fall out it is difficult to postulate that the remaining ingredient must necessarily be allowed to stand, though, of course, it may or may not be right. But being satisfied that there was no evidence at all that the expenditure, so far as the wife was concerned, was incurred wholly and exclusively in the performance of her duties as a director, I do not feel much embarrassed by the circumstance that they also found that it was "necessarily" incurred, especially as I think that they have adopted the wrong approach to this problem.

I suppose that everybody connected with income tax administration knows that nowadays a director's expenses are dealt with under paragraph 7 of the Rules applicable to Schedule E (9th Schedule), but perhaps not everybody has realized what different problems arise in the course of doing so. It is not that the words bear any different meaning, but the application of the words to directors introduces problems which never arise in connexion with

somebody whose duties are quite clearly regulated either by contract or by statute or otherwise. That the wife was a director is not in question. In order to ascertain her duties the first thing, in logical sequence, is to look at the articles of association of the company. That apparently nobody did, but that probably does not matter because almost certainly they were more or less in common form, in which case the duties would not be in any way specifically defined; they would only be defined in quite broad and general language with perhaps certain things expressly prohibited. Although, therefore, that would logically have been the proper starting-point of the inquiries, its absence causes me no embarrassment.

The next thing that has to be remembered in connexion with directors is that their duties are seldom stereotyped, and that one cannot find out what a director's duties are without studying the resolutions of the directors which ought to be recorded in the minute book of the company. Whether any resolutions were ever recorded in the minute book of this company I do not know, because I have no information about them; but that must be the proper foundation for the search for the answer to the question what are the duties of a particular director. If there had been in this minute book, and it had been proved, a resolution of the board of directors requesting her to go to Australia for some purpose specified in the resolution, then I should have been prepared to say that this expenditure ought to have been allowed, unless the Crown were able to show that the resolution was not passed in good faith. In the case of a " one-man " or " man-and-" wife " company that can sometimes be shown, but prima facie the resolution would be treated as genuine and construed according to its tenor, though it might be displaced on the ground that it was not bona fide. Nothing of that sort is suggested in this case. There is no direct statement that the company ever requested this lady to go to Australia at all, which is not without importance considering that she was the wife of the appellant. It may be that he did, but non constat that he did it on behalf of the company.

There is no suggestion as to the function she was to perform in Australia anywhere in the case and that, I should have thought, was quite inevitable if a company bona fide sends somebody from England to Australia, especially when they have no business connexions with Australia, as in the present case. The company must surely give them some sort of directions before they start as to what they are to do in Australia or, at any rate, send them out by telegraph, and there is no suggestion that any directions were ever given to her at all.

There is again no evidence retrospectively as to what she did, in fact, do for the company. That there was a business element in her visit I am prepared to concede, I think that there was; but it is ill defined, and in my judgment that falls very far short of showing that this expenditure was in the performance of

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Roxburgh J.

the duties of her office of director. I must therefore reverse the finding of the commissioners in regard to the expenditure on behalf of the wife and say that there was no evidence that this expenditure was necessarily incurred in the performance of the duties of her office of director. The reason why I think that the commissioners used the word "necessarily" was partly because they were able to find—as I could not possibly do—that she was wholly and exclusively performing the duties of that office in Australia and partly because, as I think, they did not make the right approach to the question which is: what are the duties of the office of a director?

Accordingly, I allow the appeal in part, that is to say, I allow it in so far as it relates to one moiety of the sum in question, being the expenditure on behalf of the wife, and reject it qua the other.

Appeal allowed in part.

Solicitors: *Tuck & Mann; Solicitor of Inland Revenue.*

I. G. R. M.

[CHANCERY DIVISION.]

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Mar. 16, 20, 21, 22.

Danckwerts J.

*GOODY v. BARING.

[1955 G. 1442.]

Solicitor—Negligence—Sale of land—Solicitor acting for both parties—Parts of property let to tenants—No inquiry as to standard or recoverable rent—Standard of skill and care required.

Barrister—Chancery Division—Common law counsel—Desirability of briefing Chancery practitioners.

On a sale and purchase of leasehold property of which the first and second floors were each subject to a tenancy at 25s. a week, a solicitor, at the purchaser's suggestion, acted for both parties. He used a printed form of "Enquiries before contract," containing, inter alia, a request for full particulars of all subsisting tenancies. It did not contain any questions about standard or recoverable rents. In an interview with the vendor the solicitor noted the answers: "Top floor let to [name] 25s. per week inclusive. This was the "rent receivable when the vendor bought in 1948 (?) and no "increases have been passed on to tenant. First floor let to [name] "25s. per week ditto. Ground floor let to vendor from 1947 to 1948 "at 35s. per week inclusive. No information of previous lettings." He did not ask the vendor about the standard rents or about the recoverable rents. He prepared in duplicate a contract which stated that the property was sold with vacant possession of the ground floor and garden but subject to tenancies of the first and second floors at 25s. each. The purchaser called at the solicitor's office to sign his part and the solicitor went through the inquiries with him and told him that he could possibly increase the rents as there had been no increase since 1950 although the rates had gone up. Some time after completion a proposed increase in the rents was refused

on behalf of one of the tenants by solicitors who had quite easily ascertained that in 1939 both floors were let for a total rent of 30s. a week and that the rates for the whole house had been increased by only 10s. a week. In proceedings by both tenants the county court fixed the standard rent for each of the two floors at 15s. and, with the permitted increases, the recoverable rents at 17s. 6d., and 18s. 4d. a week, so that the purchaser had to refund to the tenants the excess payments which they had made to him.

In an action against the solicitor for damages for breach of his duty as solicitor to the purchaser, the purchaser alleged that the defendant had not ascertained or sufficiently tried to ascertain what the recoverable rents were and had not advised the purchaser that the rents being received might be more than the recoverable rents:—

Held, (1) that the amount of standard or recoverable rent must be a subject for inquiry by a solicitor acting for a purchaser, and a subject on which plain and clear advice might be required from that solicitor to his client; (2) that by accepting insufficient information from the vendor, without further questions or inquiries in other directions, and by failing to inform his client that there might have been overpayments, the defendant had been guilty of negligence.

Observations of Scrutton L.J. in *Moody* v. *Cox* [1917] 2 Ch. 71, 91, on the unwisdom of a solicitor involving himself in conflicting duties by acting for both parties in a vendor and purchaser transaction considered and applied.

Per curiam. Even though preliminary inquiries have been made before contract, it is still the duty of a purchaser's solicitor to make the appropriate requisitions and inquiries after the formal contract is signed, even if the preliminary inquiries have been so complete that it is only necessary to ask whether the former answers are still complete and accurate.

ACTION.

The facts are stated in the judgment.

C. P. Harvey Q.C. and *J. P. Brookes* for the plaintiff.

Patrick M. O'Connor for the defendant.

The cases cited in argument are referred to in the judgment.

DANCKWERTS J. This is an action for negligence by a purchaser of land against the solicitor who acted for him in respect of the purchase. The case turns entirely on matters of conveyancing practice. Only one of the three counsel who appear before me practices habitually in the Chancery Division. The common law counsel appearing in the case are, of course, thoroughly competent in regard to the matters coming within the ambit of their ordinary practice, and are well known to me. But I must observe that their experience in respect of conveyancing matters does not seem to me to be such as to provide me with much assistance in regard to the matters which I have to decide. Of course, it is not the counsel concerned who are to blame for this situation.

In 1953 the plaintiff, who was employed as a clerk by a firm of radio manufacturers, saw an advertisement relating to property

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known as 36 Cecile Park, Hornsey, and he got in touch with the owner, a Mr. Tebbs. On October 12, 1953, he paid Mr. Tebbs a deposit of £100, in respect of the purchase price of £1,000, and a receipt was given to him, which was expressed to be received "subject to signing of contract."

The property was leasehold, held under a lease for the term of 99 years from December 25, 1882, at an annual rent of £9. The plaintiff was told that the two upper floors were let to tenants at 25s. a week each. The plaintiff's intention was himself to occupy the ground floor at some future date, though not immediately, but I think that it is clear that he regarded the purchase partly as an investment. He was anxious to complete by the following January 1, but otherwise there was no special urgency.

On the same day, October 12, 1953, the plaintiff wrote a letter asking the defendant, whom he had met through his (the plaintiff's) employers, to act for him. The defendant accepted these instructions. Unfortunately, he also agreed to act for Mr. Tebbs, the vendor. This is not a case in which an inexperienced purchaser has been tempted by a vendor to employ the vendor's solicitor. It was the plaintiff himself who gave the defendant's name to Mr. Tebbs and suggested that instructions should be given to him also by Mr. Tebbs, who was in fact known to the defendant as a tree feller.

But this does not make the position any more satisfactory. It seems to me practically impossible for a solicitor to do his duty to each client properly when he tries to act for both a vendor and a purchaser. The position has been pointed out very plainly by Scrutton L.J. in *Moody* v. *Cox*[1]: "It may be that a solicitor "who tries to act for both parties puts himself in such a position "that he must be liable to one or the other, whatever he does. "The case has been put of a solicitor acting for vendor and "purchaser who knows of a flaw in the title by reason of his "acting for the vendor, and who, if he discloses that flaw in the "title which he knows as acting for the vendor, may be liable "to an action by his vendor, and who, if he does not disclose "the flaw in the title, may be liable to an action by the "purchaser for not doing his duty as solicitor for him. It "will be his fault for mixing himself up with a transaction in "which he has two entirely inconsistent interests, and solicitors "who try to act for both vendors and purchasers must appreciate "that they run a very serious risk of liability to one or the other "owing to the duties and obligations which such curious relation "puts upon them."

It is nearly forty years since those words were said by Scrutton L.J., and it appears that they have still not been properly appreciated by some solicitors. Perhaps they have never been read by many of them.

[1] [1917] 2 Ch. 71, 91.

The defendant obtained the documents of title from Mr. Tebbs' bank, and from these it appeared that Mr. Tebbs had acquired the property by an assignment dated June 16, 1950, from a Mr. Edwin Hayes Johnson, who had acquired the property by an assignment dated September 15, 1933.

On November 11, 1953, the defendant saw Mr. Tebbs with the object of obtaining information from him. The defendant had with him a printed form of "Enquiries before contract," sold by a well-known firm of law stationers, and on this form he noted in pencil the answers which he obtained from Mr. Tebbs. Questions 1 (*a*) and (*b*) are in the following form: "1. Please "supply full particulars of: (*a*) All subsisting tenancies, stating "which are or have been statutory tenancies, either under the "Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, "or under the Rent and Mortgage Interest Restrictions Act, "1939, all terms of the tenancies, and the names of the tenants, "together with copies of any leases or agreements. (*b*) If the "property is now in the vendor's possession, or vacant, or the "present tenancy is not a statutory tenancy, please state whether "the property is, or has been, subject to the Rent Restrictions "Acts, and if so the amounts of the statutory and net rents, and "whether the property or any part of it was registered as "decontrolled with a local authority."

Against these questions, the defendant wrote down the following information: "Top floor let to Mr. Chapman 25s. per week "inclusive. This was the rent receivable when the vendor bought "in 1948 (?) and no increases have been passed on to tenant. "First floor let to Mr. Hommerton 25s. per week ditto. Ground "floor let to vendor from 1947 to 1948 at 35s. per week inclusive. "No information of previous lettings." It seems probable that the defendant had not examined the documents of title at this date. Against a certain number of the other questions in the form the defendant also made some pencil notes.

The defendant then proceeded to prepare a contract in duplicate incorporating the National Conditions of Sale (15th edition) with some special conditions of sale. But, as the property was registered with good leasehold title, the matter was comparatively simple. One condition states that the property is sold with vacant possession on completion, but it appears that as a result of a telephone conversation with the vendor this was altered by the defendant so as to limit it to the ground floor and garden, and a reference to the first and second floors being let at the inclusive weekly rentals of 25s. each floor was added. Completion on December 18, 1953, was provided for.

In response to a request by the defendant on November 23, 1953, the plaintiff called on the defendant to sign his part of the contract. According to the plaintiff's account, the defendant had the unsigned contract in front of him, and also the preliminary inquiries (but upside down from the plaintiff's point of view, and in any event the pencil notes are difficult to read). The plaintiff

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says that the defendant went through the inquiries, but rather for his own satisfaction, it seemed, than for the purpose of informing the plaintiff. The plaintiff says that the defendant remarked that it was possible that the plaintiff could increase the rents, as no increase had been made since 1950 although rates had gone up. The defendant passed the contract over to the plaintiff to sign. The plaintiff says that the defendant did not go through the terms of the contract with him, though he did give him every opportunity to read it. The plaintiff thought he was with the defendant for about three-quarters of an hour.

The defendant, in his evidence, said that he went through all the relevant documents with the plaintiff; that he read the replies which he had noted on the form "Enquiries before "contract" out loud; that he remarked to the plaintiff how difficult the situation under the Rent Acts was becoming, and that the standard rents were very hard to establish; that he probably did tell the plaintiff that, as increases of rates had not been passed on, it was possible he might get an increase of rents. He also says that he told the plaintiff that the rents might be reduced. He said that the plaintiff seemed to understand and was not much concerned.

As to what took place on this occasion, I think I must accept the plaintiff's story. He appeared to me to be an exceptionally honest and frank witness, and he stood up to a very severe cross-examination without being shaken and without fencing. He was said to be a business man, but he was obviously not a man who dealt often with land, and he seemed to have no more than the average knowledge of "the man in the street" that rents of houses had been "pegged" by the Rent Acts.

I am far from suggesting that the defendant was not an honest witness. But it seemed to me that his evidence was based not so much on his actual recollection as on what he thought his usual practice was, and what he would be likely to have done, and he suffered, as it seems to me, from a certain amount of "happy "hindsight." It must also be borne in mind that to a solicitor who does one hundred conveyancing matters in a year a particular transaction is merely one of many, while to the client his case is the only one he has had to bother about.

The contracts were signed and dated November 24, 1953, and the sale was completed on January 1, 1954. The defendant charged a reduced fee.

The trouble came in June, 1954. In May the plaintiff proposed to raise the rents of the two tenants by reason of increases in the rates. This drew a letter dated June 3 from the solicitors for Mr. Chapman (one of the tenants) refusing to pay an increase, and instead demanding a reduction. Apparently with very little trouble they had discovered that in 1939 the whole of the first and second floors were let for 30s. a week, and increases of rates amounted to no more than 10s. a week for the whole house. Proceedings were started in the county court on July 14, 1954.

and eventually on September 9, 1954, the standard rent was fixed by that court as being 15s. per week for each of the two floors, and, with the permitted increases, the recoverable rents were 17s. 6d. per week and 18s. 4d. per week. The consequence was that the plaintiff had to make refunds to the tenants.

The standard on which a solicitor's liability for negligence depends has recently been described by Harman J., and his remarks have been approved by the Court of Appeal in *Simmons* v. *Pennington & Son (a firm)*.[2] In that case Harman J., as quoted by Hodson L.J., said: "I do not think I need deal at "any great length with the question of a solicitor's liability for "negligence. It is the same as anybody else's liability; having "regard to the degree of skill held out to the public by solicitors, "does the conduct of the solicitor fall short of the standard which "the public has been led to expect of the solicitor?"

It is plain that the standard of skill and care required of a solicitor who acts for both parties on a sale and purchase is at least as great as that which would be required of a solicitor who acts for a purchaser alone.

Now in the present case the purchaser was buying a property let to two tenants who were in occupation as regards part of the property—the first and second floors. They were paying weekly rents, and the rateable value of the whole property (£44 a year) showed that the property was likely to be subject to the provisions of the Rent Acts. When that situation is present, the amount of the standard rent is an important fact to be ascertained if possible, because on it depends the amounts of the rents which are lawfully recoverable from the tenants concerned. There have been plenty of cases where the rents have been found to have been unlawfully raised and the owner of the property has had to refund: see, for example, *Kitchen's Trustee* v. *Madders*.[3]

It seems to me that the amount of the standard rent must be (1) a subject for inquiry by the solicitor acting for the purchaser, and (2) a subject on which plain and clear advice may be required from that solicitor to his client. The question is whether these duties were properly performed by the defendant in the present case.

So far as I can tell, the question what were the standard rents was not put to the vendor in the present case. The form of "Enquiries before contract" seems to be curiously defective in this respect. Question 1 (a), which relates to tenancies, does not mention the standard, or statutory, or recoverable rents at all. The defendant was told by the vendor that the rents of 25s. a week were receivable when he bought, that no increases had been passed on and that he had no information as to previous lettings. The defendant thereupon was content with this meagre

[2] [1955] 1 W.L.R. 183, 188; [1955] 1 All E.R. 240, 245.

[3] [1950] Ch. 134; [1949] 2 All E.R. 1079; *reversing in part* [1949] Ch. 588; [1949] 2 All E.R. 54.

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information, and apparently made no further inquiry of the vendor.

I cannot help thinking that a solicitor who knew his duty, and was not hampered by acting for both vendor and purchaser, would have pursued the subject more vigorously. Of course, the vendor or his solicitors might then have replied that to the best of the vendor's information and belief the recoverable rent was 25s. a week or they might have replied that the vendor had no further information. But should then the purchaser's solicitor do nothing further in the matter? I do not believe that his duty is then completed. For instance, in *Hunt* v. *Luck*[4] it was held that the occupation of land by a tenant affects a purchaser of the land with constructive notice of all that tenant's rights, though not of the lessor's title or rights. The deduction from this case surely is that in the course of his investigation of the title the purchaser's solicitor should inquire of the tenants the terms on which they occupy the property; and in a case which is affected by the Rent Acts the inquiries should include an inquiry whether the rents they pay are the standard or the recoverable rents of the property.

In the present case the promptness of the tenants' reaction to the plaintiff's attempt to raise their rents suggests that such inquiries as I have mentioned would have either revealed the information which was vital or sources from which the necessary information could be obtained. I reject the contention of counsel for the defendant that the readiness with which the information was later obtained has no relevance on the question of the defendant's negligence. The defendant, I may observe, was not aware of the case of *Hunt* v. *Luck*.[5]

By accepting the insufficient information given by the vendor, Mr. Tebbs, without further questioning or inquiries in other directions, in my view the defendant failed in his duty to his client. It is, in my view, no excuse for failure that inquiries may be troublesome to make. Neglect to make the inquiries may often result in no adverse claim. But when trouble occurs it does not seem to me to be sufficient answer to say that a chance is often taken by those whose duty it is to investigate.

However, evidence was called on behalf of the defendant, with the object of showing that the defendant's indifference on the subject of the standard or recoverable rents was in accordance with the usual practice of solicitors, and, therefore, not open to criticism so as to justify an allegation of negligence.

Three solicitors were called for this purpose. They were (1) the defendant himself; (2) the solicitor who acted on the occasion of the acquisition of the property by Mr. Tebbs from Mr. Johnson; and (3) a member of the firm of solicitors instructing counsel on behalf of the defendant. I am sure that all three are

[4] [1902] 1 Ch. 428; [1902] 18 T.L.R. 265.

[5] [1902] 1 Ch. 428.

perfectly respectable solicitors, but I should not describe them as being independent and uninterested in regard to the matters raised by this action.

Counsel for the defendant contended that I was bound to accept their evidence on the question of the proper practice in these matters, and (if I understood him correctly) I was not at liberty to draw upon my own conveyancing experience or reach conclusions from cases such as *Hunt* v. *Luck*,[6] which would suggest that their practices were below standard. This I cannot accept. As to the evidence in question, the defendant no doubt was bound to say that he acted in accordance with his usual practice and that that practice was in accordance with usual conveyancing standards. I am not satisfied that the evidence of the other two solicitors wholly supported him. Mr. Frank Wilders said that, unless the vendor had absolute information, his solicitors would answer inquiries by saying "so far as they "were aware." He said that it really depends on each case what one does. If it is a case of a dealer, one takes more care as it is for an investment. But why should other purchasers suffer from a lower standard of care? He said he would ask supplementary questions of the vendor's solicitors and if he could get no more he would put the onus on his client, the purchaser. He agreed that if the owner in 1939 was known, there was nothing to prevent inquiries being made of him. But he had not heard of inquiries being made of tenants. When he acted on the occasion of Mr. Tebbs's purchase in 1950, it was very easy for him as there was never any proper contract and there was a quick conveyance. Mr. Tebbs knew the situation and was satisfied.

Mr. William Wadsworth Teggin said that vendors give the information which they have and usually qualify it—by words like "so far as the vendors" knew, I think he meant. He said it was not unusual to get information from which standard rents or recoverable rents could not be ascertained. He said that one tells one's client or inquires again of the vendor. He had heard of tenants or former tenants being asked for information, and he agreed that if the 1939 owner was known it would be right to make inquiries of him.

It seems to me that the inquiries made by the defendant fell below even the standards mentioned by these witnesses.

So far as putting the matter up to the client (in the absence of satisfactory information) is concerned, I am not satisfied that the defendant advised the plaintiff in such a way as to make him understand that the amounts of 25s. a week paid by the tenants could not be relied upon as recoverable rents, and might involve the plaintiff in possible demands for repayment of amounts of rent overpaid. On the contrary, I think that the defendant spoke to the plaintiff only of possible increases.

In my view, therefore, the defendant was guilty of negligence

[6] [1902] 1 Ch. 428.

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in that he made inadequate inquiries on the subject of the standard or recoverable rents of the upper floors of the property, and he did not clearly advise the plaintiff that so little was known on this subject that there might have been overpayments. I do not believe that the question of overpayments occurred to the defendant, any more than it did to the plaintiff at the time of the contract.

There is one final remark that I have to make. Counsel for the defendant seemed to contend that when preliminary inquiries before contract have been made there is no obligation on the purchaser's solicitor to make requisitions and any necessary searches or inquiries after the contract has been signed. This is not correct. The practice of making preliminary inquiries has grown up, no doubt, because a sale "subject to contract," involving a subsequent formal contract, has become a common occurrence, and the provisions in the Law of Property Act, 1925, as to constructive or imputed notice have increased the troubles of an intending purchaser. But it is still the duty of a purchaser's solicitor to make the appropriate requisitions and inquiries after the formal contract is signed, even if the preliminary inquiries have been so complete that it is only necessary to ask whether the answers thus received are still complete and accurate.

In the result the action succeeds.

Judgment for plaintiff.

Solicitors: *Chandler & Creeke; Hewitt, Woollacott & Chown.*

K. R. A. H.

[PRIVY COUNCIL.]

J. C.† 1956 *Apr.* 10.

* SUBRAMANIAM KADIRTAMBY SUBRAMANIAM . . . . . Appellant;

AND

THE QUEEN . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Criminal law—Perjury—Summary statutory powers of court—Subsidiary investigation against witnesses during trial—Misconceived procedure—Criminal Procedure Code (Legislative Enactments of Ceylon, 1938 *Rev., c.* 16), *s.* 440 (1) (4).

Privy Council—Costs of appeal—Criminal case—Special circumstances.

By section 440 of the Criminal Procedure Code of Ceylon: "(1) If any person giving evidence on any subject in open court

† *Present*: Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Mr. L. M. D. de Silva.

"in any judicial proceeding under this Code gives, in the opinion "of the court before which the judicial proceeding is held, false "evidence within the meaning of section 188 of the Penal Code it "shall be lawful for the court, if such court be the Supreme Court, "summarily to sentence such witness as for a contempt of the "court to imprisonment . . . for any period not exceeding three "months . . . (4) In lieu of exercising the power given by this "section the court may if it thinks fit transmit the record of the "judicial proceeding to the Attorney-General to enable him to "exercise the powers conferred on him by this Code or proceed in "manner provided by section 380."

During the course of a trial for alleged murder the judge, a Commissioner of Assize of the Supreme Court of Ceylon, being apparently of the opinion that evidence of the murder was being suppressed, on his own initiative called a number of the witnesses and cross-examined them and the prosecution witnesses not in connexion with the alleged murder but in connexion with the alleged suppression of evidence of that murder. In the course of that cross-examination he formed the opinion that the appellant, who was a village headman, and some of the police and other witnesses were committing perjury, and he proceeded to direct the acquittal of the prisoner although he stated that he had not the slightest doubt that he was guilty and that he had with the assistance of the police and of the appellant suppressed the evidence. At a later hearing the commissioner, after hearing counsel for the police and other witnesses and the appellant, in purported exercise of the summary power vested in him under section 440 (1) of the Criminal Procedure Code, sentenced them to varying terms of imprisonment. On appeal by the appellant:—

Held, that the course taken by the commissioner was misconceived. The summary power conferred by section 440 (1) was one which should only be used when it was clear beyond doubt that a witness in the course of his evidence in the case being tried had committed perjury. It was never intended that in the exercise of the power under section 440 (1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case. If such an investigation was necessary it could and should be set on foot under section 440 (4).

In all the circumstances this was a case in which it was right to make the unusual order that the appellant should have his costs of the appeal and of the petition for special leave.

Order of the Commissioner of Assize set aside.

APPEAL (No. 20 of 1955), by special leave, against an order of a Commissioner of Assize of the Supreme Court of Ceylon (Mr. Commissioner Barr Kumarakulasinghe) (March 18, 1954), whereby the appellant was sentenced to one month's rigorous imprisonment for having given false evidence during the course of a trial for a murder on November 27, 1952, before the commissioner who, in sentencing the appellant, purported to exercise the summary powers vested in him under section 440 (1) of the Criminal Procedure Code of Ceylon.

The appellant had served the said sentence before the hearing of this appeal.

By section 440 of the Criminal Procedure Code: "(1) If any "person giving evidence on any subject in open court in any

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" judicial proceeding under this Code gives, in the opinion of the " court before which the judicial proceeding is held, false evidence " within the meaning of section 188 of the Penal Code it shall be " lawful for the court, if such court be the Supreme Court, " summarily to sentence such witness as for a contempt of the " court to imprisonment either simple or rigorous for any period " not exceeding three months or to fine such witness in any sum " not exceeding two hundred rupees; or if such court be an " inferior court to order such witness to pay a fine not exceeding " fifty rupees and in default of payment of such fine to undergo " rigorous imprisonment for any period not exceeding two months. " Whenever the power given by this section is exercised by a " court other than the Supreme Court the judge or magistrate of " such court shall record the reasons for imposing such fine.

" (2) Any person who has undergone any sentence of imprison- " ment or paid any fine imposed under this section shall not be " liable to be punished again for the same offence.

" (3) Any person against whom any order is made by any " court other than the Supreme Court under subsection (1) of this " section may appeal to the Supreme Court and every such appeal " shall be subject to the provisions of this Code.

" (4) In lieu of exercising the power given by this section the " court may if it thinks fit transmit the record of the judicial " proceeding to the Attorney-General to enable him to exercise " the powers conferred on him by this Code or proceed in manner " provided by section 380.

" (5) Nothing in this section contained shall be construed as " derogating from or limiting the powers and jurisdiction of the " Supreme Court or the judges thereof."

The appellant was sentenced in the following circumstances: The accused man, one Verrakathey Tharuman *alias* Tharmalingam, was charged under section 296 of the Penal Code with the murder of one Kandasamy on November 27, 1952, at or near a road junction known as Nelliadi Junction.

The appellant was at that time the village headman of Karavetti North, a village which abutted on the north side of Nelliadi Junction which was the scene of the offence. The village of Karavetti West abutted on the south side of Nelliadi Junction.

The case for the prosecution appeared to have been that the deceased was seriously assaulted and beaten by the accused and two others (who were not before the court) on the north side of Nelliadi Junction soon after it had become dark (that was, about 6.30–7 p.m.). His assailants left the injured man lying on the road where he was attacked, but subsequently he was removed to the southern side of the Junction by two innocent persons, who placed him under a tamarind tree. After the attack the attackers went away, but the accused returned shortly after and, finding the injured person under the tree, attacked him again, this time with a knife. The injured man died as a result of the injuries he had thus received.

The case for the prosecution was supported principally by the evidence of two alleged eye-witnesses and by the evidence of police officers and others (the appellant among them) who had either assisted at the police investigation or otherwise had played some part therein.

The appellant was called for the prosecution and testified that he was not an eye-witness nor in possession of information which definitely identified any person with the crime. He was first informed of the offence at about 7.30 p.m. on the day in question and within 10 minutes or so of his receiving such information he went to Nelliadi Junction. On his arrival at the junction he found the injured man alive but gravely wounded lying under a tree within the jurisdiction of the Karavetti West headman in whose absence he (the appellant) assumed jurisdiction to deal with the emergency. He reported the offence to the police by telephone very shortly after—at about 7.45 p.m.—and until the police arrived at about 9 p.m. he carried out his duties as best he could. At about 8.15 p.m. he said he sent a written message to the Karavetti West headman asking for his car for the removal of the injured person, but the message was not accepted and was returned to him. He was unable to find the letter. The Karavetti West headman did not arrive on the scene before about 9 p.m. The appellant tried vainly to enlist the assistance of car owners for removing the injured person, who died eventually at about 8.30 p.m., that was, before the arrival of either the police or the Karavetti West headman. Later the appellant telephoned to the hospital and arranged for the removal of the deceased.

Before the arrival of the police or the Karavetti West headman he questioned, among others, one Kandappu a neighbouring boutique-keeper, and recorded his statement. The appellant stated that there was a general reluctance on the part of several persons who had been questioned to come forward with any information of the attack on the deceased. He denied that there was any truth in the suggestion that "we all of us got together "and suppressed the fact as to who the assailant was." The Karavetti West headman was not called as a witness.

1956. Feb. 29, Mar. 1, 5. *Phineas Quass Q.C.* and *R. K. Handoo* for appellant.

Biden Ashbrooke and *T. O. Kellock* for the Crown.

The following cases were cited in argument: *Chang Hang Kiu* v. *Piggott* [1]; *In re Pollard* [2]; *Sivakolunthu* v. *Chelliah* [3]; *Rex* v. *Amadoru* [4]; *Ahamath* v. *Silva* [5]; *Rex* v. *Namasivayam* [6]; *Krishna*

[1] [1909] A.C. 312; 25 T.L.R. 381.
[2] (1868) L.R. 2 P.C. 106.
[3] (1910) 13 C.N.L.R. 289.
[4] (1911) 14 C.N.L.R. 481.
[5] (1920) 22 C.N.L.R. 444.
[6] (1948) 49 C.N.L.R. 289.

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Ayyar v. *Balakrishna Ayyar* [7]; *Achchi Kannu* v. *Ago Appu* [8]; *Johnson* v. *Rex* [9]; *Waugh* v. *The King* [10]; *Teper* v. *The Queen.* [11]

April 10. The judgment of their Lordships was delivered by LORD OAKSEY, who stated the facts and statutory provisions set out above, and continued: The commissioner appears to have formed the opinion that evidence of the murder had been and was being suppressed and he therefore on his own initiative called a number of witnesses and cross-examined the prosecution witnesses and the witnesses he had called not in connexion with the alleged murder which he was trying but in connexion with the alleged suppression of evidence of that murder. In the course of this cross-examination he formed the opinion that the appellant and some of the police and other witnesses were committing perjury, and proceeded to direct the acquittal of the prisoner although he stated that he had not the slightest doubt that the prisoner was guilty and that he had, with the assistance of the police and of the appellant, suppressed the evidence. At a later hearing the commissioner, after hearing counsel for the police and other witnesses and the appellant, sentenced them to various terms of imprisonment.

In their Lordships' opinion the course taken by the commissioner was misconceived. The summary power conferred by section 440 (1) is one which should only be used when it is clear beyond doubt that a witness in the course of his evidence in the case being tried has committed perjury. It was, in their Lordships' opinion, never intended that in the exercise of the power under section 440 (1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case.

If such an investigation is necessary it can and should be set on foot under section 440 (4). Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the order of the Commissioner of Assize, Supreme Court of Ceylon, dated March 18, 1954, set aside. In all the circumstances of the case they think it right to make the unusual order that the appellant shall have his costs of the appeal and of the petition for special leave.

Solicitors: *O. L. Blyth; T. L. Wilson & Co.*

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[7] (1933) I.L.R. 57 Mad. 635.
[8] (1901) 5 C.N.L.R. 87.
[9] [1904] A.C. 817, 824; 20 T.L.R. 697.
[10] [1950] A.C. 203, 209; 66 T.L.R. (Pt. 1) 554.
[11] [1952] A.C. 480; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447.

[COURT OF APPEAL.]

*J. SPURLING LTD. *v.* BRADSHAW.

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Mar. 20, 23, 26.

Denning, Morris and Parker L.JJ.

[Plaint No. R.A.L. 59.]

Contract — Exceptions clause — Negligence — Bailment — "Landing "account" including London lighterage clause exempting bailees from liability for negligence — Goods handed over to bailor in damaged state—Claim for damages for breach of implied term to take reasonable care of goods stored—Bailee found negligent without giving evidence — Sufficient notice of exceptions clause — Bailee protected by clause against claim for negligence simpliciter — Whether clause would protect bailee against claim for breach of fundamental term of or deviation from contract—Onus of proof. Shipping—London lighterage clause.

The defendant, a wholesale factor, who had had previous business dealings with the plaintiff warehousemen, delivered to them eight barrels of orange juice for storage, and a few days later received a "landing account" which on its face referred to conditions printed in small type on the back. These included the London lighterage clause, which exempted the plaintiffs, inter alia, from liability for any loss, damage or detention, in respect of goods entrusted to them in the course of their business, occasioned by the negligence, wrongful act or default of themselves, their servants, or agents. The barrels, when collected, were found to be either empty or in such damaged condition as to be useless. In an action by the warehousemen to recover charges due for storage, the defendant counterclaimed for damages for alleged breach of an implied term of the contract of bailment to take reasonable care of the barrels. The plaintiffs denied negligence and relied on the exemption clause. The county court judge, after hearing evidence for the defendant only, found that the plaintiffs had been negligent; he dismissed the counterclaim, holding that the exemption clause applied. On appeal by the defendant:—

Held, (1) that sufficient notice of the clause had been given to the defendant to make it a term of the contract.

(2) That though in the circumstances of the case the judge should not have found that the plaintiffs had been negligent, since he had not heard their evidence, they were protected by the exemption clause against what was in substance an allegation of negligence simpliciter.

Aliter, if the counterclaim had alleged that there had been deviation from or breach of a fundamental term of the contract, for that might place on the party who sought to rely on the exemption clause the burden of proving that the clause protected him.

Per Denning L.J. Exempting clauses nowadays are all held to be subject to the overriding proviso that they only avail to exempt a party when he is carrying out his contract and not when he is deviating from it or breaking it in a radical respect.

Woolmer v. *Delmer Price Ltd.* [1955] 1 Q.B. 291; [1955] 2 W.L.R. 329; [1955] 1 All E.R. 377 distinguished.

APPEAL from Judge Block, sitting in the Mayor's and City of London Court.

In June, 1953, Andrew Walter Bradshaw, trading as Bradshaw's Prescription Service, bought eight wooden casks of orange

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juice, containing 60 gallons each, and sent them for storage to a firm of warehousemen, J. Spurling Ltd., who, on June 10, 1953, sent a receipt for them, described as a "landing account," which stated, so far as relevant: "We have pleasure in advising you "that these goods consigned to you arrived at our premises this "day and are subject to either warehouse, wharfage, demurrage "or other charges. . . . The company's conditions as printed on "the back hereof cover the goods held in accordance with this "notice. Goods will be insured if you instruct us accordingly; "otherwise they are not insured." On the back there were "Contract conditions," and many lines of small print, which included, towards the end, the following words: "We will not "in any circumstances when acting either as warehousemen, "wharfingers, contractors, stevedores, carriers by land, or agents, "or in any other capacity, be liable for any loss, damage or "detention, howsoever, whensoever, or wheresoever occasioned "in respect of any goods entrusted to or carried or handled by "us in the course of our business, even when such loss, damage "or detention may have been occasioned by the negligence, "wrongful act or default of ourselves or our servants or agents "or others for whose acts we would otherwise be responsible."

On the same date, June 10, 1953, the warehousemen sent an invoice to Bradshaw: "To receiving, warehousing and redelivery, "£4." There was a note at the bottom of it: "All goods are "handled by us in accordance with the conditions as over and "warehoused at owner's risk and not insured unless specially "instructed." There were no conditions "as over."

Bradshaw paid the £4 due on the invoice and for a time also paid the warehouse rent on these goods, but he afterwards fell into arrear on these and other goods. On March 9, 1954, the warehousemen sent to him an account for the balance owing by him which was, they said, rather old. Within three days, Bradshaw issued a delivery order in favour of one Tewson, a cartage contractor, directed to the warehousemen, asking them to release to him the eight barrels of orange juice; and on April 23, 1954, Tewson collected the barrels. No complaints were made in writing at that time as to the condition of the barrels when they were collected.

Meanwhile, over £60 had become due to the warehousemen in respect of rent and wharfage charges, and in spite of repeated applications in writing, the amount remained unpaid, and no reply was received from Bradshaw until, on December 17, 1954, his solicitors wrote stating that he had a counterclaim against the warehousemen for damages in respect of the storage of the barrels, this being the first written complaint on the matter.

The warehousemen thereupon issued a writ claiming the sum of £61 12s. 6d. for their charges. By his defence Bradshaw admitted the charges, but counterclaimed that the plaintiff warehousemen had agreed with him that they would accept the barrels of orange juice, store them, and subsequently deliver

them at the defendant's directions to his customers; that it was an implied term of the said contract of bailment that the plaintiffs would take reasonable care of the barrels of orange juice while storing them; and that in breach of the said term and/or negligently, the plaintiffs had stored the goods in the open air and further damaged them while in their possession. By reason of the said matters, when the plaintiffs delivered the goods to a customer of the defendant, it was claimed, they were in the following condition: five barrels were empty and without lids, one barrel contained dirty water and was covered by a lid which had become loose; and two barrels were leaking badly. The defendant counterclaimed £180. By their reply to that counterclaim, the plaintiffs denied that they had been negligent, and further said that it was an express term of the contract that they should not be liable for any loss or damage of or to or in connexion with the barrels, however caused; and they relied on the term in the "landing account."

At the hearing, the counterclaim was the only matter in dispute. The cartage contractor, Tewson, was called. He said that when he collected the barrels they were at the far end of an alley-way, with lorry wheels in front of them, girders on top, and some tarpaulin sheets; and that he had later discovered that they were damaged, and spoke to the crane-driver about it. The defendant also gave evidence. He stated that he had received landing accounts from these warehousemen on many occasions; and that as soon as he saw the condition of the barrels he had gone to see the yardman at the office. He said further, that when he had received the demands for payment he had gone to see someone at the warehousemen's office and had raised the matter of the barrels. Before he was cross-examined, the judge intervened and asked his counsel: "Why is not the exempting clause "a complete answer to the case?" Having heard counsel in reply to that question, the judge, without hearing any further evidence, gave judgment in favour of the warehousemen. In his judgment he said: "I have no doubt that the plaintiffs were "negligent in looking after these barrels, and I accept the "evidence of Mr. Tewson as to their condition. . . . But this was "one of many transactions undertaken as between the plaintiffs "and the defendant for the storage of goods. Mr. Bradshaw was "most truthful and honest about the whole matter. He said "he had had lots of these landing accounts, where, on the "front is clearly printed: 'The company's conditions as printed "'on the back hereof cover the goods held in accordance with "'this notice.' Although his eyesight is not as good as it "might perhaps be, he told me that he had never taken the "trouble either to read or get anybody else to read those "conditions, and that many of those landing notes had passed "through his hands over the course of trading." The judge then referred to the exemption clause and said: "Although my eye-"sight is not as good as it used to be, I find no difficulty in

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"reading the words put on the back; . . . and there is the "clearest possible exemption from all liability for negligence on "the part of the plaintiffs, and the defendant therefore fails to "make out his counterclaim."

The defendant appealed.

Jonathan Sofer for the defendant appellant.
John Megaw Q.C. and *C. F. Dehn* for the plaintiffs.

The following cases were referred to in the argument: *Crooks* v. *Allan* [1]; *Williamson* v. *North of Scotland etc. Navigation Co.* [2]; *Stephen* v. *International Sleeping Car Co.* [3]; *Curtis* v. *Chemical Cleaning and Dyeing Co.* [4]; *Henderson* v. *Stevenson* [5]; *S.S. Ardennes (Cargo Owners)* v. *S.S. Ardennes (Owners)* [6]; *Parker* v. *South Eastern Railway Co.* [7]; *Olley* v. *Marlborough Court Ltd.* [8]; *Taylor* v. *Glasgow Corporation* [9]; *Thompson* v. *London, Midland and Scottish Railway Co.* [10]; *Watkins* v. *Rymill* [11]; *Van Toll* v. *South Eastern Railway Co.* [12]; *Bontex Knitting Works Ltd.* v. *St. Johns Garage* [13]; *Royal Exchange Shipping Co.* v. *Dixon* [14]; *Roe* v. *R. A. Naylor Ltd.* [15]; *White* v. *John Warrick & Co. Ltd.* [16]; *Woolmer* v. *Delmer Price Ltd.* [17]; *Cunard Steamship Co.* v. *Buerger* [18]; *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty Son & Co.* [19]; *McManus* v. *Lancashire and Yorkshire Railway Co.* [20]; *Alderslade* v. *Hendon Laundry Ltd.* [21]; *Pyrene Co. Ltd.* v. *Scindia Steam Navigation Co. Ltd.* [22]; *Humphrey Ltd.* v. *Baxter Hoare & Co.* [23]; *Canada Steamship Lines Ltd.* v. *The King* [24]; *Hood* v. *Anchor Line (Henderson Brothers).* [25]

Denning L.J. stated the facts, and continued: The judge in his judgment found that the warehousemen were negligent. That was a finding which was not open to him, in view of the fact that Mr. Bradshaw had not been cross-examined and the warehousemen had not had an opportunity of giving their evidence. But, nevertheless, assuming that they were negligent, the question for us is whether the clause excuses the warehousemen from liability.

[1] (1879) 5 Q.B.D. 38.
[2] 1916 S.C. 554.
[3] (1903) 19 T.L.R. 621.
[4] [1951] 1 K.B. 805; [1951] 1 T.L.R. 452; [1951] 1 All E.R. 631.
[5] (1875) L.R. 2 Sc. & Div. 470.
[6] [1951] 1 K.B. 55; 66 T.L.R. (Pt. 2) 312; [1950] 2 All E.R. 517.
[7] (1877) 2 C.P.D. 416.
[8] [1949] 1 K.B. 532; 65 T.L.R. 95; [1949] 1 All E.R. 127.
[9] 1952 S.C. 440.
[10] [1930] 1 K.B. 41.
[11] (1883) 10 Q.B.D. 178.
[12] (1862) 12 C.B.(N.S.) 75.
[13] [1944] W.N. 85; 60 T.L.R. 253; [1944] 1 All E.R. 381, n.
[14] (1886) 12 App.Cas. 11; 3 T.L.R. 172.
[15] [1917] 1 K.B. 712.
[16] [1953] 1 W.L.R. 1285; [1953] 2 All E.R. 1021.
[17] [1955] 1 Q.B. 291; [1955] 2 W.L.R. 329; [1955] 1 All E.R. 377.
[18] [1927] A.C. 1; 42 T.L.R. 653.
[19] [1953] 1 W.L.R. 1468; [1953] 2 All E.R. 1471.
[20] (1859) 4 H. & N. 327.
[21] [1945] K.B. 189; 61 T.L.R. 216; [1945] 1 All E.R. 244.
[22] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.
[23] (1933) 46 Ll.L.R. 252.
[24] [1952] A.C. 192; [1952] 1 T.L.R. 261; [1952] 1 All E.R. 305.
[25] [1918] A.C. 837; 34 T.L.R. 550.

If the clause is taken literally, it is wide enough to exempt the company from any obligation to redeliver the goods. It would mean that if the managing director sold the orange juice to somebody else, or used it up for the company's purposes, maybe by mistake or even dishonestly, the company would not be liable; or if some discontented storeman took the bung out of a barrel and let the orange juice escape, the company still would not be liable. If the clause went to those lengths, it would be very unreasonable and might for that reason be invalid on the lines which Bramwell L.J. indicated in *Parker* v. *South Eastern Railway Co.*[1]; but I do not think that this clause is to be construed as widely as that. These exempting clauses are nowadays all held to be subject to the overriding proviso that they only avail to exempt a party when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it. Just as a party who is guilty of a radical breach is disentitled from insisting on the further performance by the other, so also he is disentitled from relying on an exempting clause. For instance, if a carrier by land agrees to collect goods and deliver them forthwith, and in breach of that contract he leaves them unattended for an hour instead of carrying them to their destination, with the result that they are stolen, he is disentitled from relying on the exempting clause. That was decided in 1944 by this court in *Bontex Knitting Works Ltd.* v. *St. John's Garage*,[2] expressly approving the judgment of Lewis J.[3]; or if a bailee by mistake sells the goods or stores them in the wrong place, he is not covered by the exempting clause: see the decision of McNair J. in *Woolmer* v. *Delmer Price Ltd.*[4]

The essence of the contract by a warehouseman is that he will store the goods in the contractual place and deliver them on demand to the bailor or his order. If he stores them in a different place, or if he consumes or destroys them instead of storing them, or if he sells them, or delivers them without excuse to somebody else, he is guilty of a breach which goes to the root of the contract and he cannot rely on the exempting clause. But if he should happen to damage them by some momentary piece of inadvertence, then he is able to rely on the exempting clause: because negligence by itself, without more, is not a breach which goes to the root of the contract (see *Swan Hunter and Wigham Richardson Ltd.* v. *France Fenwick Tyne and Wear Co. Ltd., The Albion*[5]), any more than non-payment by itself is such a breach: see *Mersey Steel & Iron Co.* v. *Naylor*,

[1] (1877) 2 C.P.D. 416, 428.
[2] [1944] W.N. 85; 60 T.L.R. 253; [1944] 1 All E.R. 381, n.
[3] (1943) 60 T.L.R. 44.
[4] [1955] 1 Q.B. 291; [1955] 2 W.L.R. 329; [1955] 1 All E.R. 377.
[5] [1953] 1 W.L.R. 1026, 1030, 1032; sub nom. *The Albion, France Fenwick & Tyne and Wear Co. Ltd.* v. *Swan, Hunter and Wigham Richardson Ltd.* [1953] 2 All E.R. 679.

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Benzon & Co.[6] I would not like to say, however, that negligence can never go to the root of the contract. If a warehouseman were to handle the goods so roughly as to warrant the inference that he was reckless and indifferent to their safety, he would, I think, be guilty of a breach going to the root of the contract and could not rely on the exempting clause. He cannot be allowed to escape from his obligation by saying to himself: "I am not "going to trouble about these goods because I am covered by an "exempting clause."

Another thing to remember about these exempting clauses is that in the ordinary way the burden is on the bailee to bring himself within the exception. A bailor, by pleading and presenting his case properly, can always put on the bailee the burden of proof. In the case of non-delivery, for instance, all he need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which, of course, would be a complete answer at common law) or, if it was due to his fault, it was a fault from which he is excused by the exempting clause: see *Cunard Steamship Co.* v. *Buerger*[7] and *Woolmer* v. *Delmer Price Ltd.*[8] I do not think the Court of Appeal in *Alderslade* v. *Hendon Laundry Ltd.*[9] had the burden of proof in mind at all. Likewise, with goods which are returned by the bailee in a damaged condition, the burden is on him to show that the damage was done without his fault: or that, if fault there was, it was excused by the exempting clause. Nothing else will suffice. But where the only charge made in the pleadings—or the only reasonable inference on the facts—is that the damage was due to negligence and nothing more, then the bailee can rely on the exempting clause without more ado. That was, I think, the case here. As I read the pleadings, and the way the case was put to the judge, Mr. Bradshaw was complaining of negligence and nothing more. The clause therefore avails to exempt the warehousemen, provided always that it was part of the contract.

This brings me to the question whether this clause was part of the contract. Mr. Sofer urged us to hold that the warehousemen did not do what was reasonably sufficient to give notice of the conditions within *Parker* v. *South Eastern Railway Co.*[10] I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient. The clause in this case, however, in my judgment, does not call for such exceptional treatment, especially when it is construed, as it should be, subject to the proviso that it only applies when the warehouseman is carrying out his contract, and not when he is deviating from it or breaking it in a

[6] (1884) 9 App.Cas. 434.
[7] [1927] A.C. 1; 42 T.L.R. 653.
[8] [1955] 1 Q.B. 291.
[9] [1945] K.B. 189; 61 T.L.R 216; [1945] 1 All E.R. 244.
[10] 2 C.P.D. 416.

radical respect. So construed, the judge was, I think, entitled to find that sufficient notice was given. It is to be noticed that the landing account on its face told Mr. Bradshaw that the goods would be insured if he gave instructions; otherwise they were not insured. The invoice, on its face, told him they were warehoused "at owner's risk." The printed conditions, when read subject to the proviso which I have mentioned, added little or nothing to those explicit statements taken together.

Next it was said that the landing account and invoice were issued after the goods had been received and could not, therefore, be part of the contract of bailment: but Mr. Bradshaw admitted that he had received many landing accounts before. True he had not troubled to read them. On receiving this landing account, he took no objection to it, left the goods there, and went on paying the warehouse rent for months afterwards. It seems to me that by the course of business and conduct of the parties, these conditions were part of the contract.

In these circumstances, the warehousemen were entitled to rely on this exempting condition. I think, therefore, that the counterclaim was properly dismissed, and this appeal also should be dismissed.

Morris L.J. I am of the same opinion. Although the range of the discussion in this case covered a number of important points of law, it does not seem to me that all of them in fact arise. [His Lordship referred to the terms of the counterclaim set out above, and continued:] It seems to me that that, as a pleading, is quite unexceptionable, and that what it is saying is, not "these goods were lost" or "these goods were never "delivered when a demand was made," but "The defendant "asked that these goods should be delivered to a customer of "his. They were delivered, but when delivered they were in "defective condition because of the way in which they had been "stored"; in other words, because they had been stored negligently and in breach of an implied term of the contract that the plaintiffs would take reasonable care of the barrels while storing them. Thus this case does not raise questions which might arise if there were simply a claim that goods had been asked for and had not been returned.

The judge heard the evidence of the cartage contractor as to the state of the goods when he first deposited them with the plaintiffs and their state when they were removed. The evidence of Mr. Bradshaw in chief was heard, but before he was cross-examined the judge intervened. The judge said: "I have no "doubt that the plaintiffs were negligent in looking after these "barrels." I think that the plaintiffs are entitled to have it known that, although there is that finding against them, their evidence had not been heard, although (as I say) the evidence of the carter had been heard. But the judge proceeded on

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the basis that there was negligence, and negligence was the case that was raised.

There was also brought into consideration the question of the conditions on the contract, and one question is whether the conditions were a part of the contract. The judge said this: "But this was one of many transactions undertaken as between "the plaintiffs and the defendant for the storage of goods. Mr. "Bradshaw was most truthful and honest about the whole matter. "He said he had had lots of these landing accounts, where, "on the front, is clearly printed: 'The company's conditions as "'printed on the back hereof cover the goods held in accordance "'with this notice.' Although his eyesight is not as good as "it might perhaps be, he told me that he had never taken the "trouble either to read or get somebody else to read those "conditions, and that many of those landing notes had passed "through his hands over the course of trading." It is true, as Mr. Sofer said, that because the evidence of the plaintiffs was not heard, there is no positive evidence that the conditions on previous landing accounts were the same as the conditions in the present case. But it is clearly established that Mr. Bradshaw knew that there were conditions. I think there can be no question that it is abundantly plain on the face of the document that there are conditions. On the face of the document the following words are plainly legible: "The company's conditions "as printed on the back hereof cover the goods held in accord-"ance with this notice. Goods will be insured if you instruct "us accordingly; otherwise they are not insured." The judge went on to say that he himself, looking at the back, could read the back; accordingly, he was finding as a matter of fact that the conditions on the back of that document were legible; and it follows, therefore, that the judge was finding as a matter of fact that the conditions were a part of the contract. In so doing, I cannot think that he is not following the line of approach to be found in a passage relied on by Mr. Sofer in the judgment of Bailhache J. in *Roe* v. *R. A. Naylor Ltd.*,[11] who said[12]: "Therefore the question in the present case is whether this "printed clause is a clause which is so printed that from its "position in the document and the size of the type an ordinary "careful business man, reading the document with reasonable "care, might miss it." It seems to me implicit in the judgment in the present case that the judge is saying: "The words are "quite clear on the face of the contract that there are conditions "on the back, and those conditions on the back are in fact "legible." Therefore, in finding that the conditions formed part of the contract, it does not seem to me that the judge was out of line with what Bailhache J. said, nor that there is anything that controverts what was said by Lush J. in *Crooks* v. *Allan*,[13]

[11] [1917] 1 K.B. 712.
[12] Ibid. 715.
[13] (1879) 5 Q.B.D. 38, 40.

where there is another passage relied on by Mr. Sofer. It seems to me, therefore, that these conditions were a part of the contract.

Thus, in the present case, the question becomes whether, assuming that the goods were negligently kept by the plaintiffs, the conditions protect. It seems to me that they plainly do. In *Alderslade* v. *Hendon Laundry Ltd.*,[14] Lord Greene M.R. said[15]: "It must be remembered that a limitation clause of this "kind only applies where the damage, in respect of which the "limitation clause is operative, takes place within the four "corners of the contract. But there is no room for the applica- "tion of that principle in the present case, because there is no "material for finding that the loss of these handkerchiefs was "due to some act by the defendants outside what they had "contracted to do." In the present case, similarly, it seems to me that there is no material before us for finding that the claim results from some act of the plaintiffs outside what they contracted to do. In those circumstances, it seems to me that the conditions exempting the plaintiffs from negligence are conditions that availed, and which therefore excused the plaintiffs, even on the assumption that they had been guilty of negligence. I therefore agree that the appeal fails.

Parker L.J. I have come to the same conclusion, and would only add a few words on Mr. Sofer's last submission. He contends that even if the exemption clause is binding on the appellant, the circumstances of the loss were such that, wide as the clause is, it still may not cover the loss. That being so, it is said that the county court judge should not have stopped the case, but should have allowed the respondents to call evidence to show, if they could, that the clause applied. I confess that for myself I have seldom seen a wider clause, and it is impossible to think of any circumstances in which the loss occurred which are not covered, provided always—and this is conceded by the respondents—that there has been no breach of a fundamental term akin to deviation. Thus if, for instance, the contract had been to store indoors, whereas these barrels were in fact stored in the open air, the clause would not, I think, apply. Indeed, at one time that was, I think, going to be the appellant's case, but it was abandoned. Mr. Sofer, however, goes on to contend that, even so, the onus is on the respondents to show that the exemption clause has not been, as it were, displaced by any such breach of a fundamental term, and in this regard he relies strongly on the decision of McNair J. in *Woolmer* v. *Delmer Price Ltd.*[16] In that case a fur coat had been stored with the defendants under a contract which provided that "all "goods are left at customers' risk"—a clause which it was held exempted the bailees from liability for negligence. They were, however, unable to show how the loss occurred, and McNair J.

[14] [1945] K.B. 189.
[15] Ibid. 192.
[16] [1955] 1 Q.B. 291.

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said [17]: "But if, as is the case here, they have failed to adduce "satisfactory evidence of how the loss occurred, and the loss "may have occurred in a way which would not be covered by "the protective clause, then the protective clause does not avail "them." McNair J. went on to point to two sets of facts which might have occurred in that case, both amounting to breaches of fundamental terms, in which case the exempting clause would not apply. For my part, I think it is necessary to see the nature of the present proceedings and the way the pleadings are framed. I would observe that it is not a case of a mere failure to redeliver. The goods were redelivered, and redelivered damaged. In those circumstances, as it seems to me perfectly properly, the counterclaim alleged a breach of an implied contractual term to exercise reasonable care and alternatively negligence. It was said that by reason of that breach or that negligence the loss had occurred. I think in the course of the argument, when I raised this matter, Mr. Sofer took it as a criticism of his pleading. I would like to make it quite clear that I did not intend to criticize the pleading. It is a perfectly good pleading, and it pleaded the complaint made, and the only complaint that could be made. In those circumstances, it seems to me that the county court judge, having found that the negligence alleged was proved, was perfectly right in saying that the exemption clause applied. I am far from saying that the onus is not on defendants in a case where they have failed completely to redeliver or where the plaintiff has alleged a breach of a fundamental term. Thinking, as I do, that it is quite a different case from that which was before McNair J., I find it unnecessary to go into the submissions of Mr. Megaw, on behalf of the respondents, that that case—*Woolmer* v. *Delmer Price Ltd.*[18]—was wrongly decided.

I would only add this, that while sympathizing with the course which the county court judge took, I think it is a pity that the case was not heard out; but it is only right to say that, in my view, the only parties aggrieved thereby are the respondents, against whom there is a finding of negligence, albeit they are exempted from liability therefor, when they had never had an opportunity of proving that they were not negligent. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Shindler & Co.; Hyde, Mahon & Pascall.*

M. M. H.

[17] Ibid. 294.

[18] [1955] 1 Q.B. 291.

[COURT OF APPEAL.]

*PHILIPS *v.* WARD.

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Feb. 28, 29;
Mar. 21.

Denning, Morris and Romer L.JJ.

Damages—Negligence—Surveyor—Property purchased in reliance on negligent report by surveyor—Measure of damages—"Value"—Cost of repair not recoverable—Damages measurable by difference in value of property as described and as it ought to have been described—Date of assessment—Quantum of damages not to be altered by fall in value of money between date when cause of action accrued and date of hearing of action.

In June, 1952, the plaintiff, in reliance on a negligent and inaccurate report by the defendant surveyor, purchased for £25,000 a property the market value of which in its actual condition was found by the official referee to be £21,000; but after moving in, the plaintiff found that it would require an additional expenditure of £7,000 at 1952 prices to put the property into the condition in which it had been described in the report. In an action for damages for negligence against the surveyor, the plaintiff claimed, inter alia, the cost of repair at prices ruling at the date of the hearing. But the official referee awarded him £4,000, namely, the difference between the value of the property as it should have been described and its value as described (viz., £25,000). On appeal by the plaintiff:—

Held, (1) that the proper measure of damages in this case was the difference in money between the value of the property in the condition described and its value as it should have been described, namely, £4,000; the proper measure of damages was not the cost of repair, which included other factors, such as tax relief and savings on the annual cost of upkeep resulting from the replacement of new for old.

Measure of damages in cases where damage was caused by a tortfeasor or by tenant's breach of repairs covenant, and in *Baxter* v. *Gapp & Co. Ltd.* [1939] 2 K.B. 271; 55 T.L.R. 739; [1939] 2 All E.R. 752 distinguished.

Morris v. *Sands* (unreported, July 15, 1955) considered.

(2) That the damages must be assessed at the prices prevailing when the damage occurred—1952—and that figure could not in law be affected by a fall thereafter in the value of money.

Decision of official referee affirmed.

APPEAL from official referee (His Honour W. K. Carter Q.C.).

In 1952 the plaintiff, Richard Montague Philips, instructed the defendant, L. E. Ward, a surveyor, to survey and advise him on the structural and general condition of an Elizabethan manor house farm consisting of house, two cottages, oasthouses, and 137 acres of land. The surveyor inspected the property, and on February 4, 1952, made a written report stating that the house was of very substantial construction, with the best materials and workmanship lavished on it, but that there were minor defects, which he set out. He estimated the value of the property as somewhere between £25,000 and £27,000. In reliance on that report, the plaintiff, in June, 1952, bought the property for £25,000, and moved into it with his family. It was then found that the timbers of the house were badly affected by death-watch

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beetle and by worm, and were so rotten that the only course was to replace the roof by a new one, to rebuild the timbers in the cellars, put in new wall plates, and so forth. If the necessary work of restoration had been done at the cost levels ruling in 1952, the cost of such work would have been £7,000. The work was not done at that time but stood over pending the result of the present proceedings, in which the plaintiff claimed damages from the surveyor for negligence.

By his statement of claim the plaintiff claimed, first, approximately £16,000, on the basis that £25,000 was the value of the property without the unreported defects, whereas by reason of such defects, the property was worth no more than about £9,000; secondly and alternatively, he claimed an amount between £11,500 and £14,000, that being the expense which he alleged he would incur to put the property into tenantable repair.

The official referee, after himself inspecting the unrepaired property and hearing general evidence on valuations, found that the market value of the property in the actual condition in which it was at the date at which the plaintiff purchased it was £21,000; and that the surveyor had been negligent; but he gave judgment for the plaintiff for £4,000 only, directing himself "that the "proper measure of damages in this case is the difference "between the value of the house and farm in the condition "described in the report and their value as they should have "been described," namely, the difference between £25,000 and £21,000.

The plaintiff appealed.

Leonard Lewis for the plaintiff.

Viscount Hailsham Q.C. and *Owen Stable* for the surveyor.

The following cases were cited in the argument: *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London*[1]; *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd., Coulson & Co. Ltd. (Third Party)*[2]; *Eyre and Another* v. *Rea*[3]; *Duke of Westminster* v. *Swinton*[4]; *Moss* v. *Christchurch Rural Council*[5]; *The Pactolus*[6]; *Lukin* v. *Godsall*[7]; *Jones* v. *Gooday*[8]; *Hosking* v. *Phillips*[9]; *Hide* v. *Thornborough*[10]; *Joyner* v. *Weeks*[11]; *Conquest* v. *Ebbetts*[12]; *Hanson* v. *Newman*[13]; *Hadley* v. *Baxendale*[14]; *Murphy* v. *County Council of Wexford*[15]; *Di Ferdinando* v. *Simon Smits & Co.*[16]; *S.S. Celia* v. *S.S.*

[1] [1912] A.C. 673.
[2] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.
[3] [1947] K.B. 567; 63 T.L.R. 171; [1947] 1 All E.R. 415.
[4] [1948] 1 K.B. 524; [1948] 1 All E.R. 248.
[5] [1925] 2 K.B. 750.
[6] (1856) Swabey Adm.Rep. 173.
[7] (1795) Peake Add.Cas. 15.
[8] (1841) 8 M. & W. 146.
[9] (1848) 3 Exch. 168.
[10] (1846) 2 Car. & Kir. 250.
[11] [1891] 2 Q.B. 31; 7 T.L.R. 509.
[12] [1896] A.C. 490.
[13] [1934] 1 Ch. 298; 50 T.L.R. 191.
[14] (1854) 9 Exch. 347.
[15] [1921] 2 Ir.R. 230.
[16] [1920] 3 K.B. 409; 36 T.L.R. 797.

Volturno[17]; *Baxter* v. *Gapp & Co. Ltd.*[18]; *Whiteman* v. *Hawkins*.[19]

DENNING L.J. stated the facts, and continued: I take it to be clear law that the proper measure of damage is the amount of money which will put Mr. Philips into as good a position as if the surveying contract had been properly fulfilled: see *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co.*,[1] *per* Lord Haldane L.C. Now if Mr. Ward had carried out his contract, he would have reported the bad state of the timbers. On receiving that report, Mr. Philips would either have refused to have anything to do with the house—in which case he would have suffered no damage—or he would have bought it for a sum which represented its fair value in its bad condition—in which case he would pay so much less on that account. The proper measure of damages is therefore the difference between the value in its assumed good condition and the value in the bad condition which should have been reported to the client.

We were referred to the cases where a house is damaged or destroyed by the fault of a tortfeasor. These cases are, I think, different. If the injured person reasonably goes to the expense of repairing the house, the tortfeasor may well be bound to pay the cost of repair, less an allowance because new work takes the place of old: see *Lukin* v. *Godsall*[2] and *Hide* v. *Thornborough*.[3] In other cases, the tortfeasor may only have to pay the value of the house: see *Moss* v. *Christchurch Rural District Council*.[4] It all depends on the circumstances of the case: see *Murphy* v. *The County Council of Wexford*.[5] The general rule is that the injured person is to be fairly compensated for the damage he has sustained, neither more nor less.

We were also referred to the cases where a house is left out of repair by a tenant in breach of his covenant. These cases, too, are different, because a surveyor does not enter into a covenant to repair and he gives no warranty as to the condition of the premises. If those cases were relevant, however, they go to show that the cost of repair is not nowadays the proper measure. We had a case not long ago where a purchaser bought a Georgian house and 25 acres for £6,250 and then sought to recover from the tenant £7,333 for dilapidations, because that was the cost of repair. That would mean that he got the place for nothing and £1,083 in pocket as well. The official referee awarded £7,333, but this court reversed him. I there said that the cost of repair "is not the proper test in the case of a con-" siderable estate. In such a case the purchase price is often

[17] [1921] 2 A.C. 544; 37 T.L.R. 969.
[18] [1939] 2 K.B. 271; 55 T.L.R. 739; [1939] 2 All E.R. 752.
[19] (1878) 4 C.P.D. 13.
[1] [1912] A.C. 673, 689.
[2] (1795) Peake Add.Cas. 15.
[3] (1846) 2 Car. & Kir. 250.
[4] [1925] 2 K.B. 750.
[5] [1921] 2 Ir.R. 230.

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"not much affected by the want of repair, because a purchaser "can turn it to his advantage in that, when he puts it into "repair, he can get considerable tax relief. Further, when "extensive land is included in the sale in addition to the house, "the want of repair of the house does not influence the price so "greatly as it otherwise would. So many factors come into play "that the cost of repairs is not the test. The proper criterion "is to take the difference in value between the premises as they "ought to have been, delivered up in repair, and the value of "the premises as they are, delivered up out of repair. The "difference is the measure of damages to which the landlord is "entitled": see *Morris* v. *Sands*.[6] So also in this action, if Mr. Philips were to recover from the surveyor the sum of £7,000, it would mean that Mr. Philips would get for £18,000 (£25,000 paid less £7,000 received) a house and land which were worth £21,000. That cannot be right. The proper amount for him to recover is £4,000.

Another point arose about the time at which the damages should be assessed. The cost of repair has risen considerably since the house was bought, and it will cost Mr. Philips a good deal more than £7,000 now to put his house right. The £7,000 is based on 1952 costs, not 1956 costs. The £4,000 is derived from that figure, and represents the difference in value at 1952 prices, not those ruling today. I think that it is right to assess the damages as at 1952 prices. The general principle of English law is that damages must be assessed as at the date when the damage occurs, which is usually the same day as the cause of action arises, but may be later: see *Cummings* v. *London Bullion Co. Ltd.*[7] A fall thereafter in the value of money does not in law affect the figure, for the simple reason that sterling is taken to be constant in value: see *Di Ferdinando* v. *Simon Smits & Co.*,[8] *per* Scrutton L.J.[9]; *S.S. Celia* v. *S.S. Volturno*,[10] *per* Lord Wrenbury[11]; *Bishop* v. *Cunard White Star Co., The Queen Mary*,[12] *per* Hodson J.[13] In the case of continuing damage (as in personal injury cases) the award for permanent disability can and usually does take into account the fall in the value of money since the accident; but that is because much of the damage has accrued and will accrue since that date. In my opinion the official referee was quite right, and I would dismiss the appeal.

Morris L.J. stated the facts, and continued: The plaintiff purchased the property in June, 1952. In doing so, he placed reliance on the report of the defendant which left him in ignorance of the serious defects which in fact existed and which the defendant ought to have discovered and mentioned. The defects

[6] Unreported (1955) July 15.
[7] [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383.
[8] [1920] 3 K.B. 409; 36 T.L.R. 797.
[9] [1920] 3 K.B. 409, 414.
[10] [1921] A.C. 544; 37 T.L.R. 969.
[11] [1921] A.C. 544, 563.
[12] [1950] P. 240; 66 T.L.R. (Pt. 1) 828; [1950] 2 All E.R. 22.
[13] [1950] P. 240, 245.

came to the knowledge of the plaintiff later in 1952. If the necessary work of restoration had been undertaken at the cost levels ruling in 1952, the cost of such work would have been £7,000. In fact, the work of restoration has not yet been undertaken and cost levels are now higher. If damages are to be awarded by reference to the cost of executing the work, it was submitted that such cost should be computed by taking the cost levels ruling at the time of the hearing of the action. It was said that it was reasonable to postpone the execution of the work so that the state of the property should be available for inspection at the date of the hearing; it was said that the official referee availed himself of the opportunity of inspecting the property and that this demonstrated that it was reasonable to have deferred the work of repair. I cannot accede to this view. If the measure of damages is to be fixed by reference to the cost of executing repairs, it should be the 1952 cost. There could have been inspections before putting work in hand, and witnesses could have testified as to what they had seen. If necessary, photographs could also have been taken.

The official referee has held that the plaintiff should recover £4,000 as being the difference between the value of the property in the condition described in the report and the value of it as it should have been described. The plaintiff, who appeals, submits that the award should have been on the basis of what at the date of the hearing in November, 1955, or alternatively what in 1952 it would have cost to do the work of restoration.

In his judgment the official referee said: "I direct myself "that the proper measure of damages in this case is the difference "between the value of the house and farm in the condition "described in the report and their value as they should have "been described." It was submitted on behalf of the respondent that no point of law arises, and that the decision was one of fact as to the amount of the damages to be awarded to compensate the plaintiff. I think, however, that it is open to the appellant to submit, if he can, that there was a wrong approach in law, or that the basis of the finding was wrong in law and to succeed if this is shown. In his statement of claim, the plaintiff claimed his damages in alternative ways. First, he claimed £16,000, approximately, on the basis that £25,000 was the value of the property without the unreported defects, whereas "by reason of "such defects the said property was worth no more than about "£9,000." Secondly, the plaintiff claimed an amount of between approximately £11,500 and £14,000 as being the expense which he would incur in order to put the property in tenantable repair.

In my judgment, the damages to be assessed were such as could fairly and reasonably be considered as resulting naturally from the failure of the defendant to report as he should have done. I do not find any error of approach on the part of the official referee. It is said, however, that he was not warranted in proceeding on the basis which in fact constituted the first of

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the two alternative bases put forward in the statement of claim by the plaintiff, namely, the basis of the difference between the value of the property as it was described in the defendant's report and its value as it should have been described. In my view, however, that was the correct basis on the facts of this case.

If the plaintiff had discovered the omissions or errors in the defendant's report before he had contracted to buy, it may be that he would not have proceeded with his projected purchase. If he had wished to proceed and had received an estimate of £7,000 as being the cost of doing work of restoration, it may be that he would have offered £18,000 and would have urged that that was an appropriate figure to pay, having regard to the fact that he would have to spend £7,000. But the finding in this case shows that the property was, at the time of the sale, actually worth £21,000. Accordingly, the owner would not have been likely to sell for £18,000 property which was worth £21,000. It might at first seem surprising that the reduction in value below £25,000 should be less than the cost of executing the necessary work. But, apart from the fact that this was the finding of fact based on the general evidence given at the hearing in regard to valuations, it is to be remembered that property in which there is extensive new work by way of repair or restoration may have an increased life and may acquire an enhanced value. In the present case, if the repair work costing £7,000 had been done in 1952, it seems very likely that the roof would then have been put into a condition so that it would last longer than it would have lasted had it been an old roof, though an old roof not impaired by the ravages of the death-watch beetle. Similar considerations might apply in regard to the replacement of the main timbers of the house. Furthermore, the effecting of the repair work costing £7,000 would most probably have had the result that the annual cost of upkeep of the property would be diminished. But the plaintiff must not be placed in a better position by the award of damages than he would have been in had the defendant given a proper report. If the plaintiff had received £7,000 damages in 1952 on the basis of what it would then cost him to do the repair work, and instead of doing the work had sold the property for £21,000, which was its value, he would have profited to the extent of £3,000. The present case differs from *Baxter* v. *Gapp & Co.*,[14] where a negligently given valuation caused the plaintiff to advance money on mortgage to an unsatisfactory borrower, with the result that the plaintiff as mortgagee was put to expense and loss. The amount of such expense and loss was in that case the measure of the damage sustained by the plaintiff. In the present case, the plaintiff, being mindful to purchase a property and seeking advice as to its condition, paid £25,000 for it, which would have been its value

[14] [1939] 2 K.B. 271; 55 T.L.R. 739; [1939] 2 All E.R. 752.

if it had been in the condition described by the defendant, whereas its real value in its actual condition as it should have been described by the defendant was £21,000. In those circumstances, it seems to me that the figure of £4,000 represented the proper measure of the damage sustained by the plaintiff, and I see no error of law in the approach of the official referee.

ROMER L.J. It appears to me that in order to arrive at a correct solution of the problem in this case one has to compare the position into which the plaintiff was put by the defendant's failure to perform his duty with the position in which he would have been had the defendant performed it; and in so far as the first position is more unfavourable to the plaintiff than the second, and the difference can be assessed in terms of money, then prima facie that assessment is the measure of the defendant's liability to the plaintiff.

By reason of the defendant's inaccurate report, the plaintiff bought for £25,000 what he believed to be a property which was in good condition, only to discover after he had bought it and moved in that it would require an additional expenditure of some £7,000 to put the property into the state which the defendant had advised him that it was in already. The plaintiff accordingly contends that he is entitled to recover more than £7,000, if the cost of the necessary work to the property be taken at the date of the hearing before the official referee, which he submits it should be, instead of 1952. At first sight, there would seem to be much to be said in favour of the view that the extra expense with which the plaintiff was unexpectedly confronted is the proper measure of the damages recoverable from the defendant—subject, possibly, to some deduction for the fact that, as a result of the work being done, the plaintiff would have new material in the house instead of old. It is, however, as I have already suggested, necessary to consider not only what did in fact happen, but also what the plaintiff's position would have been if the defendant had performed his contract by sending in an accurate report as to the condition of the property; and this position has to be considered in the light of the official referee's finding that the market price of the property, after taking into account the defects which the defendant failed to disclose, was £21,000. If the plaintiff had received a report which revealed these defects, he would have known that he would have to spend £7,000 in addition to finding the purchase money for the house. With this knowledge, he might have decided that he would not buy the property at all, in which case he would have kept his money in his pocket and had no house. (On this hypothesis his ignorance of the defects may be said to have worsened his position to the extent of £4,000, for he parted with £25,000 and became the possessor of property worth only £21,000.) As an alternative to deciding not to buy the house, with knowledge of its defects, he might have made up his mind to purchase it at the reduced value of £21,000 and

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carry out the work which had to be done, at the cost of £7,000. In that event, he would have had to spend £28,000 instead of the £32,000 total expenditure which resulted from his buying the property on the faith of the defendant's report. On this hypothesis also, then, his position was worsened to the extent of £4,000, namely, the difference between £28,000 and £32,000. On such facts as are before us, I can think of no action that the plaintiff might have taken, had he received a true report from the defendant, other than not buying the property at all, on the one hand, or buying it at its market price, on the other; and as he would have been £4,000 better off by taking either action than he became by acting on the defendant's report, it seems to me that that is the true sum which he is entitled to recover from the defendant. It may well be that if, on learning of the real condition of the house, he had decided to leave and resell, he would have been entitled to recover from the defendant, in addition to the £4,000, his costs and expenses of moving in and moving out and of the resale. As, however, he elected to stay, after all the facts had become known to him, this point does not arise.

I feel, accordingly, constrained to reject the plaintiff's claim to £7,000; and I would only add that even if I had been able to accept the principle on which it was based, I can see no warrant for the plaintiff's submission that the sum should be increased so as to reflect the diminution in the value of the pound since 1952. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *B. A. Woolf & Co.; Oswald Hickson, Collier & Co.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1956
March 5.
Slade J.

* DONN AND ANOTHER *v.* FEINSTEIN AND ANOTHER.

PRACTICE NOTE.

Evidence—Examiner—Libel and slander—Examination of plaintiff on medical grounds—Risk to life of attending trial.

APPEAL to judge in chambers.

By their statement of claim the plaintiffs, Hyman Donn and his wife, Eve Donn, alleged that they had each been slandered

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[Reported from information supplied by counsel.]

by both of the defendants, Michael Feinstein and his wife, Marie Feinstein. Both defendants denied by their defence that either of them had spoken or published the words alleged. On January 4, 1956, Master Clayton granted the first-named plaintiff an order to be examined before an examiner of the court or a master or examiner to be agreed on, on medical grounds. The defendants appealed against this order to Slade J. in chambers, who has approved the publication of the following note of the reasons for his decision supplied by counsel.

Gabriel Cohen for the plaintiffs.
Lord Dunboyne (*F. H. Lawton* with him) for the defendants.

SLADE J. said that he was fully alive to the practice of requiring strong evidence in support of an application by a party to an action to have his evidence taken otherwise than before the court. Further, he was fully alive to the even greater importance of following that practice when the action was to be before a jury more especially so when the party applying was the plaintiff and not the defendant, because it was the plaintiff who had chosen the venue, and, when the action was one for defamation, it was of paramount importance that the jury should see the plaintiff. Although granting or refusing leave was a question of discretion, the discretion should be exercised on the principle of refusing to allow the plaintiff's evidence to be given elsewhere than before the court, unless " ' there are very strong positive reasons ' for " his not attending to be examined at the trial " (see Gatley on Libel and Slander, 4th ed., p. 545, citing Cotton L.J. in *Lawson* v. *Vacuum Brake Co.*[1]).

He was prepared to assume that, where the reasons were based on the plaintiff's ill-health, an order for examination before an examiner would not be made unless it was shown that the plaintiff could only attend the court with some risk to his life. There was evidence, which was not in dispute, that the first-named plaintiff suffered serious organic heart disease, and there was also evidence, which was not common ground although quite strong evidence, that the excitement of attending the trial and undergoing cross-examination might well involve considerable risk to his life. It seemed that no serious injury could accrue to the defendants by making the order which he proposed to make, subject to the conditions as to the use of the depositions at the trial, whereas very grave injury might accrue to the first-named plaintiff if he refused to make the order de bene esse and, when the trial was reached, it was no longer in dispute between the parties that the first-named plaintiff's attendance would involve risk to his life. Therefore, he exercised his discretion and varied the master's order by providing that the deposition of the first-named plaintiff to be taken thereunder should not be used at the trial of the action

[1] (1884) 27 Ch.D. 137, 143.

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without the consent of the trial judge, who should be furnished with the evidence of the first-named plaintiff's then state of health, he undertaking to submit himself for examination at his house by a doctor selected by the defendants, in the presence, if so desired, of his own doctor.

Order varied.

Solicitors: *John Holt; Max Bitel & Co.*

J. D. P.

[CHANCERY DIVISION.]

1956
Mar. 19, 26.

Harman and Danckwerts JJ.

* *In re* A DEBTOR (No. 66 of 1955). *Ex parte* THE DEBTOR *v.* THE TRUSTEE OF THE PROPERTY OF WAITE (A Bankrupt).

Bankruptcy — Set off — Mutual dealings — Sale of goods on credit by debtor to purchaser—Guarantee by purchaser of debtor's overdraft secured by deposit of title deeds—Debt due to debtor from purchaser — Receiving order made against purchaser — Discharge by purchaser's trustee of overdraft to obtain release of title deeds — Judgment for trustee against debtor to recover amount paid to bank —Receiving order against debtor on petition of trustee—Claim for set off by debtor—Whether mutual dealings—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 31.

In January, 1952, the debtor agreed to sell to W. on credit goods for which the debtor had to pay in cash. In order to pay for the goods the debtor found it necessary to borrow money from his bank, and W. in consideration of the credit which he thus received agreed to guarantee the debtor's overdraft to an extent not exceeding £200, the guarantee being secured by a deposit of title deeds of certain property owned by W. During 1952 the debtor supplied goods to W. to the value of £201 14s. 6d. and W. paid £100 into the debtor's bank, which left a balance due of £101 14s. 6d. On October 1, 1954, a receiving order was made against W. and W.'s trustee in bankruptcy, in the course of realizing the assets and in order to complete a sale by him of the property secured by the deposit of title deeds, paid to the debtor's bank the sum of £133 14s., the amount (with interest) of the debtor's overdraft, and obtained the release of the deeds.

On September 9, 1955, W.'s trustee commenced an action in the Brighton District Registry against the debtor to recover the sum of £133 14s. "paid for the defendant as his surety." The debtor appeared and claimed to set off the sum of £101 14s. 6d. for the goods supplied to W. and interest on the overdraft, but on October 6, 1955, the district registrar gave leave to W.'s trustee to sign judgment for the sum of £133 14s. and £16 16s. costs, a total of £150 10s. On October 15, 1955, W.'s trustee in bankruptcy obtained the issue of a bankruptcy notice to the debtor in which was claimed payment of the sum of £150 10s. This bankruptcy notice was not complied with and on December 22, 1955, W.'s trustee filed a petition in bankruptcy against the debtor based on the judgment debt.

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On February 2, 1956, the registrar (who was the same person as the registrar of the Brighton District Registry) was asked on behalf of the debtor to go behind his decision as district registrar in his judgment of October 6, 1955, and allow the set off claimed by the debtor. On February 6, 1956, the registrar, in a judgment, refused to go behind his previous judgment. On February 9, 1956, a receiving order was made against the debtor. The debtor appealed:—

Held, that, as at the date of W.'s bankruptcy there was nothing presently due from the debtor to W. (the liability of the debtor not to W. but to the trustee having accrued later when the bank was paid off) there was no debt against which W.'s debt could be set off under section 31; so that the judgment against the debtor was good and a proper foundation for a bankruptcy notice.

In re Fenton [1931] 1 Ch. 85; 46 T.L.R. 478 and *In re a Bankruptcy Notice* (*No.* 171 *of* 1934) [1934] Ch. 431, 438; sub nom. *In re Judgment Debtor* (*No.* 171 *of* 1934), 50 T.L.R. 333, C.A. applied.

In re Daintrey [1900] 1 Q.B. 546, *Peat* v. *Jones & Co.* (1881) 8 Q.B.D. 147, and *In re Moseley Green Coal and Coke Co., Barrett's Case* (1865) 13 W.R. 559 distinguished.

Per curiam. The registrar was in error in refusing to go behind his previous judgment on the ground that the debtor had not availed himself of his right to appeal against it, for even if the debtor had appealed and had lost the appeal, it would still have been open to the Bankruptcy Court to go behind the judgment and reopen the matter.

Appeal from Brighton County Court.

The debtor appealed against a receiving order made against him by the registrar of Brighton County Court on February 9, 1956. The principal ground of the appeal was the refusal of the registrar to give effect to a set off claimed to be effective under the provisions of section 31 of the Bankruptcy Act, 1914.[1] The petitioning creditor in this case was the trustee of the property of one Ernest Edward Waite, a bankrupt, and it was in the bankruptcy of Ernest Edward Waite that the set off was alleged to be operative.

The facts are fully set out in the judgment of the court.

Muir Hunter for the appellant.

J. K. Wood for the respondent.

The following cases, not referred to in the judgment, were cited in argument: *Ince Hall Rolling Mills Co.* v. *Douglas Forge Co.*[2]; *In re Flatau.*[3]

Cur. adv vult.

[1] Bankruptcy Act, 1914, s. 31: "Where there have been mutual "credits, mutual debts or other "mutual dealings, between a debtor "against whom a receiving order "shall be made under this Act and "any other person proving or claiming to prove a debt under the "receiving order, an account shall be "taken of what is due from the one "party to the other in respect of "such mutual dealings, and the sum "due from the one party shall be set "off against any sum due from the "other party, and the balance of the "account, and no more, shall be "claimed or paid on either side "respectively. . . ."

[2] (1882) 8 Q.B.D. 179.

[3] (1888) 22 Q.B.D. 83, 85; 5 T.L.R. 5.

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March 26, 1956. Harman J. I will ask Danckwerts J. to read the judgment of the court.

Danckwerts J. This is an appeal against a receiving order made by the registrar of the Brighton County Court on February 9, 1956, against the appellant. The principal ground of the appeal is the refusal of the registrar to give effect to a set off claimed to be effective under the provisions of section 31 of the Bankruptcy Act, 1914. The petitioning creditor in this case is the trustee of the property of Ernest Edward Waite, a bankrupt, and it is in his bankruptcy that the set off is alleged to be operative.

The receiving order in Waite's bankruptcy was made in the Brighton county court on October 1, 1954. It appears that at that date the position was as follows. In January, 1952, the appellant had agreed to supply Waite with goods which had to be paid for by the appellant with cash, but were to be sold to Waite in the normal course of business (whatever that may mean)—presumably on trade terms with some months' credit. Accordingly the appellant had to borrow money from his bank. In consideration of the credit which he thus received Waite agreed to guarantee the appellant's overdraft to an extent not exceeding £200. He gave this guarantee on January 14, 1952, and apparently backed it by the deposit of title deeds of property of his. During 1952 the appellant supplied goods to Waite of the value of £201 14s. 6d., and Waite paid £100 into the appellant's bank, leaving a balance due to the appellant from Waite of £101 14s. 6d. That was the position on October 1, 1954, or must for present purposes be taken to be the position. The amount of Waite's indebtedness has not been proved or agreed, but the appellant has a right of proof in that bankruptcy.

Waite's trustee, in the course of realizing his assets and in order to complete a sale by him of the property, mentioned above, had to obtain a release of the title deeds, and, accordingly, on July 20, 1955, he paid the sum of £133 14s. 0d., the amount of the appellant's overdraft, to his bank and secured the release of the deeds. On September 9, 1955, Waite's trustee started an action in the Brighton District Registry of the High Court of Justice against the appellant to recover the sum of £133 14s. 0d. "paid for the defendant as his surety." The appellant appeared and put in an affidavit when the plaintiff applied for judgment under R.S.C., Ord. 14, claiming to set off the sum of £101 14s. 6d. for the goods supplied to Waite, but on October 6, 1955, the district registrar (who was the same person as the registrar of the Brighton County Court) gave leave to Waite's trustee to sign judgment for the sum of £133 14s. 0d. and £16 16s. 0d. costs, a total of £150 10s. 0d.

On October 15, 1955, Waite's trustee in bankruptcy obtained the issue of a bankruptcy notice to the appellant claiming payment of the sum of £150 10s. 0d. "to him" and referring to "a contra claim set off or cross demand against him." It is

contended on behalf of the appellant that this notice is defective because the words " as such trustee," or something of that kind, showing that it is not a personal claim by the individual who is Waite's trustee, are lacking. We can dispose of this point at once by saying that in our view this objection is without foundation. It is quite plain that the notice is by Waite's trustee as such (his personal name does not appear) and the case in no way resembles *In re a Debtor* (*No.* 41 *of* 1951).[1]

This bankruptcy notice was not complied with, and on December 22, 1955, Waite's trustee filed a petition in bankruptcy against the appellant based on the judgment debt of £150 10s. 0d. due " to me." The petition was plainly presented by the trustee of the property of Ernest Edward Waite, but an objection was taken to the form of the petition, similar to that taken in respect of the bankruptcy notice. Both these objections were rejected by the registrar on January 20, 1956, and, in our view, his decision was plainly right.

On February 2, 1956, at a further hearing, the registrar was asked on behalf of the appellant to go behind his decision as district registrar in his judgment of October 6, 1955, and allow the set off claimed by the appellant. The point was that if the set off was allowed the debt on which the petitioning creditor relied would be reduced below the sum of £50 required to support the petition. On February 6, 1956, the registrar gave judgment declining to go behind his previous judgment on the ground that the proper way to test his previous judgment was an appeal of which the debtor had not availed himself. In this respect it seems that the registrar was undoubtedly wrong, as even if the debtor had appealed, and even if he had lost in the Court of Appeal, it would still have been open to the Bankruptcy Court to go behind the judgment and reopen the matter. This is clear from *In re Fraser*.[2]

At a further hearing before the registrar on February 9, 1956, the receiving order now appealed against was made.

The first point for us is that which the registrar decided in the action and refused to reopen, namely, whether the appellant was entitled to rely on the provisions as to set off, contained in section 31 of the Act, in Waite's bankruptcy as against Waite's trustee. Section 31 provides as follows: [His Lordship read the relevant part of the section, and continued:] The material date for the purpose of the set off under this section is the date of the receiving order in Waite's bankruptcy; that is, October 1, 1954. At that date the appellant had a right to prove for the debt due to him from Waite, £101 14s. 6d. At that date, beyond the £100 which Waite had paid in respect of the goods purchased from the appellant, no payments had been made by Waite; he was a debtor for the balance due on the goods and he was a surety for the appellant's overdraft at the bank by reason of the

[1] [1952] Ch. 192; [1952] 1 T.L.R. 53; [1952] 1 All E.R. 107.

[2] [1892] 2 Q.B. 633.

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guarantee which he had given. It is much later that Waite's trustee, in order to complete the sale of an asset of Waite's estate, was compelled to pay the appellant's bank £133 14s. 0d.

Thus, while it is true that there had been mutual dealings between the appellant and Waite, there were at the date of Waite's receiving order no mutual debts to be set off. It appears to us to be a very odd result if the expenditure by the trustee of £133 14s. 0d. of Waite's creditors' money, in order to complete the sale of an asset, enables the appellant to secure payment in full of the debt for which up to that time he had only a right of proof, while at the same time he has been freed from his overdraft at the bank. But this, it is said, is the result of the authorities.

Mr. Muir Hunter, for the appellant, relied on the case of *In re Daintrey*.[3] In that case Daintrey, a solicitor, was indebted to Mant for £86. He then sold his practice to Mant under an agreement whereby Mant was to pay him a portion of the profits at the end of three years. A receiving order was made against Daintrey, at a date when no profits had been earned. At the end of the three years a sum of £300 was found to be payable by Mant to Daintrey. It was held by the Court of Appeal that, though the date of the receiving order was the relevant date for the purposes of the section, the £86 and the £300 ought to be set off, because the amount of £300 was payable under an agreement which existed at the date of the receiving order, though the amount due was not ascertainable till later. This seems to us to be a different case from the present: there was an existing obligation by Mant to Daintrey at the date of the receiving order; it was merely the amount due which came to be quantified when the accounts were subsequently taken.

Peat v. *Jones & Co.*[4] seems to us to present no difficulty. It is true that unliquidated damages for non-delivery of goods under a contract were set off against a claim for the price of the goods which had been delivered. But both claims arose out of the same contract, and it was merely a matter of quantification; and it seems, therefore, to be an obvious case for the application of a set off.

Ex parte Barrett[5] at first sight seems to give some support to the claim of a set off. The facts, however, are very unusual. Corbett mortgaged coal mines to Lee, with Barrett as surety. Corbett then sold the equity of redemption to a company which covenanted to indemnify Corbett against the mortgage. In order to satisfy Lee, the company gave him their promissory note for £7,000. The company subsequently went into liquidation. Barrett's sister took an assignment from Lee of the mortgage debt and all securities for it, including the company's note for £7,000. It appears that Barrett was liable as a shareholder and contributory of the company, and he took an assignment of the

[3] [1900] 1 Q.B. 546.
[4] (1881) 8 Q.B.D. 147.
[5] (1865) 13 W.R. 559; 34 L.J. Bcy. 41.

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mortgage and the company's note for £7,000 from his sister and gave her his own promissory note for £7,000. He then claimed to set off the liability of the company on the company's note for £7,000 against the claim by the liquidator for calls on his shares, and it was held by the Lord Chancellor that the set off applied. The basis of the decision was that Barrett as surety had before the liquidation a right to have the security transferred to him; his rights, therefore, accrued before the liquidation and as one of the securities happened to be the company's promissory note he was held entitled to use it as a set off.

It is to be observed that in the present case it was the surety who was insolvent (Waite), and it was not he who paid off the debt, but his trustee in bankruptcy after the date when the property of the surety had vested in the trustee. These circumstances seem to us to distinguish the present case from *Ex parte Barrett.*[6]

There are, on the other hand, authorities which seem to show that the set off section is not applicable in circumstances like the present case.

Kitchen's Trustee v. *Madders*[7] was rather a complicated case. A trustee in bankruptcy was claiming arrears of rent for five quarters, three of which accrued after the date of the receiving order, and it was sought to set off against this claim a large sum of damages (for which judgment had been obtained) for fraudulent misrepresentation. In the Court of Appeal a further claim to set off rent improperly overpaid by reason of the Rent Acts was allowed to be put in. Some observations of Cohen L.J.[8] have been misunderstood, as pointed out by Jenkins L.J. in *Bradley-Hole* v. *Cusen*,[9] in so far as they have been applied to the claim for rents overpaid. The set off of these was properly allowable against the trustee's claim for arrears of rent, as they arose out of the same transaction. But the real basis of the decision that, subject to this, no set off was allowable against the trustee's claim in respect of the rent for the three quarters which accrued after the date of the receiving order, appears from the judgment of Harman J. in the court below.[10] Harman J. was only dealing with the claim to set off the judgment for damages for fraudulent misrepresentation (as the other claim had not then been put forward). He points out that the three quarters' rents had never been due to the bankrupt but had become due to the trustee in bankruptcy after the date of the receiving order, and so there was no such mutuality as would permit of a set off of the judgment for damages against them. See also *Alloway* v. *Steere*.[11]

The claim in the present case for a set off also seems to be contrary to the statement of the law made by the Court of

[6] 13 W.R. 559.
[7] [1950] Ch. 134; [1949] 2 All E.R. 1079.
[8] [1950] Ch. 135, 145.
[9] [1953] 1 Q.B. 300, 302–305; [1953] 2 W.L.R. 193; sub nom. *Hole* v. *Cuzen* [1953] 1 All E.R. 87.
[10] [1949] Ch. 588, 592, 593.
[11] (1882) 10 Q.B.D. 22.

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Appeal in *In re Fenton*.[12] Fenton had guaranteed advances by certain banks to the Fenton Textile Association. The Association went into liquidation and the liquidator lodged a proof against Fenton's estate in bankruptcy in respect of sums due by Fenton to the Association. Fenton's trustee rejected the proof and claimed to set off the various sums which had been advanced by the banks to the Association for which Fenton had given his personal guarantee. The banks had proved against Fenton's estate under the guarantee but had received nothing. It was held that inasmuch as none of these sums had in fact been paid by Fenton or his trustee to the banks, the trustee was not entitled, under section 31 of the Bankruptcy Act, 1914, to set off Fenton's contingent liability under the guarantees against the sums due by him to the Association. In the present case Waite's trustee in bankruptcy has now paid off the guarantee. But the resemblance to *In re Fenton* is in respect of the situation at the date of the receiving order. Lawrence L.J.[13] makes some observations on the position of a surety who has not paid anything: "The law as to "the right of a surety to indemnity where the principal debtor is "solvent is not in doubt. Until the surety is called upon to pay "and does pay something under his guarantee, there is no debt or "right at law at all; until then a surety's right is confined to a "right to come into equity in order to get an indemnity against "his liability to the principal creditor: see *per* Parker J. in "*In re Mitchell*.[14] The form which the order takes in such "case (as shown by *Wolmershausen* v. *Gullick* [15]) is a declaration "of liability, followed by an order upon the principal debtor to "pay or secure the debt. Even a solvent surety is not entitled "to an order for payment to himself of the amount of the debt, "as such a payment would not discharge the principal debtor "from his liability to the principal creditor; much less is the "trustee of a bankrupt surety entitled to any such payment, "as the money paid to him by the principal debtor would be "distributable amongst the general creditors of the surety leaving "the principal debtor liable to pay the debt due to the principal "creditor."

If, as Lawrence L.J. says, until the surety is called upon to pay and does pay something under his guarantee, there is no debt or right at law at all, then at the date of the receiving order in Waite's bankruptcy (when payment in respect of the guarantee had not been made) there was no debt due to Waite which could be the subject of any set off in respect of the moneys owed by Waite to the appellant for goods supplied. A debt due from the appellant did not arise until subsequently Waite's trustee made a payment to the bank.

Romer L.J.[16] puts a supposition which seems very pertinent to the present case: "Let me now consider the case upon the

[12] [1931] 1 Ch. 85; 46 T.L.R. 478.
[13] [1931] 1 Ch. 85, 113, 114.
[14] [1913] 1 Ch. 201, 206.
[15] [1893] 2 Ch. 514; 9 T.L.R. 437.
[16] [1931] 1 Ch. 85, 116.

"supposition that Fenton became bankrupt, but the Association "remained solvent. The Association would then have had to "prove for the £436,000 in the bankruptcy. But could Fenton's "trustee have set off his liability to the banks against such proof? "In my opinion he could not. That there were mutual dealings "between the Association and Fenton resulting in the debt due "to the Association on the one hand and the liability of the "Association to indemnify Fenton against his liability to the "banks on the other may be conceded. But there was nothing "'due' from the Association to Fenton which could have been "placed to Fenton's credit in the account that would have been "taken under section 31 of the Bankruptcy Act. A set off would "have been equivalent to a payment by the Association to "Fenton's trustee for the general benefit of his creditors, leaving "the Association still liable to the banks. The trustee's right "against the Association could have been no greater than "Fenton's before his bankruptcy. He could have only obtained "an order upon the Association to discharge their indebtedness "to the banks. That would have been the only way in which "he could have compelled the Association to discharge their "contingent liability to Fenton's estate."

Now, if in this passage there is substituted for Fenton, Waite (the surety becoming bankrupt) and, for the Association, the appellant (the solvent principal debtor), the remarks of Romer L.J. exactly cover the present case. There was nothing due from the appellant to Waite at the date of the receiving order. It was only later, when the trustee in bankruptcy paid off the bank, that a debt became due from the appellant, and that payment was made not by Waite but by the trustee, and out of assets which then were no longer vested in Waite but in the trustee. It seems to us, therefore, that the decision in the action by Waite's trustee against the appellant was right in declining to admit the set off. There was in fact no mutuality at the date of the receiving order in Waite's bankruptcy and the debt on which the action was founded was not due to Waite but to his trustee. It follows that the judgment was good and was a proper foundation for a bankruptcy notice which, therefore, could not have been set aside. See *In re a Bankruptcy Notice* (*No.* 171 *of* 1934).[17] The notice not having been complied with, the petition is, on the face of it, in order. That, however, is not an end of the matter. The Court of Bankruptcy is not bound to make a receiving order. Section 5 (2) provides that the court "may "make a receiving order in pursuance of the petition." Under subsection (3): "If the court . . . is satisfied . . . that for other "sufficient cause no order ought to be made, the court may "dismiss the petition." It was argued that the petition ought to have been dismissed here owing to the following circumstance.

[17] [1934] Ch. 431, 438; sub nom. *In re Judgment Debtor* (*No.* 171 *of* 1934), 50 T.L.R. 333, C.A.

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It was said that in the appellant's bankruptcy Waite's trustee would have to prove for his debt, but that in that bankruptcy he could be met by the appellant's claim against him for the £101 due from Waite and that if this were right the debt of the petitioning creditor would be reduced below £50 which would show that he ought never to have been allowed to proceed on his petition. There is certainly force in this submission, but we do not consider that we ought to refuse the order because of it. In the first place, the existence of the alleged debt of £101 has never yet been proved. The petitioner is a judgment creditor for £150 and, therefore, prima facie entitled to have an order made on his petition. Even if the set off be allowed in the appellant's bankruptcy, as to which we decide nothing today, there will remain a debt. The result may well be in the end that each party will be entitled to prove in the other's bankruptcy, a result we think more consonant with justice to the other creditors of each of them than any set off. We therefore dismiss the appeal.

Appeal dismissed.
Leave to appeal.

Solicitors: *Nye & Donne, Brighton; Haslewood, Hare, Shirley Woolmer & Co. for Bosley & Co., Brighton.*

J. A. G.

[Queen's Bench Division.]

1956
Apr. 10.

Byrne J.

* CORRICK *v.* NORTHAM.

Practice Note.

Legal Aid—Costs—Order for costs against aided person—Variation—Procedure—Legal Aid (General) Regulations, 1950 (*S.I.* 1950, *No.* 1359) (*as amended by the Legal Aid (General) (Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954, *No.* 166), *reg.* 26), *reg.* 17 (4).

Motion to vary an order for costs under regulation 17 of the Legal Aid (General) Regulations, 1950, as amended.[1]

On November 10, 1954, judgment was given for the defendant, Ray Edna Northam, who carried on the business of a ladies'

[1] Legal Aid (General) Regulations, 1950 (as substituted by S.I. 1954, No. 166, reg. 26), reg. 17: "(1) Where "an order for costs is made against "an assisted person, the determina- "tion of the amount of his liability "for costs in accordance with section "2 (2) (*e*) of the Act shall be made "at the trial or hearing of the action, "cause or matter: . . . (4) The party "in whose favour the order is made "may, within six years from the "date thereof, apply to the court for "the order to be varied on the "grounds that there has been a "change in the assisted person's "circumstances since the date of the "order and on any such application "the order may be varied as the "court thinks fit; save as aforesaid "the determination of the court shall "be final."

hairdresser in Exeter, in an action by the plaintiff, June Blatchford (now Corrick), for wrongful dismissal. The plaintiff was an assisted person and an order for 6d. costs was made against her. The defendant now applies for that order to be varied on the ground of the plaintiff's change of circumstances.

Christopher Besley for the defendant.
J. H. Inskip for the plaintiff.

BYRNE J. This is a motion on behalf of the defendant, in whose favour a nominal order for costs was made against the plaintiff as an assisted person at Exeter Assizes on November 10, 1954, to vary the plaintiff's liability for costs under regulation 17 (4) of the Legal Aid (General) Regulations, 1950, as amended. The motion is in accordance with the following procedure approved by Lord Goddard C.J. on March 14, 1956: "Where a "party in whose favour an order for costs has been made against "an assisted person after trial by a judge of the Queen's Bench "Division in London or on circuit desires to apply 'to the court' "under regulation 17 (4) of the Legal Aid (General) Regulations, "1950, as amended, for variation of the order, the application "should be made by notice of motion (R.S.C., Ord. 52) before "the judge who made the order, if convenient, or to the judge "in charge of the appropriate list. The notice of motion, entitled "in the action, may be framed from Form No. 1 on p. 967 of "Chitty's Queen's Bench Forms, 18th ed. The applicant's solici-"tor should, though the Crown Office and Associates' Department "in London, consult the judge's clerk and ascertain a convenient "date and time for the hearing. The notice of motion should be "served personally on the assisted person with at least two clear "days between the service of the notice of motion and the date "of hearing in accordance with R.S.C., Ord. 52, r. 5. The "hearing will be before the judge in open court, when the pro-"visions of regulation 17, in determining the amount of the "assisted person's liability for costs in accordance with section 2 "(2) (*e*) of the Legal Aid and Advice Act, 1949, will apply. Any "order made for an increase of the amount of liability shall "include a direction that the judgment shall be indorsed "accordingly."

I am satisfied in the present case that there has been a change in circumstances. It was agreed between the parties at the time of the action that the plaintiff's weekly wage was £4 14s. 6d., and it now transpires from an affidavit by her present employer that she is receiving at least £6 a week, because her salary is £5 19s. and there is also commission. I think, therefore, that this is a case in which the order should be varied. When I originally made an order, it was merely to keep the matter alive, she at that time being an assisted person, but an infant, she now being of full age and a married woman. I recognize the fact, as she states in her affidavit, that she is expecting a child in

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October, 1956, and I think that that is a matter that I should take into consideration in deciding what my order should be. The order that I propose to make, having regard to all that I have heard, is that there will be an order that the plaintiff pays £75 costs by instalments of £8 a month, the first instalment to be payable on May 1, and she shall have liberty to apply to me in chambers to vary the amount of the instalments if it becomes necessary. The judgment containing the original determination shall be indorsed accordingly. I make no order as to costs with regard to this application.

Order accordingly.

Solicitors: *Martineau & Reid for Campion, Symons & Co., Exeter; Pettit & Westlake for Penny & Harward, Exeter.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

1956
Mar. 23, 26.

Cassels J.

* HAMMON *v.* FAIRBROTHER AND OTHERS.

[1955 H. No. 3735.]

Agriculture—Agricultural holding—Notice to quit—Reasons stated—Ambiguity—Validity—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (1) (2) (*d*).

The tenant of an agricultural holding was served with a notice to quit, which included, inter alia, the following reasons for the landlords' decision to terminate the tenancy, namely: (1) that rent due was in arrear; (2) that the tenant had not kept the farm property and appurtenances in good tenantable repair, and (3) that he had not complied with the terms of an agreement entered into by him, whereby he agreed to repay moneys expended by the landlords, upon repairs to the property, on his behalf. The tenant served a counter-notice, in accordance with section 24 (1) of the Agricultural Holdings Act, 1948,[1] and the consent of the Minister

[1] Agricultural Holdings Act, 1948, s. 24: "(1) Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, then, subject to the provisions of the next following subsection, the notice to quit shall not have effect unless the Minister consents to the operation thereof. (2) The foregoing subsection shall not apply where— . . . (*d*) at the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord requiring him within two months from the service of the notice to pay any rent due in respect of the agricultural holding to which the notice to quit relates, or within a reasonable time or within such reasonable period as was specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice to quit that it is given by reason of the matter aforesaid; . . ."

[Reported by Miss J. EPHRON, Barrister-at-Law.]

was applied for, by the landlords, and granted. The tenant then issued a writ for a declaration that the notice to quit was invalid on the grounds that it was not a clear and unambiguous notice under section 24 (1) and that, in stating reasons, it fell within section 24 (2) yet failed to comply with paragraph (*d*) of that section:—

Held, that the mere stating of reasons in explanation of the notice did not bring the case within section 24 (2) of the Act of 1948; the notice was not ambiguous and the landlords were entitled to possession.

Budge v. *Hicks* [1951] 2 K.B. 335; [1951] 2 All E.R. 245; sub nom. *Hicks* v. *Budge* [1951] 2 T.L.R. 349 and *Cowan* v. *Wrayford* [1953] 1 W.L.R. 1340; [1953] 2 All E.R. 1138 considered.

ACTION.

By an agreement in writing dated November 27, 1944, the plaintiff, Reginald Arthur Hammon, leased an agricultural holding of some 47 acres known as East Dean Farm, Headcorn, Kent, from the freeholder, Hugh Kingsley Fairbrother, at a rent of £110 a year. The agreement contained, inter alia, a covenant by the tenant to keep the farmhouse and buildings in good tenantable repair (excluding structural repairs to the farmhouse only, for which the landlord was to be liable), and provision was made for 12 months' notice to determine, to expire on September 29 in any year. In June, 1949, the freeholder died and the property vested in the defendants, as executors and trustees of his will.

On August 31, 1953, the tenant entered into an agreement with the landlords, the terms of which provided for the sale of the farm with vacant possession and the carrying out by the landlords of certain essential repairs and other works, the cost of which was to be repaid to them by the tenant. These repairs were subsequently executed and the necessary steps were taken to sell the property by auction on May 27, 1954. The tenant, however, failed to implement the agreement entered into by him and the property had to be withdrawn from auction.

On September 24, 1954, the landlords served upon the tenant notice to quit and deliver up possession of the property on September 29, 1955. The notice (which was drawn up by solicitors) set out the reasons for the landlords' decision, namely: (1) "That "rent due from September 29, 1953, is in arrear and unpaid . . . "notwithstanding written notices of the rent due having been "given to you"; (2) "That you have not kept the said farm "property and appurtenances in good tenantable repair . . ."; and (3) "That you have not complied with the terms of an agree-"ment dated August 31, 1953, entered into by you . . . and in "breach thereof have not repaid to the landlords the moneys "expended by them on your behalf on repairs to the said farm "property. . . ." The tenant served upon the landlords a counter-notice, in accordance with section 24 (1) of the Agricultural Holdings Act, 1948, which was stated to be "without "prejudice to any points arising therein." A copy of the notice to quit and the counter-notice, together with an application for

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consent to the operation of the notice to quit, were forwarded to the Kent County Agricultural Executive Committee by the landlords' solicitors. The committee, acting on behalf of the Minister of Agriculture and Fisheries, duly heard the application, and on June 10, 1955, formal notice of consent was issued. The tenant gave notice of appeal against the Minister's decision to the Agricultural Land Tribunal but subsequently withdrew it.

On November 7, 1955, the tenant issued a writ claiming a declaration that the notice to quit was invalid. It was contended on his behalf that the notice was not a clear and unambiguous notice as it should have been if it were under section 24 (1) of the Agricultural Holdings Act, 1948, and that in giving reasons one or more of which should be characteristic of section 24 (2) (*d*) of the Act the notice was wholly bad. The landlords denied the invalidity of the notice and counterclaimed for possession and mesne profits.

George Dobry for the tenant.
C. F. Fletcher-Cooke for the landlords.

The following cases, in addition to those quoted in the judgment, were cited in the argument: *P. Phipps & Co.* (*Northampton and Towcester Breweries*) *Ltd.* v. *Rogers* *; *Addis* v. *Burrows* †; *W. Davis* (*Spitalfields*) *Ltd.* v. *Huntley* ‡; *Lazarus Estates Ltd.* v. *Beasley* §; *Doe* d. *Armstrong* v. *Wilkinson* ¶; *General Assurance Co.* v. *Worsley* **; *Doe* d. *Cox* v. *Roe*.††

Cassels J. stated the facts and continued: I have been referred to *Cowan* v. *Wrayford*,[1] which was a case in the Court of Appeal in which the landlord had, in fact, served a notice under section 24 (2) and then wanted to switch over to section 24 (1). The difference between the two was pointed out by Somervell L.J. when he said[2]: "There is therefore a difference "not only in procedure, but a financial difference affecting both "landlord and tenant, according as to whether the landlord is "able to establish a right to proceed under section 24 (2) (*d*) or "has no case for bringing himself within the words of that sub-"paragraph, but serves an ordinary notice and does in fact get "the Minister's consent if the counter-notice is served. In one "case compensation for disturbance will be payable and in another "case it will not." My attention was also called to *Budge* v. *Hicks*,[3] where Denning L.J., who was a member of the court in *Cowan* v. *Wrayford*,[4] said[5]: "If the landlord of an agricultural

* [1925] 1 K.B. 14; 40 T.L.R. 849.
† [1948] 1 K.B. 444; 64 T.L.R. 169; [1948] 1 All E.R. 177.
‡ [1947] 1 All E.R. 246.
§ [1956] 2 W.L.R. 502; [1956] 1 All E.R. 341.
¶ (1840) 12 Ad. & El. 743.
** (1895) 64 L.J.Q.B. 253.
†† (1802) 4 Esp. 185.
[1] [1953] 1 W.L.R. 1340; [1953] 2 All E.R. 1138.
[2] [1953] 1 W.L.R. 1340, 1342.
[3] [1951] 2 K.B. 335; [1951] 2 All E.R. 245; sub nom. *Hicks* v. *Budge* [1951] 2 T.L.R. 349.
[4] [1953] 1 W.L.R. 1340.
[5] [1951] 2 K.B. 335, 341.

" holding wishes to give his tenant notice to quit, he should get " some good advice on the matter, because there are now many " legal requirements which he has to fulfil before his notice will " be good. In particular, he must state in his notice the reason " why he requires possession, and that reason must be one of " the reasons prescribed in the Act of Parliament. I do not think " that the notice need be in any particular form, but it must " at least make it clear what his reason is. In particular, when " he complains of a breach of covenant which may, or may not, " be capable of remedy, he must make it clear which it is, so that " the tenant may know whether the notice is given under sub-" paragraph (*d*) or (*e*). The notice of September 27, 1949, does " not do that. It does not make it clear under which subsection " it comes. It is therefore not a good notice." In *Cowan* v. *Wrayford* [6] Denning L.J. said [7]: " But this case cannot be con-" sidered at common law apart from the statute. The ancient " script of the common law has been over-written by the statute, " and the two have to be integrated together. In order that a " notice to quit an agricultural holding should be good, it must " be clear and unambiguous: and for that purpose it must either " be a simple notice without stating reasons at all, in which case " it will operate under section 24 (1); or it must be a notice " stating reasons as prescribed by subsection (2), in which case " it will operate under subsection (2)." I venture to think, with great respect to the Lord Justice, that the words " without stating " reasons at all " are really unnecessary for the decision of that case and I should be very sorry to have to hold that where a landlord of an agricultural holding gave notice stating reasons, which might, of course, be infinitely various and even personal, but none of which could come within paragraph (*d*) or any of the paragraphs of section 24 (2), the notice was therefore under section 24 (2) and subject to all the consequences of that particular section. Upon the receipt of the notice (assuming that it does not come under section 24 (2)) the tenant has all the protection of subsection (1). He has the protection of the Minister, whose consent the landlord must obtain before the notice to quit can have any effect. When one looks at subsection (2) (*d*) it will be observed (as indeed Birkett L.J. observed in *Budge* v. *Hicks* [8]) that it is required that if the reason for giving notice comes under any of these paragraphs, that reason must be so stated in the notice.

Two months after *Cowan* v. *Wrayford* [9] was decided *Jones* v. *Gates* [10] came before the Court of Appeal and there the landlord had tried to exclude the tenant from exercising his rights under section 24 (1) by stating that the land was " required for a use, " other than for agriculture," which is paragraph (*b*) of sub-section (2). It turned out, as the facts emerged, that all that

[6] [1953] 1 W.L.R. 1340.
[7] Ibid. 1346.
[8] [1951] 2 K.B. 335, 342.
[9] [1953] 1 W.L.R. 1340.
[10] [1954] 1 W.L.R. 222; [1954] 1 All E.R. 158.

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the landlord had was an idea that the land might be useful and attractive to anybody who was going to promote a sports ground, but there were no definite arrangements ever arrived at between the landlord and anybody else that it would be taken over as a sports ground. The county court judge was not satisfied that the holding was required for such a purpose and that decision was upheld by the Court of Appeal. I have looked very carefully at paragraph (*d*) of section 24 (2) and indeed, if technicalities are to prevail, they are available, of course, for use not only by the tenant but also by the landlord. My attention has been drawn to the strict wording of the paragraph and in so far as the rent is concerned, it does say that " at the date of the giving of the notice " to quit the tenant had failed to comply with a notice in writing " served on him by the landlord requiring him within two months " from the service of the notice to pay any rent due in respect of " the agricultural holding to which the notice to quit relates . . ." All I have to go upon—and I have nothing before me to indicate that that paragraph was ever complied with as far as the two months' notice is concerned—is the wording of the first of the reasons, which indicates that what happened between the parties was that the landlord demanded of the tenant to pay the rent, and that is exactly what the tenant did not do. There had, therefore, been no two months' notice served as required by paragraph (*d*). The plaintiff served a counter-notice under section 24 (1) and the procedure under that Act came into operation by the defendants applying for the Minister's consent on October 15, 1954. That consent was duly given on June 10, 1954, the Minister having given due consideration to the circumstances of the case, because as I read his decision, he referred, first, to the non-payment of the rent by the tenant in breach of the terms of tenancy, and, secondly, to the tenant's failure to keep the farm property and appurtenances in good tenantable repair. Thirdly, there was a breach of the agreement. I do not think the Minister referred to that, but I have to look at the reasons given in that notice, and having given careful consideration to all this I hold that this notice was not invalid and the reasons given did not come within any of the paragraphs of subsection (2).

The first reason which was given was the non-payment of rent by the tenant in breach of the terms of the tenancy. Secondly, the plaintiff failed to keep the farm property and appurtenances in good tenantable repair. Thirdly, there had been an agreement to repay money spent by the landlords on the tenant's behalf, and, as I read the correspondence, this matter was the subject of discussion in an exchange of letters between the solicitors acting for both parties. The solicitors for the tenant asked the landlords' solicitors why they gave reasons at all, and the landlords' solicitors said that they gave reasons because they thought it was only courtesy to let the tenant know that he was being called upon to give up possession of the farm at due time, which,

incidentally, was more than a year ahead, by reason of non-payment of rent, non-payment of a sum of money due, and not keeping the farm in good and tenantable repair. It is perfectly true that in the tenant's counter-notice the words "without "prejudice" are contained, and they are also in a letter dated October 23, 1954, in which the tenant said that his appearance before the Agricultural Committee would be entirely without prejudice to his right to contend in another place that his notice to quit, which he received, was invalid. He has contended it here and I am not prepared to hold that he was estopped from putting that contention forward. When I look at the pleadings I find that in the reply it is put forward that the Minister had no jurisdiction to entertain the case at all, but I have not heard that emphasized in this court.

It is only right to indicate that my attention has also been called to more than one case which dealt with the validity of notice. In *Norfolk County Council* v. *Child* [11] Avory J. said, in giving the judgment of the court consisting of himself and Lawrence J.[12]: "I think the decisions upon the point establish that "the test to be applied in either case is whether it is so vague "or uncertain that it is unsafe for the tenant or landlord, as the "case may be, who receives the notice to act upon it," and they cited *Gardner* v. *Ingram*,[13] in which Bowen L.J. said [14] "The "tenant used language on which the landlord could not safely "act." Of course, if a notice to quit is ambiguous, and in a case where it is given from landlord to tenant the tenant cannot make head nor tail of it, or there may be difficulty in understanding what the tenant ought to do, there may be all kinds of things in a notice to quit which may puzzle the tenant or one given by the tenant might well puzzle the landlord. I have come to the conclusion that this notice is not in the least bit ambiguous. He is told, and he knows he is told, to quit this agricultural holding by the end of the year following the giving of the notice. As a matter of courtesy the landlords' solicitors have added the reasons why he has to get out. He has not paid his rent, which is a matter of considerable interest to both sides one would think. He is told that he has not kept the property and appurtenances in good and tenantable repair, and he signed an agreement in which he said that he would. What is more, when the landlords have spent a considerable sum of money in putting the farm buildings into good repair, and he entered into an agreement whereby he would repay the landlords the money they had spent, he has not paid them. I hold that this case does not come within section 24 (2).

When the counter-notice was served, the Minister came to the conclusion that this did not come under section 24 (2) but under section 24 (1), and he gave his consent to the notice to quit being

[11] [1918] 2 K.B. 351.
[12] Ibid. 354.
[13] (1889) 61 L.T. 729; 6 T.L.R. 75.
[14] 61 L.T. 729, 730.

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put into operation. In those circumstances I give judgment to the landlords for possession and mesne profits.

Judgment for the defendants.

Solicitors: *Field, Roscoe & Co. for Hallett & Co., Ashford, Kent; Hirst & Co.*

[COURT OF APPEAL.]

C. A.

1956
Jan. 16.

Denning, Morris and Parker L.JJ.

* WARD *v.* BYHAM.

[Plaint No. L.O. 207.]

Contract—Consideration—Promise to perform existing duty—Illegitimate child—Promise by father to pay weekly sum to mother so long as child well looked after—Child thereafter maintained by mother—Mother bound in law to maintain child—Whether consideration for father's promise.

After the parents of an illegitimate child had lived together for some years, the father turned the mother out, himself retaining the child. Later the father made an offer to let the mother have the child and to pay an allowance of £1 per week, provided that the child was well looked after and happy. The mother took the child away and maintained it accordingly. When, some months later, the mother married, the father discontinued the payments. In an action by the mother to enforce the continuance of the payments:—

Held, that, though the mother was bound by the provisions of the National Assistance Act, 1948, to maintain the child, there was good consideration for the father's promise.

Hicks v. *Gregory* (1849) 8 C.B. 378 followed.

APPEAL from His Honour Judge Shove, sitting at Lincoln County Court.

The facts are stated in the judgment of Denning L.J.

G. D. Lane for the father.

H. A. Skinner for the mother.

Case cited in argument not mentioned in the judgments: *Smith* v. *Roche*.[1]

DENNING L.J. This is a claim for the sum of £1 a week in respect of the maintenance of a bastard child. The father and mother lived together unmarried for four or five years, from 1949 until May, 1954, and a little girl was born of that union on October 28, 1950. Whilst the father and mother were living together, the father went out to work and maintained the household. But in May, 1954, the father turned the mother out. He put the child into the care of a neighbour and paid the neighbour

[1] (1859) 6 C.B.(N.S.) 223.

£1 a week. The mother meanwhile found work as a housekeeper to a man who was ready to let the child come too. The mother wanted the child with her, and she wrote a letter to the father asking for Carol, the child, and £1 a week for her maintenance, which was the sum which the father had been paying the neighbour. We have not got a copy of the letter which the mother wrote, but we have the father's reply, which is the basis of this action. It is dated July 27, 1954, and says: "Mildred, I am "prepared to let you have Carol and pay you up to £1 per week "allowance for her providing you can prove that she will be well "looked after and happy and also that she is allowed to decide "for herself whether or not she wishes to come and live with "you. She is well and happy and looking much stronger than "ever before. If you decide what to do let me know as soon as "possible." On receiving that letter the mother went to see the father, and it was agreed that she could have the child. She took the child with her, and the child has lived with the mother ever since.

In February, 1955, some seven months later, the mother married the man to whom she had been acting as housekeeper; and a few weeks later the father himself married. The father kept up the payments of £1 a week until the mother married, but after that he stopped.

I look upon the father's letter as dealing with two things. One is the handing over of Carol to the mother. The father agrees to let the mother have the child provided that the child herself wishes to come and provided also that the mother satisfies the father that she will be well looked after and happy. The other thing is the future maintenance of the child. The father promises to pay the mother up to £1 per week so long as the mother looks after the child.

The mother now brings this action, claiming that the father should pay her £1 per week, even though she herself has married. The only point taken before us in answer to the claim is that it is said that there was no consideration for the promise by the father to pay £1 a week: because the mother, when she looked after the child, was only doing that which she was legally bound to do, and that is no consideration in law. In support of this proposition, reliance was placed on a statement thrown out by Parke B. in the course of argument in *Crowhurst* v. *Laverack*.[1]

It is quite clear that by statute the mother of an illegitimate child is bound to maintain it: whereas the father is under no such obligation. (See section 42 of the National Assistance Act, 1948.) The mother can, of course, if she is a single woman, apply to the justices for an affiliation order against the father: and it might be thought that in this case consideration could be found by holding that the mother must be taken to have agreed not to bring affiliation proceedings against the father. But the mother

[1] (1852) 8 Exch. 208, 213.

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in her evidence said that she never at any time had any intention of bringing affiliation proceedings. It is now too late for her to bring them, because she has married and is no longer a single woman.

I approach the case, therefore, on the footing that the mother, in looking after the child, is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise; and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child.

I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay £1 a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week. The case seems to me to be within the decision of *Hicks* v. *Gregory*,[2] on which the judge relied. I would dismiss the appeal.

MORRIS L.J. I agree. I think that the letter of July 27, 1954, shows that there was consideration for the agreement and promise of the father. After the mother was made to leave the home in May, 1954, the child in fact stayed with the father until July. The terms of the father's letter of July 27 suggest that he was animated by a concern for the well-being of the child. The phrases that he uses are, I think, evidence of that. When the mother asked for the child, the answer was in the terms of the letter. Mr. Lane submits that there was a duty on the mother to support the child; that no affiliation proceedings were in prospect or were contemplated; and that the effect of the arrangement that followed the letter was that the father was merely agreeing to pay a bounty to the mother.

It seems to me that the terms of the letter negative those submissions, for the husband says "providing you can prove "that she"—that is Carol—"will be well looked after and happy "and also that she is allowed to decide for herself whether or not "she wishes to come and live with you." The father goes on to say that Carol is then well and happy and looking much stronger than ever before. "If you decide what to do let me know as "soon as possible." It seems to me, therefore, that the father was saying, in effect: Irrespective of what may be the strict legal position, what I am asking is that you shall prove that Carol

[2] (1849) 8 C.B. 378.

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will be well looked after and happy, and also that you must agree that Carol is to be allowed to decide for herself whether or not she wishes to come and live with you. If those conditions were fulfilled the father was agreeable to pay. Upon those terms, which in fact became operative, the father agreed to pay £1 a week. In my judgment, there was ample consideration there to be found for his promise, which I think was binding.

PARKER L.J. I have come to the same conclusion. I think that the letter of July 27, 1954, clearly expresses good consideration for the bargain, and for myself I am content to adopt the very careful judgment of the county court judge.

Appeal dismissed.

Solicitors: *Henry Gover & Son for Anthony T. Clark, Lincoln; Andrew, Race, Hill & Mason, Lincoln.*

F. R. D.

[CHANCERY DIVISION.]

1956
Feb. 10, 14; *Mar.* 22.
Upjohn J.

* *In re* COUNTY OF LONDON (DEVONS ROAD, POPLAR) HOUSING CONFIRMATION ORDER, 1945.

[1955 L. No. 2335.]

Compulsory Purchase — Compensation — War-damaged property—Payment into court of compensation—Difference between incumbrances to which property subject at time of war damage and at time of notice to treat—Incumbrances due to payer not deducted—Incumbrances to be taken into account in determining compensation—Application for payment out of excess—Lands Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 76, 78—*War Damage Act,* 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *Sch. II—Town and Country Planning Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 47), *Sch. VIII.*

Housing—Dangerous structure—Metropolis—Whether charge upon land for cost of repairs—Land Charges Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 22), *s.* 15—*London Building Acts (Amendment) Act,* 1939 (2 *&* 3 *Geo.* 6, *c. xcvii*), *ss.* 66, 70.

Statute—Construction—Erroneous view of law—Construction of section proceeding on—London Building Acts (Amendment) Act, 1939, *s.* 70.

In 1940 certain property in the Metropolitan Borough of Poplar was in a dangerous state of disrepair, and under powers conferred by the London Building Acts (Amendment) Act, 1939, the London County Council repaired the property. In 1941 the property was totally destroyed by enemy action and qualified for a value payment under the War Damage Act, 1943, which was subsequently fixed by the War Damage Commission at £3,735. In 1943 the London County Council obtained orders under section 70 of the London Building Acts (Amendment) Act, 1939, fixing the cost of repairs which the council were entitled to recover at £207 7s. 11d., and directing that no part of the property, if repaired or rebuilt, should

[Reported by P. G. GALLICHAN, Esq., Barrister-at-Law.]

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be let for occupation until after payment to the council of this sum. These orders were duly registered as local land charges.

In 1944 the council made a compulsory purchase order acquiring the property, and this order was subsequently confirmed by the Minister. In 1945 the council served a notice to treat on the respondent who claimed to be at all material times the owner of the property. The respondent failed or neglected to prove his title to the property and accordingly in 1955 the council paid compensation moneys of £3,735 into court under section 76 of the Lands Clauses Consolidation Act, 1845, and vested the land in itself under section 77 of this Act. The council now claimed payment out of court of the sum of £207 7s. 11d. in respect of the cost of repairs:—

Held, (1) that the orders obtained under section 70 of the London Building Acts (Amendment) Act, 1939, being incumbrances of a kind required by Schedule II, paras. 1 and 2 of the War Damage Act, 1943, to be taken into account in ascertaining the value of a hereditament, were incumbrances within the terms of Schedule VIII, para. 1 (1) and (3) of the Town and Country Planning Act, 1944,[1] and that accordingly the amount of compensation moneys paid into court under section 76 of the Lands Clauses Consolidation Act, 1845,[2] should not have included the sum of £207 7s. 11d. due to the council under those orders.

[1] Town and Country Planning Act, 1944, Sch. VIII, para. 1: "(1) Where "the subject of a compulsory purchase ". . . is or comprises an interest in "the whole of the land in a hereditament within the meaning of the "War Damage Act, 1943, the value "of which is required by that Act to "be ascertained by reference to its "state after war damage and to an "assumed sale thereof, the value of "the said land for the purposes of the "ascertainment of the compensation "for the purchase shall be taken to "be such amount as may be certified "by the War Damage Commission to "be the value of the hereditament "as ascertained as aforesaid (in this "Schedule referred to as the 'certified "'after-damage value' of that land), "subject however to the two next "succeeding sub-paragraphs. . . . "(3) If . . . there is any material "difference either—(*a*) . . . or (*b*) between the incumbrances, if any, to "which the said land was subject "immediately after the occurrence of "the war damage and the incumbrances, if any, to which it is subject "at the time when the notice to treat "is served, being incumbrances of a "kind required by the said Act to be "taken into account in ascertaining "the value of the hereditament, the "value of the said land for the purposes of the ascertainment of the "compensation for the purchase shall "be taken to be the certified after-"damage value thereof adjusted by "adding, or by subtracting, as the "case may require, the amount by "which the value of the hereditament "as required to be ascertained under "the said Act would have been greater "or less if that value had fallen to be "ascertained by reference to the state "of the hereditament at the time "when the notice to treat is served, "and if it had been subject immediately after the occurrence of the "war damage to all incumbrances of "any such kind as aforesaid to which "it is subject at the time when the "notice to treat is served and to no "other incumbrances of any such "kind."

[2] Lands Clauses Consolidation Act, 1845, s. 76: "If the owner of any "such lands purchased or taken by "the promoters of the undertaking, "or of any interest therein, on tender "of the purchase money or compensation either agreed or awarded to "be paid in respect thereof refuse to "accept the same, or neglect or fail "to make out a title to such lands ". . . it shall be lawful for the promoters of the undertaking to deposit "the purchase money or compensation "payable in respect of such lands, or "any interest therein, in the Bank, "in the name and with the privity of "the accountant-general of the Court "of Chancery . . . subject to the "control and disposition of the said "court."

S. 78: "Upon the application by "petition of any party making claim "to the money so deposited as last "aforesaid, or any part thereof . . . "the said Court of Chancery . . "may order distribution thereof, or

(2) That the court had power under sections 76 and 78 of the Lands Clauses Consolidation Act, 1845, to order the payment out of court to the council of the sum of £207 7s. 11d., the excess amount of the compensation moneys.

Quaere whether section 70 of the Act of 1939 or section 15 (1) of the Land Charges Act, 1925,[3] confers a charge on a person obtaining an order under section 70 enabling the chargee to exercise all the powers of a mortgagee to recover the expenses incurred.

ADJOURNED SUMMONS.

The facts are taken substantially from the judgment. The respondent, John Segar, claimed to be, and to have been at all material times, the owner in fee simple of certain properties in Grace Street, Stratfield Road and Talwin Street in the Metropolitan Borough of Poplar, though he had never proved his title thereto. In 1940 some of these properties were in a dangerous state of disrepair, and, under powers conferred by the London Building Acts (Amendment) Act, 1939 (hereinafter called "the "Act of 1939"), the applicant, the London County Council (hereinafter called "the council"), did certain works of repair to render the properties safe. In March, 1941, the properties suffered damage through enemy action, and were later classified

"payment of the dividends thereof, "according to the respective estates, "titles, or interests of the parties "making claim to such money or "lands, or any part thereof, and "may make such other order in the "premises as to such court shall seem "fit."

[3] Land Charges Act, 1925, s. 15 (1): ". . . For the purposes of this "section any sum which is recover-"able by a local authority under any "of the Acts aforesaid from successive "owners or occupiers of the property "in respect of which the sum is re-"coverable shall, whether such sum "is expressed to be a charge on the "property or not, be deemed to be a "charge."

Note: The above words were added by the Schedule to the Law of Property (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 11).

London Building Acts (Amendment) Act, 1939, s. 66: "All expenses in-"curred by the council in respect of "any dangerous structure shall be "paid by the owner of the structure "but without prejudice to his right "to recover the amount of the said "expenses from any person liable to "pay the expenses of the repair of "the structure."

S. 70: "(1) Where the council have "incurred any expenses in respect of "any dangerous or neglected structure "and have not been paid or have not "recovered those expenses it shall "notwithstanding anything to the "contrary in any Act be lawful for "a court of summary jurisdiction on "complaint by the council within "twelve months after the date of the "demand for the payment of the said "expenses to make an order fixing the "amount of the said expenses and "the costs of the proceedings before "the said court and directing that no "part of the land upon which the "dangerous or neglected structure was "or is situate shall be built upon or "that no part of the dangerous or "neglected structure if repaired or "rebuilt shall be let for occupation "until after payment to the council "of the said amount and thereupon "no part of the said land shall be "built upon and no part of the "dangerous or neglected structure so "repaired or rebuilt shall be let for "occupation until payment to the "council of the said amount. (2) (*a*) "Section 15 of the Land Charges Act, "1925 shall apply to orders made "under subsection (1) of this section ". . . and any such order is accord-"ingly registrable under the said Act "of 1925 as a local land charge. (*b*) "For the purpose of enforcing any "such charge arising out of an order "made after the commencement of "this Act the council shall have all "the same powers and remedies under "the Law of Property Act, 1925, and "otherwise as if they were mortgagees "by deed having powers of sale and "lease of accepting surrenders of "leases and of appointing a receiver."

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as a total loss, which qualified them for a value payment under the War Damage Act, 1943. The amount of this value payment was subsequently fixed by the War Damage Commission at £3,735. In October and November, 1943, the council obtained nine orders under section 70 of the Act of 1939 fixing the costs which the council were entitled to recover from the owner at £207 7s. 11d., and directing that no part of the dangerous structure, if repaired or rebuilt, should be let for occupation until after payment to the council of this sum. The orders were duly registered as local land charges in the register of the council.

In 1944 the council made a compulsory purchase order acquiring, amongst other properties, the properties in question, and this order was confirmed by the Minister on April 25, 1945, by an order entitled "The County of London (Devons Road, Poplar) "Housing Confirmation Order, 1945." On November 16, 1945, the council served a notice to treat on the respondent. The respondent either failed or neglected to prove his title, and accordingly, on October 12, 1955, pursuant to section 76 of the Lands Clauses Consolidation Act, 1845, the council paid the sum of £3,735 into court to the ledger credit "Ex parte the London "County Council, the account of John Segar or other the owners "or owner of the freehold interest in land being . . . ," and then setting out the properties. The council then proceeded to vest the land in itself under section 77 of the said Act.

The council now sought by this application to have paid out of court to itself the sum of £207 7s. 11d. expended by it in putting the premises then standing on the sites in question into a state of safety.

H. E. Francis for the council.
Nigel Bridge for the respondent.

The following case, not referred to in the judgment, was cited in argument: *In re City of London Property Co. Ltd.'s Appeal.*[4]

Cur. adv. vult.

March 22, 1956. Upjohn J. read the following judgment. [His Lordship stated the facts, as set out above, and continued:] The first question which I have to determine is whether the council have a charge upon the properties in respect of their expenditure. That depends upon section 70 of the Act of 1939, which I must now read. [His Lordship then read the section and continued:] It is unfortunate that, unlike sections in earlier comparable Acts—for example, section 257 of the Public Health Act, 1875, and section 13 of the Private Street Works Act, 1892—subsection (1) imposes no charge in express terms upon the property enabling the council to recover the expenses incurred as though it was a mortgagee for that amount.

[4] [1949] Ch. 581; 65 T.L.R. 205; [1949] 1 All E.R. 763.

Subsection (2) (*b*) of section 70 appears to proceed upon the footing that registration under the Land Charges Act, 1925, puts the council in the position of a mortgagee, but it is important to observe that the subsection in itself created no charge. If the section proceeds upon an erroneous view of the law it cannot be construed otherwise than in its ordinary meaning so as to attain the result which it is thought was achieved by registration under the Land Charges Act; if the view be truly erroneous the section has misfired: *Inland Revenue Commissioners* v. *Ayrshire Employers Mutual Insurance Association Ltd.*[1] and *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ltd.*[2]

The Land Charges Act can only operate to impose a charge if the last paragraph of section 15 (1), a paragraph inserted by the Law of Property Act (Amendment) Act, 1926, does so. That paragraph is in these terms. [His Lordship read the paragraph and continued:] It only creates a charge if successive owners are liable, and section 66 of the Act of 1939 only provides that the expenses incurred shall be paid "by the owner of the structure." I am not convinced that that section imposes on successive owners any obligation to pay, though no doubt subsequent owners will do so where the charge has been registered as the price of being permitted to develop the land.

Whatever my doubts may be as to whether section 70 in fact achieves its object of conferring a charge enabling the chargee to exercise all the powers of a mortgagee to recover the expenses incurred, there can be no doubt that the council, having registered their charge, had a good equitable charge in the nature of a restrictive covenant enabling it to prevent any letting of any building rebuilt on the site until the amount of the expenses and costs is paid.

On that footing Mr. Bridge submits that a mistake has been made; too much has been paid into court, and the council, he says, now has no right to obtain payment out of any part thereof.

This argument, which involves a review of some complicated statutory provisions, may be stated thus.

Upon a compulsory purchase of land which has qualified for a value payment under the War Damage Act, 1943, the value is to be that certified by the War Damage Commission—see the Town and Country Planning Act, 1944, Schedule VIII, para. 1 (1)—and this sum has been certified to be the sum of £3,735 mentioned earlier in this judgment. That provision, however, is subject to the qualification contained in paragraph 1 (3) (*b*) of Schedule VIII, that where there is a material difference between the incumbrances to which the property was subject at the time of the war damage and the incumbrances to which it was subject at the date of the notice to treat, being incumbrances of a kind required by the War Damage Act to be taken into account in ascertaining the

[1] 62 T.L.R. 317; [1946] 1 All E.R. 637; 27 T.C. 331.

[2] [1952] A.C. 401, 426; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 560; 33 T.C. 259.

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value of the hereditament, then where the incumbrances have increased such increase must be deducted from the previously ascertained value by the War Damage Commission.

To ascertain what incumbrances must be taken into account for the purposes of the War Damage Act reference must be made to paragraph 1 of Schedule II to that Act, which provides that the hereditament is to be valued as on a sale made in the open market with vacant possession subject (inter alia) to any restriction imposed by or under any enactment passed before the War Damage Act, 1941, to which the hereditament was subject at the time immediately after the occurrence of the war damage.

The charge created by the orders made under section 70 of the Act of 1939 came into effect after the war damage, but before the notice to treat. Consequently it is argued that at the time of the notice to treat the land should have been valued subject to the right of the council to restrict development until its costs and expenses have been paid. It can hardly be doubted that that right ought to be evaluated at £207, the amount of the expenses, and so it is said that the value of the interest of the vendor in the land which was being acquired was £3,735 less £207, that is, £3,528, and too much has been paid into court. I accept that argument.

It is then urged that payment into court under section 76 of the Lands Clauses Consolidation Act and vesting of the land by the council in themselves under section 77 of that Act operate as a statutory conveyance of the property; the money has been paid into court to the credit of the owner, and if too much has been paid in it is as though too much had been paid to the vendor by mistake and the council has no equity or title to claim repayment of any sum so overpaid. That is a formidable argument, but it overlooks the powers given to the court under sections 76 and 78 of the Lands Clauses Consolidation Act, 1845.

Section 76 empowers the acquiring authority, in the circumstances therein mentioned, to pay the purchase-money into court "subject to the control and disposition of the court."

Section 78 is in these terms. [His Lordship read the section and continued:] That section confers a wide discretion upon the court in ordering payment out. The facts are clear. The value of the interest of the respondent which was acquired by the council was £3,528, and too much by £207 has mistakenly been paid into court. That sum was properly expended by the council pursuant to its statutory powers and duties. It is recoverable as a debt from the respondent though that right may now be statute-barred. The difficulty has arisen solely because of the neglect or failure of the respondent to make a title. No question could have arisen if he had made a title, and the matter completed in 1945.

It seems to me that in those circumstances the discretion of the court can only be exercised in one way, namely, by ordering payment out to the council of the money they mistakenly paid

in rather than in permitting the respondent to receive an admitted and entirely unmerited windfall, which has come about solely through the circumstance of his own failure or neglect to make title.

Order accordingly.

Solicitors: *J. G. Barr; Victor Mishcon & Co.*

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[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION.

(COSTS : POLISH TRANSLATIONS.)

1956 *April* 19.

Husband and Wife—Practice—Costs—Taxation—Polish translations. Legal Aid—Costs—Taxation—Polish translations.

The Senior Registrar, after consultation with the masters of the Supreme Court Taxing Office, is of opinion that under present conditions it is more appropriate to treat Polish upon the same basis as French, German, Spanish, etc., than as an "other "language" (Annual Practice, 1956, p. 1483) for the purpose of fixing the rate allowed on taxation for translations. He is also of opinion that the employment of a translator as an intermediary between a Polish assisted party and his own solicitor requires to be strictly justified, and should in any event be kept to a minimum. In particular, the translation of simple letters (such as "writing petitioner to call") from a solicitor to a Polish client resident in England should seldom be necessary.

D. A. NEWTON,
Secretary.

Principal Probate Registry.
April 19, 1956.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* SPARKES.

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1956 *Apr.* 16, 23.

Lord Goddard C.J., Cassels, Lynskey, Donovan and Havers JJ.

Criminal Law—Court of Criminal Appeal—Fresh evidence—Reference by Home Secretary—Whether normal rule of practice applicable—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 19 (*a*)—*Criminal Appeal Rules*, 1908 (*S.R. & O.*, 1908, *No.* 227), *r.* 48.

The petitioner was convicted together with one B. of conspiring, between March and November, 1950, with M. and other persons unknown to break and enter a dwelling-house and steal jewellery, and of breaking and entering that dwelling-house on November 5, 1950, and stealing jewellery. At the trial M. gave evidence of meetings which he had had with the petitioner and B. on occasions

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in August, September and early October, 1950, and he said that the petitioner, he thought in September, had suggested that he should assist them to steal the jewellery by giving certain information; M. also said that he had had a meeting with the petitioner and B. a week before the robbery, and that on the evening of November 4 he had, by arrangement with the petitioner and B., unfastened a catch on a bedroom window in the dwelling-house. The Court of Criminal Appeal dismissed an appeal by the petitioner and the petitioner, alleging that his passport, in force in 1950, showed that he had been absent from the country between July 13 and October 19, 1950, petitioned the Home Secretary, contending that, had the passport been before the jury at the trial it would have shown the evidence of M. to be untrue in a material matter and he might well have been acquitted. The Home Secretary referred the case to the Court of Criminal Appeal under section 19 (*a*) of the Criminal Appeal Act, 1907. The petitioner's passport had in fact been available at the trial, but had not been called for by the petitioner, nor was it suggested by him that he was abroad during the summer of 1950. At the hearing of the reference the petitioner gave no acceptable reason for his failure to mention at the trial that he had been abroad, and objection was taken by the Crown to the admission of the passport as evidence on the ground that on such a reference the court should follow the same procedure as on an ordinary appeal and that, therefore, its reception as fresh evidence was precluded by the rule of practice that the court would not receive fresh evidence unless it was shown that it had not been available at the trial:—

Held, that whether or not the court would admit fresh evidence on a reference under section 19 (*a*) was a matter that must depend on the merits of each case, and that it was undesirable that criminals should be encouraged to attempt to get fresh evidence before the court as the result of a petition and a reference by the Home Secretary, but the court would not treat itself as bound by the rule of practice if there was reason to think that to do so might lead to an injustice, or to the appearance of injustice, and that, lest the impression might arise that a review of the petitioner's case had been refused for a purely procedural reason, the court would look at an agreed schedule of the entries in the passport.

Rex v. *McGrath* [1949] 2 All E.R. 495 and *Rex* v. *Collins* (1950) 34 Cr.App.R. 146 considered.

Held, further (on the merits), that the appeal must fail, for in the face of the whole of the evidence it was impossible to say that if M. had been shown to be wrong in his reference to the meetings in August and September, the jury would or might well have acquitted the petitioner.

Reference by the Home Secretary.

The petitioner, Victor George Sparkes, was charged at Surrey Quarter Sessions on April 25, 1952, together with one, Albert Charles Burley, on an indictment containing two counts; the first count alleged a conspiracy between March and November, 1950, with one Duncan McLeod and other persons unknown to break and enter a dwelling-house of the Duke and Duchess of Sutherland and steal their jewellery, and the second count alleged breaking and entering that dwelling-house on November 4, 1950, and stealing jewellery. Both the petitioner and Burley pleaded not guilty, but the jury convicted each of them on both counts

and the petitioner was sentenced to five years' imprisonment. On July 21, 1952, the Court of Criminal Appeal heard and dismissed an appeal against conviction brought by the petitioner on the ground of misdirection, and he duly served his sentence.

At the trial McLeod, who at the material times had been employed as butler by the Duke of Sutherland, gave evidence for the prosecution to the effect that he had had various meetings with the petitioner and Burley on occasions in August, September and early October, 1950, and that the petitioner, he thought in September, had suggested that he should assist in the robbery, and had asked him if he would give information which would help in stealing his employers' jewels. McLeod also gave evidence to the effect that he met the petitioner and Burley a week before the robbery, when he gave them information about the movements of the Duke and Duchess of Sutherland and that, on the night of the robbery, he had unfastened the catch of the Duchess's room.

Shortly before the petitioner's release after serving his sentence his passport in force for 1950 was returned to him, and the petitioner, alleging that he had been wrongly convicted, presented a petition to the Home Secretary, supporting it with the production of his passport. He contended that entries in the passport showed that he had been abroad between July 13 and October 19, 1950, and that, had it been before the jury at his trial, the passport would have shown that a material part of the evidence of McLeod was untrue and would have raised a doubt in the minds of the jury as to the credibility of McLeod, and he might well have been acquitted. The Home Secretary referred the case to the Court of Criminal Appeal under section 19 (*a*)[1] of the Criminal Appeal Act, 1907.

At the hearing of the reference application was made for leave to call the petitioner in order to produce his passport. During the trial at quarter sessions the petitioner's passport had been in the hands of the police, who, prior to the trial, had received a letter from the defendants' solicitors asking that their passports should

[1] Criminal Appeal Act, 1907, s. 19: "Nothing in this Act shall affect the "prerogative of mercy, but the "Secretary of State on the considera- "tion of any petition for the exercise "of . . . mercy, having reference to "the conviction of a person on indict- "ment or to the sentence . . . passed "on a person so convicted, may, if "he thinks fit, at any time either— "(*a*) refer the whole case to the "Court of Criminal Appeal, and the "case shall then be heard and deter- "mined by the Court of Criminal "Appeal as in the case of an appeal "by a person convicted; or, (*b*) if he "desires the assistance of the Court "of Criminal Appeal on any point "arising in the case with a view to "the determination of the petition, "refer that point to the Court of "Criminal Appeal for their opinion "thereon. . . ."

Criminal Appeal Rules, 1908 (S.R. & O., 1908, No. 227) r. 48: "When "the Secretary of State exercises his "powers under section 19 (*a*) of the "[Criminal Appeal] Act and refers "the whole case to the Court of "Appeal, the petitioner whose case is "so dealt with shall be deemed to be "for all the purposes of the Act or "these rules a person who has "obtained from the Court of Appeal "leave to appeal, and the Court of "Appeal may proceed to deal with "his case accordingly."

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be available, but, although the petitioner's passport was in fact available during the trial the passport was not called for by the petitioner, nor did he suggest that he had been out of the country during the summer of 1950. The petitioner gave no reason for his failure to mention at the trial that he had been abroad, except that he forgot, and the Crown objected to the admission of the passport on the ground that on a reference by the Home Secretary under section 19 (*a*) the court should follow the same procedure as it did on an ordinary appeal and that, therefore, the admission of the passport was precluded by the rule of practice that the court would not receive fresh evidence unless it was shown that the evidence could not have been given at the trial.

Sebag Shaw for the petitioner.

Sir Reginald Manningham-Buller Q.C., *A.-G.*, and *J. C. Phipps* for the Crown.

The following cases were referred to in argument: *Rex* v. *McGrath* [2]; *Rex* v. *Collins* [3]; *Rex* v. *Hamilton* [4]; *Rex* v. *Hullett* [5]; *Rex* v. *Fratson* [6]; *Rex* v. *Harding*.[7]

LORD GODDARD C.J. We think that we should look at the passport. There is no need to call the petitioner, for on the application to call further evidence we can look at the agreed schedule of entries.

The court, having looked at the agreed schedule of entries in the passport, and heard argument upon the facts of the case, announced that the appeal would be dismissed and that judgment would be given at a later date.

Cur. adv. vult.

April 23. LORD GODDARD C.J. The judgment of the court will be delivered by Donovan J.

DONOVAN J. read the following judgment: This matter comes before the court upon a reference by the Home Secretary under the provisions of section 19 (*a*) of the Criminal Appeal Act, 1907. By rule 48 of the Criminal Appeal Rules, 1908, it is provided that upon such a reference, the petitioner whose case is so dealt with shall be deemed for all the purposes of the Act or the rules to be a person who has obtained from the court leave to appeal, and the court may proceed to deal with his case accordingly. The court on Monday last heard and dismissed the appeal and now gives its reasons for that judgment.

[2] [1949] 2 All E.R. 495.
[3] (1950) 34 Cr.App.R. 146.
[4] (1917) 13 Cr.App.R. 32; 26 Cox C.C. 157.
[5] (1922) 17 Cr.App.R. 8.
[6] (1930) 22 Cr.App.R. 29.
[7] (1936) 25 Cr.App.R. 190.

Victor George Sparkes (hereinafter called "the appellant") was convicted at Surrey Quarter Sessions on April 25, 1952, together with one Albert Charles Burley upon an indictment containing two counts. The first count charged them with conspiring between March and November, 1950, with one McLeod and other persons unknown to break and enter a dwelling-house of the Duke and Duchess of Sutherland and steal their jewellery. The second count charged them with breaking and entering that dwelling-house on November 4, 1950, and stealing jewellery. The jewellery was worth some £50,000 and none of it has been recovered. The appellant and Burley pleaded not guilty. The jury found them guilty on both charges. Sparkes and Burley were each sentenced to five years' imprisonment on each charge, the sentences to be concurrent. Both prisoners appealed to the Court of Criminal Appeal, and their appeals were heard and dismissed on July 21, 1952. Burley later died in prison, having presented no petition to the Home Secretary alleging that he was wrongly convicted. The appellant served his sentence, but just prior to his release presented such a petition dated August 27, 1955, supporting it with the production of his passport in force in 1950.

The passport purports to show that the appellant was absent from the United Kingdom between July 13, 1950, and October 19, 1950. It is not a complete record of the appellant's movements, for it shows him entering Italy at a place on the French-Italian border in September, 1950, but bears no stamp showing that he left France on the same day. Again, when he left Italy, apparently on September 11, 1950, from the same place on the border, there is no record in the passport of his entry into France. But for the purpose of this appeal these discrepancies may be ignored, and the court will assume that the appellant was abroad from July 13, 1950, to October 19, 1950. Upon receipt of the appellant's petition, accompanied by his passport, the Home Secretary exercised his powers under section 19 (*a*) aforesaid to refer the matter to this court.

Two observations may be made at once. The first is that the period July 13, 1950, to October 19, 1950, is shorter in length than the period charged in the indictment as covering the time when the conspiracy was hatched. The period alleged in the indictment was "between March and November, 1950." The appellant was admittedly in this country during 1950 between March and July, and again from October 19 till December 21. The second observation is that he was admittedly in this country on the date of the robbery, which was November 4, 1950, and for a fortnight beforehand. Plainly, therefore, the fact that the appellant was abroad from July 13 to October 19, 1950, did not make it impossible for him to commit the offences of which he was found guilty; and the contrary is not contended by him.

What is said on his behalf is this: that if he was abroad for the period July to October, then certain evidence given against

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him at his trial could not be true; and if the jury had known this they might well have acquitted him instead of convicting him as they did. The evidence referred to was that of one Duncan McLeod. McLeod began employment as butler to the Duke of Sutherland in March, 1950, and was still his butler at the time of the robbery. The appellant had also been in the Duke's service in 1950 and earlier, as a chauffeur-valet, but he left in April, 1950. McLeod stayed on in the Duke's service, and in his evidence said that he saw the appellant frequently after April, 1950, and had drinks with him in London and Guildford.

Inquiries made by the police immediately after the robbery on November 4, 1950, led to no arrests. But in February, 1952, McLeod went to the police and made a full confession. In summary it was that he, the appellant, and one Burley had planned the crime. He said that at one of his meetings with the appellant after the latter had left the Duke's employ, he was asked by the appellant and by Burley to assist in the proposed robbery by giving necessary information about the lay-out of the house, and the Duchess's movements, and after consideration he agreed to do so. He was promised £8,000 as his share of the proceeds by Burley, but after the robbery he was told that there was a hitch and it would be £1,000. In fact he received £800 only in all, the first £50 of it, he said, from the appellant. He went on to describe how a week before the robbery he was told by the appellant and Burley that it was to take place on the following Saturday evening, and he gave information as to what room the Duchess would be using, where in the room the jewels would be, and he agreed to unfasten the latch of the window, which in fact he did. He had confessed, some sixteen months after the crime, through remorse. The jury at the trial, after being warned of the risks involved in acting upon the evidence of an accomplice, obviously accepted McLeod's confession as true and convicted both the appellant and Burley.

In the course of McLeod's examination-in-chief the following questions and answers appear:

"(Q.) Can you tell us about what date it was, the month of "that year, that you first met Burley? (A.) I should think it "was the latter part of August or the beginning of September.

"(Q.) Now on the other occasions when you met him, what "were the circumstances? (A.) We used to go for drinks "together.

"(Q.) You and who else? (A.) Sparkes.

"(Q.) And Burley? (A.) Yes.

"(Q.) On those occasions when you went for drinks together, "who paid generally? (A.) Burley, usually.

"(Q.) Now on one of those occasions was any suggestion made "to you by either of the two men? (A.) Yes.

"(Q.) First of all, who made the suggestion? (A.) Sparkes "made the suggestion.

"(Q.) In the presence of Burley or not? (A.) No.

" (Q.) Where was the suggestion made by Sparkes? (A.) At " 14 Cheyne Walk.

" (Q.) And about what date was that: can you give it " approximately? (A.) I should think it was in September, if " I remember rightly.

" (Q.) What was the suggestion that Sparkes made to you in " Cheyne Walk about September? (A.) He asked if I would " give some information which would help in stealing my " employers' jewels . . ."

The Deputy Chairman: " Now do you know which of the defendants mentioned £8,000 as your share. (A.) Burley.

" (Q.) Was that in Sparkes' presence or not? (A.) I cannot " remember whether Sparkes was there, not definitely."

Mr. Phipps: " Were you ever visited by either of them at " the house at Wilton Crescent? (A.) I was.

" (Q.) By which of them? (A.) By Sparkes.

" (Q.) Can you give us the month of that visit? (A.) I " should think it would be either the latter part of September " or the beginning of October."

What is now said on behalf of the appellant is that since his passport shows that he was out of the country in August and September the evidence of McLeod to the effect that he met the appellant in August or September cannot be right; and had this been brought out at the trial, McLeod's reliability as a witness would have been so shaken that the jury might well not have believed him at all; and it being McLeod's evidence which convicted the appellant, the conviction should now be quashed.

If one assumes in the appellant's favour that the passport had been produced at the trial, or that the appellant himself had averred (which he did not do) that he was abroad from July to October, 1950, and that the result was that the jury believed McLeod to be mistaken when he spoke of August or September as being, to the best of his recollection, the dates of his meetings with the appellant, there is still no reason to think that the result of the trial would, or might well, have been different. In the course of the appellant's cross-examination it was elicited that more than one statement had been made by McLeod to the police; and in re-examination one of these statements, made on February 23, 1952, was made an exhibit, and verified by McLeod. Part of it reads thus:

" I now remember that on the Sunday prior to Saturday, " November 4, 1950, ' Mike ' Burley and Sparkes came down to " Sutton Place by car. Sparkes had phoned me earlier and made " the arrangement. We met outside the gates of Sutton Place " and we drove to the Bell Public-house, Guildford, where I was " introduced to two women, one as Mrs. Burley and the other a " girl named ' Barbara ' who was Sparkes' girl friend. After " leaving this public-house, while we were outside, I told both " Burley and Sparkes that the Duke and Duchess of Sutherland " would be coming down to Gardens Cottage, Sutton Place, on

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" the following week-end. During the week following this I met " Sparkes and ' Mike ' Burley in the Horse and Groom Public- " house round the corner from 33 Wilton Crescent and I then " confirmed the fact that the Duke and Duchess of Sutherland " would be visiting Sutton Place on the following week-end. I " gave them the information as to where the ladder was kept and " which room the Duchess would be sleeping in at Gardens " Cottage. In fact I told them everything about the arrange- " ments. Burley then told me that they would come down after " dinner on the Saturday and that when I left the house to drive " the grey van up to the garage at the big house they would " know that the staff had left. They asked me to unfasten the " catch of the Duchess's bedroom window to make it easier for " them to enter the room and I agreed to do this. Sparkes " telephoned me some time on the Friday and told me that the " job was coming off on the following night and I agreed to carry " out the pre-arranged plan. The following day, which was " Saturday, November 4, 1950, I remember this because it was " ' firework ' night on this day, I carried on with my normal " duties. Dinner commenced that evening about 8 p.m. and " after one of the courses I went upstairs to put the Duke's " things out in his bedroom, that was my normal practice and " while I was there I went through to the Duchess's bedroom " and unfastened the catch on the bedroom window and then " looked to see if the Duchess's jewel cases were in their normal " place at the head of the bed and they were. I had previously " told Burley and Sparkes that the jewel cases would be in that " position in the bedroom because the Duchess had always put " them there on previous occasions. After this I went back " downstairs, carried on with my duties and after finishing my " work I left the cottage by the back door with the cook and " drove the grey van up to the big house. I did not go back to " the cottage again that night. About midnight that night the " night watchman woke me up at the big house and told me " that there were burglars at the cottage and I was wanted there " straight away. I dressed and went to the cottage where I was " seen by the police. I did not see ' Mike ' Burley or Sparkes " again or hear from them until after November 17, 1950, when " I left the Duke's employ and went to live at 1 Cottismore " Gardens, Kensington, where I had a room and where I was " employed as a butler. Sparkes knew I was going there. " Shortly after November 17, 1950, Sparkes and ' Mike ' Burley " came round to 1 Cottismore Gardens, Kensington, to see me. " We all went to The Connoisseur Club. The conversation then " was general, about the job going off all right and they told me " they would be giving me a share of the money later. On a " previous occasion when the job was being arranged, Burley told " me my share would be £8,000, but later he said that a ' snag ' " had occurred and my share would be about £1,000. He told " me this when we were discussing the possibility of a reward

" being offered. About Christmas, 1950, Sparkes handed me £50 " in £1 notes and at intervals I have received from him or Burley " various amounts in £50 and £25 lots, amounting in all to about " £800."

There is nothing in this statement which can be criticized as faulty recollection on the part of McLeod on the ground that the appellant was out of England at the time. He was admittedly in England, and he admittedly met McLeod and Burley at Guildford, though he puts the date as the 21st and not the 28th of October. Even, therefore, had the jury concluded that McLeod had been mistaken in his somewhat tentative recollection of earlier dates, they might well have concluded (and we think probably would) that he was telling the truth when he gave this detailed and circumstantial account of the meeting and of other events very shortly before the robbery—a meeting which Sparkes did not deny, though he put the date of it a week earlier. In the face of this evidence it is impossible to say that if McLeod had been shown to be wrong in his reference to meetings in August or September, the jury would or might well have acquitted the appellant.

One obvious question is why the appellant did not produce his passport at the trial. It was in the hands of the police but was nevertheless available to him at the hearing had he called for it. He could also have given evidence himself that he was abroad during the summer of 1950. He did not do so, and his explanation is that he forgot. It is impossible to believe this. He had been abroad for substantial periods in 1947, 1949, 1950 and 1951, if his passport accurately records his movements. Questions were put to McLeod by the appellant's own counsel to the effect that the appellant was abroad from June to August, 1951, and this information presumably came from the appellant. Could he in all the circumstances have forgotten that he was abroad during 1950 as well, when this was apparently the regular pattern of his life at that time? One possible reason for the appellant's reticence at the trial is that he realized it would not really help him to allege and establish that he was abroad from July until October 19, for this would not get rid of the damning evidence which McLeod could and did give about what happened at the meeting of the appellant with McLeod and Burley later in October. But the court need not speculate upon the matter; it is enough to say that the appellant has given no acceptable reason why at the trial he did not mention his absence abroad from July to October 19, 1950, but remained silent about it.

That circumstance led the Attorney-General to object to the court receiving the appellant's passport in evidence. He relied upon the well-established rule of practice that the court will not receive fresh evidence unless it is shown that the evidence could not have been produced at the trial, or that some point which could not have been foreseen arose at the trial upon which the evidence would have been material. The present is admittedly

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not such a case; and the Attorney-General argued that since the reference from the Home Secretary is to be treated in all respects as an appeal, the rule of practice precluded the reception of fresh evidence in the shape of the passport. In *Rex* v. *McGrath*,[1] however, the court indicated that different considerations arise where a case is referred to it by the Home Secretary under section 19 (*a*) of the Act; and in the circumstances of that case admitted fresh evidence. A similar course was followed in *Rex* v. *Collins*.[2] But no general rule applicable to all such cases is to be deduced from these precedents. On the one hand it might well be undesirable to stultify such a reference at the outset by a refusal to receive evidence which was available at the trial. On the other hand it is clearly undesirable to encourage astute criminals dishonestly to by-pass the court after conviction in the hope that fresh evidence, genuine or otherwise, might be got before the court as the result of a petition to the Home Secretary, and a reference of the matter by him to the court. Each case must, therefore, be decided upon its merits, although the court will not treat itself as bound by the rule of practice if there is reason to think that to do so might lead to injustice or the appearance of injustice. In the present case the court thought it better to look at the agreed schedule of entries in the appellant's passport, lest the impression might arise that a review of his case had been refused for a reason which was merely procedural.

One final point should be mentioned. It may be that the appellant personally did not break and enter the house and steal the jewels. It was not necessary to the Crown's case to prove that he did. If he conspired with Burley to steal them, as the jury found he did, then as an accessory before the fact he was just as guilty of the breaking-in and stealing effected in pursuance of that conspiracy as the person or persons who actually and physically committed the crime; and he could be tried, convicted and punished in all respects as if he were a principal felon: see the Accessories and Abettors Act, 1861.

For these reasons the appeal constituted by the reference to this court was dismissed.

Appeal dismissed.

Solicitors: *Irwin Shaw; Director of Public Prosecutions.*

J. F. L.

[1] [1949] 2 All E.R. 495.

[2] (1950) 34 Cr.App.R. 146.

[PRIVY COUNCIL.]

* ONG BAK HIN . . . . . Appellant;

AND

GENERAL MEDICAL COUNCIL . . . Respondent.

J. C.† 1956 *Mar.* 19; *April* 24.

ON APPEAL FROM THE MEDICAL DISCIPLINARY COMMITTEE OF THE GENERAL MEDICAL COUNCIL.

Medical Practitioner — Medical Disciplinary Committee — Evidence — Charge of infamous conduct in professional respect — Alleged operation of abortion—Conviction in criminal court in Malaya—Admissibility in evidence of record of criminal proceedings—Statutory powers of Medical Disciplinary Committee—Desirability of alteration in Rules of Procedure—Medical Disciplinary Committee (Procedure) Rules, 1951 (*S.I.* 1951, *No.* 665), *r.* 63.

The appellant, a registered medical practitioner practising in Malaya, was charged before the Medical Disciplinary Committee of the General Medical Council with having, with intent to cause the miscarriage of a woman, unlawfully performed an operation of abortion which caused her death and thereby committed an offence under the Penal Code of the Federation of Malaya of which he was convicted in the High Court of Malacca (the conviction being affirmed on appeal), and having in relation to those alleged facts been guilty of infamous conduct in a professional respect. The evidence adduced before the Disciplinary Committee in support of the charge consisted of the record of the hearing in the High Court of Malacca "edited" by the deletion of certain passages in the evidence which the legal assessor sitting to advise the committee considered would not be admissible in a criminal court in England, and certain further passages at the request of the appellant's solicitor. The summing up of the judge at the trial was also omitted. While agreeing that the documentary evidence was admissible, it was contended for the appellant that the witnesses who had given evidence at his trial should be called to give oral evidence before the committee. The appellant was found guilty by the committee of infamous conduct in a professional respect and his name was directed to be erased from the register. On appeal by the appellant under section 20 of the Medical Act, 1950:—

Held, dismissing the appeal, that the record, with certain excisions, of the proceedings before the criminal court having been put in by consent as soon as the committee had decided, quite properly, that the attendance of the witnesses from Malaya was not practicable and that their absence did not vitiate the proceedings, that consent was fatal to any objection before the Board to the admission of the record. There had been no miscarriage of justice.

The observations in *General Medical Council* v. *Spackman* [1943] A.C. 627 at 634–637 and 645–646; 59 T.L.R. 412; [1943] 2 All E.R. 337 were applicable in this case—subject to the Rules governing the committee's procedure—where the conviction, not having taken place in the United Kingdom or the Republic of Ireland, was only prima facie evidence of the infamous conduct alleged.

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† *Present*: Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Mr. L. M. D. de Silva.

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The Disciplinary Committee as a domestic forum charged with the duty of making "due inquiry" into the circumstances attending the conviction in a distant country of a medical practitioner with a view to deciding—of which they alone were the judges—whether he had been guilty of infamous conduct in a professional respect, could not adequately perform that duty unless they were in possession of the whole of the proceedings in the criminal court in which the conviction occurred. The record of proceedings was a "document" within the meaning of rule 63 of the Medical Disciplinary Committee (Procedure) Rules, 1951, which provided that "The committee may . . . after consultation with the assessor "to the committee, treat any statement of fact contained in any "document as evidence of that fact." The admissibility of such documents was, however, limited to the statements of fact contained therein, and in the case of the record of proceedings in a criminal court would exclude the judge's charge to the jury and other parts of the record which it was desirable that the committee should see. It was desirable that there should be an alteration in the Rules of Procedure whereby the committee could be empowered beyond all question to receive in evidence and examine the whole of the officially authenticated proceedings of the convicting court in this class of case.

APPEAL (No. 50 of 1955) from a determination of the Medical Disciplinary Committee of the General Medical Council (November 25, 1955).

The following facts are taken substantially from the judgment of the Judicial Committee: In this case the appellant, Dr. Ong Bak Hin, who had been at all material times a medical practitioner registered under the Medical Acts, appealed to Her Majesty in Council under section 20 of the Medical Act, 1950, from a determination of the Medical Disciplinary Committee on November 25, 1955, that he had been guilty of infamous conduct in a professional respect and that the registrar be directed to erase his name from the register.

This determination was arrived at after an inquiry which had been held as a result of information as to the conduct of the appellant sent to the General Medical Council by the Director of Medical Services for the Federation of Malaya in accordance with rule 12 (2) (*b*) of the Medical Disciplinary Committee (Procedure) Rules, 1951 (S.I. No. 665 of 1951).

The conduct referred to in the information supplied to the council was to the effect that the appellant had been convicted and sentenced by the Supreme Court of Malacca on August 14, 1953, for performing an operation with intent to cause miscarriage which caused death contrary to section 314 of the Penal Code for the Federation of Malaya.

The formal charge before the Disciplinary Committee alleged that on May 18, 1953, the appellant, being registered under the Medical Acts, with intent to cause the miscarriage of Tee Bee Geok, unlawfully performed an operation of abortion which caused her death and thereby committed an offence under section 314 of the Penal Code of the Federation of Malaya of which he was convicted in the High Court of Malacca on August 14, 1953.

and sentenced to five years' imprisonment (reduced on appeal to two years), and concluded with the words: "And that in relation "to the facts alleged you have been guilty of infamous conduct "in a professional respect."

At the inquiry Mr. Widgery, a solicitor, appeared to place the facts before the committee, and the appellant was represented by Mr. Taylor, of Messrs. Hempsons, solicitors. The committee had the advice of a legal assessor.

The evidence adduced in support of the charge consisted of a statutory declaration by the registrar of the Court of Appeal for the Federation of Malaya to which were exhibited: (A) A certificate by the assistant registrar of the Supreme Court of Malacca of the conviction on August 14, 1953. (B) The record of the hearing in the High Court consisting of: (1) The charge. (2) Notes of evidence made by the trial judge. (3) Judge's reasons for sentence. (4) List of exhibits at the trial. (5) Statement of deceased woman dated May 22, 1953, being Ex. P.1 at trial. (6) Extracts from medical textbooks put in at trial. (7) Copies of notice and petition of appeal to Court of Appeal of Federation of Malaya. (8) Certified copies of order and judgment of Court of Appeal.

The copies of the record of the hearing in the High Court of Malacca provided for the members of the Disciplinary Committee had been "edited" by the deletion of certain passages in the evidence which the legal assessor considered would not have been admissible in a criminal court in England and certain further passages at the request of the appellant's solicitor. The summing up of the judge at the trial was also omitted.

The appellant appeared and gave evidence and was cross-examined at the inquiry. He contended, inter alia, that before he began the operation he believed that pregnancy had already terminated, and that the remnants had to be cleared. The whole purpose of the operation, he said, was thus limited, and the products of conception removed did not include any piece or pieces of a foetus.

At the conclusion the president announced the decision of the committee to the effect that the appellant was adjudged to have been guilty of infamous conduct in a professional respect and that the registrar had been directed to erase his name from the register.

1956. March 13, 14, 15 and 19. *J. R. Cumming-Bruce* and *R. Barr* for the appellant.

J. G. S. Hobson for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Mechanical and General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.*[1];

[1] [1935] A.C. 346.

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Council of the Municipality of Brisbane v. *Martin* [2]; *Har Prasad Singh* v. *Judges of the High Court at Allahabad.* [3]

March 19. LORD OAKSEY announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons later.

April 24. The reasons of their Lordships for dismissing the appeal were delivered by LORD TUCKER, who stated the facts set out above and continued: At the inquiry the appellant's solicitor submitted at the outset that justice could not be done to his client unless the witnesses who had given evidence at his trial were called to give oral evidence before the committee. He agreed that the documentary evidence was admissible, but contended that the committee in their discretion should exclude it in the interests of justice. He expressly stated that he did not ask for an adjournment. The legal assessor pointed out that the committee had no power to compel the attendance of witnesses from Malaya and advised the committee to proceed on the documentary evidence. Certain passages were then deleted or covered up at the request of the appellant's solicitor and in this form the record of the criminal proceedings was put in. The solicitors on each side drew the attention of the committee to such portions of the evidence as they considered relevant, but it was agreed that the committee should be at libery to look at any parts they wished and the desirability of the whole of the evidence of one of the witnesses, viz., Dr. Bennett, being read was stressed.

It was contended before their Lordships by counsel for the appellant that the proceedings at the inquiry outlined above were defective and not strictly in accordance with the rules of procedure to which reference will shortly be made, and that the determination of the committee should be set aside. He said that the notes of evidence given by Dr. Bennett should not have been received unless the committee were satisfied that an attempt had been made to secure his personal attendance and that he had refused to attend. He further submitted that if the notes of evidence were received they should all have been read out before the committee and that failing this the committee should have read the entire evidence themselves which, he said, they could not have done in the time available having regard to the length of the hearing and the short mid-day adjournment.

It will be convenient here to refer to the relevant sections of the Medical Acts and the Rules of Procedure made thereunder.

Section 29 of the Medical Act, 1858, as amended by the Medical Act, 1950, reads: "If any registered medical practitioner "shall be convicted by any court in the United Kingdom or the "Republic of Ireland of any felony, misdemeanour, crime or "offence, or shall, after due inquiry, be judged by the general

[2] [1894] A.C. 249. [3] (1931) L.R. 58 I.A. 152.

" council to have been guilty of infamous conduct in any pro- " fessional respect, the general council may, if they see fit, direct " the registrar to erase the name of such medical practitioner " from the register."

By section 14 of the Medical Act, 1950, the functions of the General Medical Council under section 29 of the Medical Act, 1858, were transferred to and became exercisable by the Medical Disciplinary Committee.

By section 16 of the Medical Act, 1950, the Medical Disciplinary Committee were required to make rules as to procedure and evidence, to be approved by the Privy Council. The Medical Disciplinary Committee (Procedure) Rules, 1951, were approved by Order in Council and are Statutory Instrument No. 665 of 1951.

Rule 28 of these Rules, under the heading " Cases relating to " conduct—proof of Charges," provides: " 28. In cases relating " to conduct where the practitioner appears, the following order " of proceedings shall be observed as respects proof of the charge " or charges:—(*a*) If a complainant appears, he shall open the " case against the practitioner. If no complainant appears, the " solicitor shall present the facts on which the complaint or " information is based. (*b*) Next the complainant, if any appears, " or, if no complainant appears, the solicitor shall adduce " evidence of the facts alleged in the charge or charges or such " of those facts as he is prepared to prove."

Rule 63 reads: " The Committee may receive any such oral " or other evidence as would be receivable in a court of law, and " in addition may, after consultation with the assessor to the " committee, treat any statement of fact contained in any " document as evidence of that fact."

The position of the General Medical Council in relation to its disciplinary powers under the Medical Act of 1858 was considered by the House of Lords in proceedings by way of certiorari in *General Medical Council* v. *Spackman*.[1] Viscount Simon L.C., after referring to section 29 of the Act of 1858, said[2]: " That " section draws a significant distinction between a case in which " the impeached practitioner has been convicted of felony or " misdemeanour and a case in which the allegation of infamous " conduct is not connected with a criminal conviction. In the " former case, the decision of the council is properly based on " the fact of the conviction, and the practitioner cannot go " behind it and endeavour to show that he was innocent of the " charge and should have been acquitted. In the latter case, " the decision of the council, if adverse to the practitioner, must " be arrived at ' after due inquiry,' and this of course means " after due inquiry by the council."

After referring to the refusal of the council to hear evidence

[1] [1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 337.

[2] [1943] A.C. 627, 634.

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tendered with a view to showing that the practitioner was not guilty of the adultery of which he had been found guilty by the Divorce Court, he proceeded [3]: "It is worth observing that this problem "does not arise only in connexion with conclusions reached in the "Divorce Court. A jury's verdict of justification in proceedings "for slander, judgment for the plaintiff in an action for seduction, "a bastardy order made by a bench of magistrates—all these, "and many other, instances of adverse conclusions reached in a "court of law might conceivably in certain circumstances lead "to a charge against a medical man of infamous conduct in a "professional respect. It seems obvious, in these other instances, "that, while the council might well treat the conclusion reached "in the courts as prima facie proof of the matter alleged, it "must, when making 'due inquiry' permit the doctor to "challenge the correctness of the conclusion and to call evidence "in support of his contention. . . . This does not mean that "the council has to rehear the whole case by endeavouring to get "the previous witnesses to appear before it, though in special "circumstances the recalling of a particular witness, in the light "of what the accused or his witnesses assert, may, if feasible, be "desirable. The council will primarily rely on the sworn "evidence already given at the trial."

Lord Atkin said [4]: "It is not disputed that where there has "been a trial, at least before a High Court judge, the notes of "the evidence at such trial and the judgment of the judge may "afford prima facie evidence in support of the charge. . . ."

Lord Wright said [5]: "The council very properly have treated "the decree of the Divorce judge as prima facie evidence. So "it is, and very strong evidence too, especially considering that "the respondent did not appeal but paid the £1,000 of damages "awarded against him." Later he said [6]: "Most of the cases "before the council must involve questions of fact which they "have to decide as best they can. It can only be in compara-"tively rare cases that the cause of complaint is a matter which "has been decided in a court of law other than by a conviction "for felony or misdemeanour. The decision of the court should, "indeed, ease that duty, because the proceedings and judgment "of the court at least give the council prima facie evidence "which may be for practical purposes unanswerable by the "practitioner. . . ."

That case concerned a finding of adultery which at that time was not conclusive. The law in that respect has now been altered, but the observations of the noble Lords in that case are—subject to the effect of the Rules of Procedure—in their Lordships' opinion applicable to such a case as the present where the conviction, not having taken place in the United Kingdom or the Republic of Ireland, is only prima facie evidence of the infamous conduct alleged.

[3] [1943] A.C. 627, 635.
[4] Ibid. 637.
[5] Ibid. 645.
[6] Ibid. 646.

In so holding their Lordships have not lost sight of the changes produced by the Medical Act, 1950, in the position of the Medical Disciplinary Committee, as compared with the General Medical Council under the Act of 1858, whereby they are now empowered to compel the attendance of witnesses and the production of documents, to administer oaths, and are required to make rules as to procedure and evidence which have statutory force, and by which a right of appeal from their determination is given. They are, however, not a court of law but a domestic forum charged in certain cases, of which the present is one, with the peculiar duty of making " due inquiry " into the circumstances attending the conviction in a distant country of a medical practitioner with a view to deciding—of which they alone are the judges—whether he has been guilty of infamous conduct in a professional respect. This duty they cannot adequately perform unless they are in possession of the whole of the proceedings in the criminal court in which the conviction occurred. It would be unfortunate if they have precluded themselves from so functioning by the Rules which they have made, and in particular by rule 63. It is not easy to decide whether the whole of the proceedings in Malaya would have been " receivable in a court of law." No court of law in this country is charged with precisely the same function as that entrusted to the committee and the admissibility of documents may depend upon the precise issue before the court. The record of proceedings is, in their Lordships' opinion, a " document " within the meaning of the second limb of rule 63 (see the decisions under the Evidence Act, 1938—which it may however be noted does not apply to Scotland—in *Edmonds* v. *Edmonds & Rogers*,[7] *Bullock* v. *Borrett*,[8] and *Barkway* v. *South Wales Transport Co.*[9] The admissibility of such documents is, however, limited to the statements of fact contained therein, and such a restriction may render the task of the committee and legal assessor extremely difficult in dealing with the record of proceedings in the criminal court and would exclude the judge's charge to the jury and other parts of the record which it is clearly desirable that the committee should see.

In the present case the record, with certain excisions, was put in by consent as soon as the committee had quite properly decided that the attendance of the witnesses from Malaya was not practicable and that their absence did not vitiate the proceedings. The consent to the admission of the record is fatal to any objection on this score now being put forward before the Board, nor do their Lordships consider there is any substance in the contentions that the whole of the evidence was not read out in court or that it was incumbent upon the committee to read portions not considered by either side to have sufficient relevance to require the attention of the committee to be directed thereto.

[7] [1947] P. 67; 63 T.L.R. 327.
[8] [1939] 1 All E.R. 505; 55 T.L.R 408.
[9] [1949] 1 K.B. 54; [1948] 2 All E.R. 460; 64 T.L.R. 462.

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Their Lordships desire, however, to draw the attention of those concerned to the desirability of an alteration in the Rules of Procedure whereby the committee can be empowered beyond all question to receive in evidence and examine the whole of the officially authenticated proceedings of the convicting court in this class of case.

For the reasons stated above their Lordships are of opinion that there has in this case been no miscarriage of justice and they have accordingly humbly advised Her Majesty that this appeal should be dismissed.

Solicitors: *Hempsons; Waterhouse & Co.*

C. C.

[LIVERPOOL ASSIZES.]

1956
Feb. 6, 7, 20.
McNair J.

* LABONE *v.* LITHERLAND URBAN DISTRICT COUNCIL. LIVERPOOL CO-OPERATIVE SOCIETY LTD. AND ANOTHER, THIRD PARTIES.

[1954 L. No. 2231]

Landlord and Tenant—Restrictive covenant—Shop—Lease of shop for "trade or business of bread and confectionery"—Lessors' covenant not to permit adjacent premises to be used for the trade or business for which the demised premises were let—Lease of adjoining premises to grocers—Sale of bread and confectionery by grocers—No breach of covenant.

The owners of a row of shop premises leased a shop to a master baker and confectioner the lessee covenanting not to carry on upon the demised premises "any trade or business whatsoever other than "that of bread and confectionery"; the lessors covenanting "not "to carry on or permit or suffer to be carried on by others upon "adjacent premises the trade or business for which the demised "premises are let." The lessors let adjacent premises to two grocers who, in the course of carrying on their businesses, sold bread and confectionery:—

Held, that the words "bread and confectionery" were descriptive of a class of trade or business and therefore the monopoly reserved to the lessee by the lease was that of the trade or business of a bread and confectionery shop, that is, a shop in which substantially only bread and confectionery is sold; accordingly, since there was not carried on upon the adjacent premises the trade or business of such a shop, the sale of bread and confectionery thereat was not a breach of the lessors' covenant.

Held, further, that even if the words, "trade or business of "bread and confectionery," be construed as meaning, "the trade "or business of selling bread and confectionery," the sale of bread and confectionery at a grocer's shop was not a breach of the lessors' covenant, since it would be wholly artificial to say that at a grocer's shop there is being carried on the trade or business of selling each substantial group of articles which a grocer commonly sells.

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

A. Lewis & Co. (Westminster) Ltd. v. *Bell Property Trust Ltd.* [1940] Ch. 345; 56 T.L.R. 391; [1940] 1 All E.R. 570 followed.

Per curiam: "The covenant, 'not to carry on the trade or "'business of selling bread and confectionery,' plainly is different "from a covenant, 'not to sell bread and confectionery by way of "'trade or business.' The latter covenant would be breached by "any sale (beyond, possibly, minimal quantities) of bread and "confectionery."

ACTION.

In February, 1953, the defendants, Litherland Urban District Council, who had previously developed a housing estate in the neighbourhood of Kirkstone Road North, invited tenders for the tenancy of shops in that road and published a list of businesses to which the shops would be allocated. The list comprised a number of businesses, among some of which there would inevitably be some overlapping with regard to the commodities which might be expected to be on sale in those shops; such, for example, as that between a chemist and a hairdresser in respect of toilet articles, and that between a butcher and a poulterer in respect of poultry. On March 3, 1953, the plaintiff, Leonard Stuart Labone, a master baker and confectioner, was informed that his tender "for the bread and confectionery shop" had been accepted and, by a lease dated November 9, 1953, he was granted a tenancy of the shop. By that lease the plaintiff covenanted: "not "without previous consent in writing of the landlords to carry "on or permit or suffer to be carried on in or upon the demised "premises or any part thereof any trade or business whatsoever "other than that of bread and confectionery, and, at all times "of the year during usual business hours of the locality, to keep "the demised premises open as a shop for carrying on the said "business"; the words "bread and confectionery" being written in ink in the typed form of lease. By a further clause in the lease the defendant council, the lessors, covenanted: "not "during the period of tenancy to carry on or permit or suffer to "be carried on by others in or upon the adjoining or adjacent "premises in Kirkstone Road North belonging to the landlords, "the trade or business for which the demised premises are let."

By leases dated October 7, 1953, and November 18, 1953, the tenancies of two shops allocated to the business of grocer were granted respectively to the Liverpool Co-operative Society Ltd. and to Gourley Bros. Ltd. The former shop was number 4, and the latter 30 Kirkstone Road North, and they were adjoining or adjacent to that demised to the plaintiff, which was number 22. The leases relating to nos. 4 and 30 were similar in their terms, both containing a lessee's covenant similar to that, set out above, contained in the plaintiff's lease, with the substitution of the word "grocer" for those of "bread and confectionery"; but neither lease contained the lessor's covenant contained in the plaintiff's lease. Following the execution of the leases both companies, as part of their grocery businesses, offered for sale

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bread and confectionery, such sales amounting in the case of the former company to some £25 or £30 per week, or about 2¼ per cent. of total sales, and in the case of the latter company to between £10 and £12 per week, or 1½ per cent. of total sales. In neither shop, however, was there any distinct section devoted to the sale of bread and confectionery.

In the Liverpool area—in which the shops were situated—the sale of bread and confectionery is part of the normal trade of a grocer. A firm of wholesale bakers and confectioners supplied 400 grocers in the area with bread and cakes; and of 48 grocers selected at random in the area only two sold neither bread nor cakes, whereas 43 sold both bread and cakes. The plaintiff's sales at the demised premises were distributed in value: as to 45 per cent. in bread (of which he baked 85 per cent.); as to 50 per cent. in cakes, and as to 5 per cent. in meat pies and the like.

The plaintiff brought this action claiming, inter alia, damages on the ground of breach by the defendant council of, inter alia, the lessor's covenant in permitting to be carried on at nos. 4 and 30 Kirkstone Road North the trade or business for which the premises demised to him were let. By third party proceedings the defendant council brought in the Liverpool Co-operative Society Ltd. and Gourley Bros. Ltd. The case is reported only on the question of whether there was a breach of covenant by the lessors.

Gordon Clover for the plaintiff.

A. E. Baucher for the defendants.

G. Glynn Blackledge Q.C. and *Leslie S. Rigg* for the Liverpool Co-operative Society Ltd., third party.

Gerson Newman for Gourley Bros. Ltd., third party.

The only case cited in argument which is relevant to this report is referred to in the judgment.

Cur. adv. vult.

February 20. McNAIR J. read a judgment in which he stated the facts substantially summarized above, referred to the pleadings, and continued: On behalf of the plaintiff it was submitted that his rights in this action depend solely on the true construction of the terms of his own particular lease, and that in deciding the question of construction, the advertisement, the tenders, and the conditions of sale, in the absence of any plea for rectification, are irrelevant. This submission I accept as accurate.

Now, the breach alleged is a breach of clause 3 (1). By that clause the defendants undertake not to carry on or permit or suffer to be carried on by others, in or upon the adjoining or adjacent premises in Kirkstone Road North belonging to the landlord, the trade or business for which the demised premises are let. The "trade or business for which the demised premises

" are let " is nowhere expressly defined, but it is common ground and, indeed, indisputable, that this expression means the trade or business of bread and confectionery. This is clearly a proleptic expression, since, strictly, " bread and confectionery " is not a trade or business, as is " chemist " or " grocer." On behalf of the plaintiff it is argued that the trade or business in question is the trade or business of selling bread and confectionery. In my judgment, the more natural or grammatical construction of the words " bread and confectionery " is to treat them as words of description, as words describing the class of trade or business. The class of trade or business, the monopoly of which is reserved to the plaintiff, is in my judgment the trade or business of a bread and confectionery shop, i.e., a shop in which substantially only bread and confectionery is sold—the trade or business of a shop, over the fascia of which one would find the words: " J. Smith, Bread and Confectionery." If this is correct as a matter of construction, then the claim of the plaintiff fails, for neither of the third parties is carrying on the trade or business of such a shop. Even accepting the plaintiff's contention that the trade or business of bread and confectionery means the trade or business of selling bread and confectionery, in my judgment the same result follows. The covenant " not to carry on the trade " or business of selling bread and confectionery " plainly is different from a covenant " not to sell bread and confectionery " by way of trade or business." The latter covenant would be breached by any sale (beyond, possibly, minimal quantities) of bread and confectionery.

To ascertain whether there has been, on the facts here admitted or proved, a breach of the covenant in the former form, that is, a covenant against carrying on the trade or business of selling bread and confectionery, one has to ask oneself whether, on the fair meaning of the covenant so expressed and according to the ordinary use of language, it can be said of either of the third parties that they carried on at their respective shops the trade or business of selling bread or confectionery. Though, no doubt, at the same premises two or more trades or businesses may be carried on, it is wholly artificial to say that at a grocer's shop there is being carried on the trade or business of selling each substantial group of articles which a grocer commonly sells. In ordinary parlance a grocer is carrying on the trade or business of grocer, and not carrying on the trade or business of selling tea, or the trade or business of selling tinned fruit, or the trade or business of selling bacon; nor, if he sells bread and confectionery, is he carrying on the trade or business of selling bread or confectionery.

In my judgment, even accepting the plaintiff's construction of this clause, his case fails on the facts. Although the result of this case must turn on the terms of the covenant, I am fortified in the conclusion I have reached by the reasoning of Simonds J. in *A. Lewis & Co. (Westminster) Ltd.* v. *Bell Property Trust*

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Ltd.[1] In that case it was held that the sale of cigarettes in a tea-shop did not involve a breach of covenant against the use of the premises for the business of the sale of tobacco, cigars, and cigarettes. Two passages illustrate the view I have formed as to the construction of the material covenant in this case. The judge said[2]: "In my view, what is done at these premises is "the carrying on of the business of a tea-shop, and that involves, "amongst other things the sale of cigarettes. It is common— "indeed, I am told it is almost universal—that in tea-shops of "this character cigarettes should be sold. Accordingly, it "appears to me that it is no more right to predicate of this shop "that there is carried on there the business of the sale of "tobacco, cigars and cigarettes than to say of it that there is "carried on the business of the sale of milk, or the business of "the sale of confectionery. There is there carried on the usual "business of a tea-shop, which involves the sale of a number of "articles therein usually sold."

Referring to a syllogism for which Bowen L.J. was responsible, in *Stuart* v. *Diplock*,[3] Simonds J. said[4]: "In the present "case the syllogism which Bowen L.J. referred to would be: "'The business of the sale of tobacco, cigars and cigarettes "'consists in selling tobacco, cigars and cigarettes. The A.B.C. "'tea-shop sell cigarettes. Therefore, the A.B.C. tea-shop carry "'on the business of selling tobacco, cigars, and cigarettes.' "That, of course, is a fallacy. The tea-shop does not carry on "a business of a tobacconist or the business of selling tobacco, "cigars, or cigarettes because, as part of its business, it sells "cigarettes, any more than it carries on, in ordinary parlance, "the business of retailer of milk because, in the course of its "business, it sells milk, either in glasses or as an ingredient of "a cup of tea."

The conclusion which I have reached makes it unnecessary for me to express any final view on the alternative submission advanced by counsel for the defendants. [His Lordship referred to the submission, and continued:] In my judgment, accordingly, the defendants are entitled to judgment on the claim, and the third parties are entitled to judgment in the third party proceedings.

[His Lordship concluded his judgment by stating that had he been persuaded that the trade or business carried on by the third parties was in conflict with the rights conferred on the plaintiff by clause 3 (1) of his lease he would have held that the defendant council was in breach, as regards the second third party's activities, of the express covenant, and, as regards the first third

[1] [1940] Ch. 345; 56 T.L.R. 391.
[2] [1940] Ch. 345, 348.
[3] (1889) 43 Ch.D. 343; 6 T.L.R. 104.
[4] [1940] Ch. 345, 350.

party's activities, of an implied term or warranty; and on that basis assessed the damages at £1,500.]

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Judgment for the defendant council on the claim.
Judgment for the third parties in the third party proceedings.

Solicitors: *Forwood, Williams & Co., Liverpool; William Boys, Litherland; H. J. Davis, Berthen & Munro, Liverpool; Cooke, Patterson & Co., Liverpool.*

[COURT OF APPEAL.]

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April 16, 17, 18.

Singleton, Morris and Romer L.JJ.

[1954 K. No. 894.]

Negligence—Safe system of work—Plant and equipment—Foreseeable risk — Employee struck in eye by particle of wire ejected from machine—Dangerous machinery not securely fenced in compliance with Factories Act, 1937*—Common law duty of employer to take reasonable care to protect employee against foreseeable risk.*

Factory—Dangerous machinery—Fencing—Duty not applicable to particles ejected from machine—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

Statutory duty—Whether civil right created—Accident not one against which legislation designed to protect.

The plaintiff, while in charge of a stranding machine in the defendants' wire-rope factory, was blinded in one eye by a particle of wire which flew out of the machine, which was not securely fenced. She sued the defendants for damages, alleging breach of statutory duty under section 14 (1) of the Factories Act, 1937, and negligence at common law:—

Held, that the defendants, knowing that many similar accidents had occurred in which their employees had been struck in the face or other parts of the body by wire ejected from like machines, were negligent in failing to take reasonable measures to protect their employees from foreseeable risk, and the plaintiff was entitled to recover damages at common law.

Dicta of Lord Herschell in *Smith* v. *Baker & Sons* [1891] A.C. 325, 362; 7 T.L.R. 679, and Lord Wright in *Nicholls* v. *F. Austin (Leyton) Ltd.* [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92 applied.

Per Singleton and Morris L.JJ. Although the defendants were in breach of their statutory duty, under section 14 (1) of the Factories Act, securely to fence every dangerous part of the machine against the risk of contact, the duty did not extend to fencing against the risk of injury from dangerous material ejected from the machine. The defendants were therefore not liable to the plaintiff under that section, since the injury was not one against which it was designed to protect him.

Nicholls v. *F. Austin (Leyton) Ltd.* (*supra*); and observations

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of Viscount Simonds in *Grant* v. *National Coal Board* [1956] 2 W.L.R. 752, 754; [1956] 1 All E.R. 682 applied.

APPEAL from Pilcher J., sitting at Sheffield Assizes.

The plaintiff, Mrs. Nora Kilgollan, was employed by the defendants, William Cooke & Co. Ltd., as a strander in their wire rope factory at Attercliffe, Sheffield. She was in charge of a stranding machine, which was described by Singleton L.J., in his judgment, as follows: "a long machine, and the main part "of it is a barrel which revolves at considerable speed—over "800 revolutions a minute. Inside the barrel there were, at the "material time, some 18 bobbins, on each of which there was "wire, sometimes of very thin or small mesh and sometimes of "a little bigger mesh. The wire was drawn from the bobbins to "the end of the machine and the rotation of the barrel caused "it to be wound round a rope core in the process of making the "completed rope."

It was admitted that at times a wire would break and the loose end of it would fly out. It was the duty of the strander to stop the machine so that the wire could be mended. On January 22, 1955, while the plaintiff was in charge of the machine in question, a wire broke and a small particle flew out of the machine and struck her in the eye, penetrating the optic and lodging in the bone behind it. The sight of the eye was destroyed.

The revolving barrel was admittedly a dangerous part of machinery and therefore should have been securely fenced against contact under section 14 (1) of the Factories Act, 1937.[1] The upper part had been fenced with a wire mesh guard, but the lower part was not fenced, although the defendants had been recommended by a factory inspector to do further fencing.

The plaintiff brought the present action against the defendants, alleging that they were in breach of their statutory duty under section 14 (1) and also alleging negligence at common law. The trial judge found for the defendants and the plaintiff appealed.

J. F. Drabble Q.C. and *Peter Stanley-Price Q.C.* for the plaintiff.

G. S. Waller Q.C. and *R. R. Rawden-Smith* for the defendants.

The following cases were cited in addition to those referred to in the judgments: *Dickson* v. *Flack*[2]; *Roe* v. *Minister of Health*.[3]

SINGLETON L.J., having described the machine in question and stated the facts, continued: I have sought to describe the

[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any "machinery . . . shall be securely "fenced unless it is in such a posi- "tion or of such construction as to "be as safe to every person employed "or working on the premises as it "would be if securely fenced:"

[2] [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840.

[3] [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131.

machine and the accident in as few words as I can, but I do not disguise that there are complications, and it is not very easy to follow completely what takes place inside the machine. A good deal of discussion has taken place upon what will happen or what does happen when a wire breaks inside the machine. It is said that frequently when that happens one end of the broken wire flails out under the guard and that it may, and sometimes does, strike the worker who is opposite the machine. I do not know that the expression that it "flails out" is the right one. Mr. Waller, for the defendants, prefers the description that it "lashes out." I should have thought that was rather a stronger description. But what is clear is that very often when there is a break one end of the wire swishes out under the guard, and that it sometimes strikes a workwoman. The worker in charge of the machine, as the plaintiff was, is called a strander. Let me make this clear: the guard upon the machine was not put there to deal with this kind of thing at all; it was a guard provided to prevent a strander, or any other workman or workwoman, coming into contact with a "dangerous part of machinery," either accidentally or inadvertently. None the less, it was admitted by the general manager of the defendant company that if there had been a guard of the kind that there should have been, for the purposes of section 14, the guard would have prevented an accident such as happened in this case.

Mr. Drabble, on behalf of the plaintiff, submitted that the accident arose through the defendants' breach of section 14 of the Factories Act, which, so far as material, reads: "Every "dangerous part of any machinery . . . shall be securely fenced "unless it is in such a position or of such construction as to be "as safe to every person employed or working on the premises as "it would be if securely fenced:" That is followed by a proviso to this effect: "Provided that, in so far as the safety of a "dangerous part of any machinery cannot by reason of the nature "of the operation be secured by means of a fixed guard, the "requirements of this subsection shall be deemed to have been "complied with if a device is provided which automatically "prevents the operator from coming into contact with that part." The proviso appears to give support to the argument of the defendants (which indeed has been approved in the House of Lords) that the object of the guard which has to be provided under section 14 is to prevent the operator from coming into contact "with that part"—that is, the dangerous part. The section ends with these words: "The Secretary of State may, as respects any "machine or any process in which a machine is used, make "regulations requiring the fencing of materials or articles which "are dangerous while in motion in the machine." The Secretary of State has not made any such regulations.

In *Nicholls* v. *F. Austin (Leyton) Ltd.*[1] these were the

[1] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.

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circumstances which had to be considered: "By section 14 (1) "of the Factories Act, 1937: 'Every dangerous part of any "'machinery . . . shall be securely fenced.' The last paragraph "of section 14 gave the Secretary of State power to 'make "'regulations requiring the fencing of materials or articles which "'are dangerous while in motion in the machine' but none had "been made. The appellant, while operating a circular saw "belonging to her employers, the respondents, was injured "through a piece of wood flying out of the machine which was "fenced so as to comply with the requirements of the Wood-"working Machinery Regulations, 1922, which by section 150 of "the Act were to be deemed to have been made under that Act." It was held by the House of Lords "that the respondents were "not in breach of any statutory obligation, since the obligation "to fence imposed by section 14, subsection (1), was an obliga-"tion to guard against contact with any dangerous part of a "machine and not to guard against dangerous materials ejected "from it, a matter depending solely on the making of regulations "under the discretionary power conferred by section 14 (3) on the "Secretary of State and not exercised by him."

Lord Thankerton said [2]: "My Lords, on consideration of the "terms of section 14, I am of opinion that there is a simpler "answer to the contention of the appellant, namely, that the "obligation to fence imposed by subsection (1) is an obligation "to provide a guard against contact with any dangerous part of "a machine, and that it does not impose any obligation to guard "against dangerous materials or articles ejected from the machine "in motion, that matter depending solely on the making of "regulations by the Secretary of State under the discretionary "power conferred on him by the last paragraph of the section. "This view appears to be amply confirmed by the language "used"; and (at p. 500) "I am of opinion that there is no "obligation imposed by section 14 on the respondents as regards "these flying bits of wood, and therefore they are not in breach "of any statutory obligation, and the appellant's main contention "fails."

The other law lords expressed the same view; and the law is that the respondents, in those circumstances, "were not in breach "of any statutory obligation, since the obligation to fence imposed "by section 14 was an obligation to guard against contact with "any dangerous part of a machine and not to guard against "dangerous materials ejected from it." In the present case, that which came out from the machine was a part of that which was being manufactured or put together in the machine: it was material being used in the machine; and upon the decision to which I have referred it is clear that this court cannot accede to the first part of the argument advanced by Mr. Drabble.

There have been, however, two other decision which I ought

[2] [1946] A.C. 493, 499.

to mention. The first is a decision of the House of Lords in *Carroll* v. *Andrew Barclay & Sons Ltd.*[3] That was a case under section 13 of the Factories Act, 1937. The headnote reads: "The requirement of section 13 (1) of the Factories Act, 1937, "that 'every part of the transmission machinery shall be securely "'fenced' imposes on occupiers of factories a duty to erect a "barricade to prevent any employee from making contact with "the machinery, and does not in ordinary cases oblige them to "erect an enclosure to prevent broken machinery from flying out "and injuring him. *Quaere* whether, in the case of a machine "which in working might be expected to throw off loose or broken "parts, there might be an obligation to fence it for the purpose "of protecting the workman against that danger." Lord Jowitt L.C., in his speech, reserved that question for decision; and Lord du Parcq said[4]: "I wish to add, however, that, while I agree "with Lord Normand that the words 'securely fenced' must be "given the same meaning in each of the three sections (sections "12, 13 and 14), I think that they may well mean 'so fenced "'as to give security from such dangers as may be reasonably "'expected.' If machines exist, or are hereafter invented and "used, which are dangerous because fragments or loose parts of "the machinery are sometimes ejected from them, then I am "not prepared to say that section 14 does not require such "machines to be fenced for the purpose of protecting workmen "against that danger. If the dictum of my noble and learned "friend Lord Simonds in *Nicholls* v. *F. Austin (Leyton) Ltd.*[5] "is to be understood as meaning that such a machine need not "be fenced, I respectfully doubt its accuracy, and must reserve "my opinion upon it"; and there is a comparatively recent decision of one division of the Court of Appeal which took the view expressed by Lord du Parcq. I need not go into it.

Mr. Drabble submitted, further, that the decision in *Nicholls's* case[5] did not cover the present case, by reason of the fact that in *Nicholls's* case it was found that there was no breach of the statute, whereas in the present case it was common ground that there was a breach, and though the breach was of something which was intended to prevent a man from falling against or coming into contact with a dangerous part of a machine, still, if, as a result of the breach, an accident of another kind was sustained by the plaintiff, the plaintiff can recover. I do not think that that is right, in the circumstances of this case, though I hope I may say that I have some sympathy with the argument.

I think, again, that this court is bound by the words of Viscount Simonds in *Grant* v. *National Coal Board*[6]: "My "Lords, where damages are claimed for breach of a statutory "duty without any allegation of negligence, the pursuer must

[3] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.
[4] [1948] A.C. 486, 487.
[5] [1946] A.C. 493.
[6] [1956] 2 W.L.R. 752, 754; [1956] 1 All E.R. 682.

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"establish two things: first, that the breach is intended, not "only to be visited by a penalty but also to be the ground of "civil liability to a class of persons of whom the pursuer is one, "and, secondly, that the injury was one against which the "legislation was designed to protect him. The first of these "tests is undoubtedly satisfied in this case. No one questions "that a civil action for damages can be founded on a breach of "section 49. It is at the second test that, in my opinion, a real "difficulty arises, in which I am not prepared to differ from your "Lordships though I have been much pressed by the cogent "arguments to be found in the judgments under appeal." Viscount Simonds then referred to the case of *Gorris* v. *Scott* [7] and pointed out that it was quite different from the case before the House.

Mr. Drabble drew attention to the words of Lord Reid,[8] "But it seems to me to be a very different thing to say that, "where the object of the enactment is to promote safety, the "implication is that liability only arises if the breach causes "injury in a particular way"; and he submitted that this point was open to him under those words and from certain words in the speech of Lord Tucker. I do not think that the point is really open to this court, for the reasons I have given; though I have often thought—and I consider these two grounds put forward by Mr. Drabble together—that if there is a danger from something flying from the machine, a real danger which everyone knows, there is just as much reason to protect the workman from that danger as there is from his falling against the dangerous part of the machine. The employers knew that the machine ought to be guarded down below the place to which the mesh came. From the point of view of the Factories Act it does not matter whether they knew or not; but they knew. They had seen one other factory where a more complete guard was provided; they had been recommended before this accident took place to put on a deeper guard; they had contemplated doing it; but they had not done it at the time the action was heard—some two years later—except in regard to one machine. If they had done it, this accident would not have happened.

The form of guard which was recommended and which everyone agrees would give much greater protection to the workman from both points of view, is a guard which comes down from the place where the present wire mesh guard is, and covers all the rotating machinery and that part which is shown under it. The guard which it is intended to provide on all their machines at some time is a guard of sheet metal. As the machine is, one can see part of that which revolves down below the wire mesh, so that there was, at the time this accident happened, a risk of a strander being caught by the barrel as it revolved underneath the guard. And it is the fact, so we are told by the defendants'

[7] (1874) L.R. 9 Exch. 125. [8] [1956] 2 W.L.R. 752, 759.

witness, that if the guard which it is proposed to put on had been there on the day of this accident a piece of wire could not have come out in the way that this piece did.

[His Lordship read from the evidence of Mr. Cockerill, general manager of the defendant company, as to how the accident happened, and continued:] It appears to me that both the witness and Pilcher J. accepted the plaintiff's witnesses' theory as to how the accident happened. What particular piece of the machinery the lashing end struck, no one can know, nor can anyone tell precisely what happens when an accident of this kind takes place. It must be theory. It is, however, clear that a piece did come from the broken wire, and that that was the cause of the accident to the plaintiff. She was somewhere near the machine, on duty.

The case put forward on behalf of the plaintiff under the common law is this: that the defendants knew of the risk of wire coming out, knew that people had been injured on many occasions through flailing or lashing wire, and that nevertheless they took no steps whatever to protect their workpeople against the risk of injury. It seems to me that if there is a risk of wire lashing—even though it be only a few feet—across a room where people are working, it is a risk which ought to be prevented if possible, or if feasible. That it is feasible is clearly admitted. Mr. Drabble submitted that as the defendants had taken no steps to avoid or to minimize the risk, they were negligent and in breach of their duty at common law.

The duty of an employer to his workpeople was stated by Lord Herschell in *Smith* v. *Baker & Sons* [9] in this way: "It is "quite clear that the contract between the employer and "employed involves on the part of the former the duty of taking "reasonable care to provide proper appliances, and to maintain "them in a proper condition, and so to carry on his operations "as not to subject those employed by him to unnecessary risk." The duty, I repeat, is, to take reasonable care.

In *Nicholls* v. *F. Austin (Leyton) Ltd.*[10] Lord Wright put the duty at common law in this way: "That the common law duty "exists in proper cases is unquestionable. But it is limited to "reasonable exercise of care and skill to guard against danger "which as reasonable people the employers ought to have "anticipated." I believe that those two citations cover every proposition which has been put forward by counsel in argument, though sometimes somewhat different words are used. The duty is no more than a duty to take reasonable care so as not to subject workpeople to unnecessary risk.

There had been, over the three years prior to this accident, a large number of accidents in this factory, and, in particular, in that part of it which is called the ropery, the part in which the plaintiff was working. The employers are under a duty of

[9] [1891] A.C. 325, 362; 7 T.L.R. 679.

[10] [1946] A.C. 493, 503.

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keeping an accident book, or books. There is one which is kept under the National Insurance (Industrial Injuries) Act, 1946, and there is another which is kept under the provisions of the Factories Acts, 1937 to 1948. Those books which the defendants have contain particulars of accidents—perhaps I should say of some accidents. I add that because I asked Mr. Waller, this morning, what was the report, in either of the books, on the accident to a witness which occurred after the accident in this case—the witness who was struck by a piece of metal upon the forehead and the metal, she said, lodged under the skin in her forehead, and she went to the ambulance room. Mr. Waller said that there is no mention of that accident in the book, though there is of another accident to the same witness at some other time. It may be that the book is not complete.

I do not think anything ought to be made of that, perhaps. It is rather in what the books disclose that there is importance; and the evidence upon the matter is given by Mr. Cockerill. There were a great number of accidents—not accidents of a very serious character, but accidents which were reported and of which particulars are contained in the books. Furthermore, it is clear that a good many people in the company's employ who had accidents of a minor character did not report them; so that there are many more accidents in fact, Mr. Cockerill said, than appear in the books. The witness was asked: "Would she get struck "with wire in that position?"—that is, the position in which the plaintiff described that she was at the time of her accident—"Are operators struck with wire in that position?"—that is, with wire as distinct from a piece of wire or a little bit of wire—"(A.) They are, sir, yes. (Q.) With wire? (A.) With wire."

Pilcher J. asked him: "Operators do get struck? You "recognize that? (A.) They do get struck, but I have never "seen an operator in the whole of my experience walking up a "machine like that—walking along the length of the machine "and inspecting the work." It was pointed out that she had not said that, and he said: "They are provided with seats, and "they sit on a seat by the control and periodically inspect." I suppose that must mean that they go along the machine to look at the bobbins. Pilcher J. said: "Do not let us waste too much "time on it, because it is quite clear they do get flicked standing "in what I should say was a normal position by the ends of this "wire, but they in substance do not get hurt." Mr. Drabble asked: "We have extracted certain particulars from these books "for his Lordship to see, but am I right in saying that there "are scores and scores of cases of people reporting to the "ambulance room, reported in the accident book, with injuries "by wire to parts of the body other than the face? (A.) There "are, sir. (Q.) Scores of them? (A.) Yes, scores of them. "(Pilcher J.): From this room? (Mr. Drabble): A great many "of them from the ropery? (A.) From the ropery, yes, my Lord.

" Six hundred in those books." I think I am right in saying that that is over three years.

The judge asked him: " There are a great many reports in " the accident book of workers being—is it scratched or cut or " what? Do not trouble to look. You have just been through " it all. (Mr. Drabble): My Lord, there are punctures, incisions, " lacerations. (Pilcher J.): By wire? (Mr. Drabble): By wire, " my Lord. (Pilcher J.): In the ropery. I thought we need " worry about nothing except *here (indicating list)*. Those are " accidents other than to the face?" Then it appeared that certain particulars had been taken out of the books by the plaintiff's advisers, dealing with accidents to the face; and there is a page which I have before me dealing almost altogether with accidents to the face, from September, 1950, to September, 1953. I think there are about 28, though they are not quite all accidents to the face. It was put at one time in the cross-examination that there were ten or twelve cases of accidents to the face.

Mr. Cockerill was asked about this. It had been said by one witness that she had complained to the chargehand. The chargehand was not called. The general manager was the only witness called on behalf of the defendants, and he was asked: " What " sort of number of people do you have reporting to the accident " room every week for injuries to any part of the body—face, " hands, legs—any part of the body, from wire in the ropery? " (A.) The exact number I could not give you, but considerable." Then the learned judge pointed out that it was a great pity that some little care had not been taken to have earlier discovery and to have full information as to what the books showed. I would like to express my agreement with him. We might have had this part of the case in much more convenient form. It took a long time this morning to find out what the accidents were and what was shown by the books. The witness said that if there had been side pieces on—that is, if the additional guard had been there—a very considerable number of minor accidents could have been prevented; he said there would not have been the injuries through flailing. He was asked about the ten cases which had come from somewhere, apart from those in the particulars. Of eleven (said counsel in cross-examination) there were ten that affected the face, and the witness said " Yes." " (Q.) Is this " the position? You do not know that any one of those ten was " in fact caused by a broken-off piece of wire flying over from " the stranding machine? You do not know that it happened " in that way? (A.) I do not know, no. (Q.) And you have " never heard it did happen in that way? (A.) I have not. " (Q.) But you do not know it did not happen in that way, either? " (A.) I do not." Pilcher J. said: " The injuries on the list to " the eyes and face of stranders may have been due to particles " of wire breaking off? (A.) Yes, my Lord. (Q.) That, you did " say, 'has never been reported to me'? (A.) That is quite " correct." A little later the judge said: " I have written down:

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" ' There are in this list accidents to the eyes and face of " ' stranders in the ropery which may have been due to particles " ' of wire breaking off, but I cannot tell you whether they were.' " (A.) Yes. (Pilcher J.): Do you want to add anything to that? " (Mr. Drabble): No, I am perfectly happy."

The witness was then asked about the accident which was reported to Mr. Shires, the chargehand. Mr. Shires had been there since 1948. It was impossible to find out on the trial how any one of these accidents to the face or eyes or in the neighbourhood of the eyes had been caused. I do not regard that as satisfactory. The defendants have to keep records of accidents. Unless the accidents are reported to the factory inspector, or unless the factory inspector sees the book, he cannot know the cause of accidents arising in the factory; and of course for him to be able to know, the cause must be set out in the book, or he must be told by someone in charge. But there is nothing to show what the cause was; and the general manager (who, as I have said before, and I say again, was the only witness called on behalf of the defendants) said that he did not know how any of the injuries to the face were caused. A worker who gets a cut on the face or an abrasion could not well say whether it was done by a piece or by the wire itself which was lashing out.

The defendants, in a case of this kind, if they knew there were accidents, were under a duty to consider how those accidents could be lessened in number. They owed a duty to their workpeople; and it cannot be right, I think, for them to say: " Well, the " injuries were mostly cuts on the hand, or cuts on the legs, or a " scratch or abrasion on the body somewhere, and the people " were not off more than three days. Therefore, there was no " duty upon us to do anything: they were trivial injuries." That is not the right way of approach. The number in the accidents book alone is sufficient to show that something should have been done, and nothing had been done. So far as I know, no consideration was given to the question of injuries, or possible injuries, through flailing wire. Consideration was given to a further guard, but that was to stop people falling under, or into, the machine. The defendants, as employers, ought not to be content to allow a state of things to continue in which a large number of accidents to the hands or legs of the girls working there take place. It cannot be right to leave it like that.

One would have thought that it would occur to someone, " If there are all these accidents through flailing wire some day " we shall have a serious one." Suppose that at the time a break takes place the strander is stooping down a little, perhaps to do something to her foot. A flailing wire comes out: her eye is in danger. And again, if the flailing wire comes out below the guard and hits something on the way, what is more natural than that a bit of it should be broken off at or near the point at which the break has taken place? Those matters do not appear to have been considered. It is right to say that those who gave evidence

on behalf of the plaintiff could not point to an accident caused through a piece breaking off the wire before this accident. One said it might have been so. The answer may well be that they do not all know how their injuries were caused. If it is an abrasion or a cut on the face, they do not know in all cases whether it is due to the flailing of the wire itself of to a piece that breaks off it.

Since the accident to the plaintiff there have been other accidents in this factory. I mentioned one, some little time ago, to Mrs. Callaghan. A piece lodged in her forehead, and she had another piece which hurt her on the leg. Each of those injuries was caused by a piece breaking from the wire. Another witness found a piece in her hair, or a piece went into her hair. Those were after the accident: the defendants are not charged with knowledge of those incidents before the accident. But what I point out is: if those happenings are found when people are watching more carefully afterwards, it does show how easy it is for a piece to come off the broken end or from some part of that broken wire, and it appears that the defendants' general manager thought that was the most likely thing in this case. If consideration had been given as to how the workpeople could be protected against something of that kind, it might well have been said: "Put the guard on, or bring the guard a little lower than it is, "so that the flailing out cannot take place." That, in Mr. Cockerill's view, would have prevented this accident. Mr. Waller, on behalf of the defendants, submitted that whether the defendants were under a duty to take some action to prevent this sort of thing depended in part upon whether there was any reason to anticipate any serious accident. I agree with that; but it was not a very serious matter to extend the guard so as to prevent this sort of thing, if thought had been given to it.

Again, I think that assistance is to be gained, in considering this part of the case, from the words of Warrington L.J. in *In re Polemis and Furness Withy & Co. Ltd.*[11] which were cited by Pilcher J. in his judgment. Warrington L.J. said: "The result "may be summarised as follows: The presence or absence of "reasonable anticipation of damage determines the legal quality "of the act as negligent or innocent. If it be thus determined to "be negligent, then the question whether particular damages are "recoverable depends only on the answer to the question whether "they are the direct consequence of the act." In the circumstances of this case, there was reason to anticipate damage—damage and injury were caused. So far as we know it was not of a very serious character in the cases to which reference was made; but we do not know all the circumstances. We know that there were a large number of injuries over the years. If there is the cutting of a face through wire or the cutting of a hand through lashing wire or through a part of wire, there must always be

[11] [1921] 3 K.B. 560, 574; 27 T.L.R. 940.

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a risk of some injury to an eye, whether the workwoman is standing up or stooping down; and that is something which ought to have been anticipated. But even if one could say that no one thought about the possibility or probability of an injury to an eye, it cannot be right, if there are these frequent injuries to the hands and some injuries to the face, that the employers should do nothing year after year.

In my opinion, this is a clear case of failure to take a precaution which, if taken, would result in the workpeople having less risk to undergo. I have not forgotten the evidence given by the defendants' witness that 32 other factories in Sheffield adopted the same method as the defendants and that only one had guards of the kind which the factory inspector recommended. I do not know what their experience was; I have no particulars on which to go: I have only the evidence in this case in regard to the defendants. If it be right to say there have been 600 accidents caused to stranders working in the ropery—most to the hands and legs and body, but some to the face—then I am satisfied that before this accident happened there was a duty upon the defendants to take some steps—proper and necessary steps—to avoid that sort of thing, and if they had done that, this accident would not have happened.

In my judgment, the defendants are responsible in damages for breach of the duty which they owed under the common law. In my view, the appeal should be allowed, and the case should go back for the assessment of damages, unless the parties can agree upon what is a right sum to compensate the plaintiff.

MORRIS L.J. I am of entirely the same opinion; and I only add a few words because we are reaching a conclusion different from that of the learned judge. It seems to me that the employers are responsible on the basis of negligence at common law, but not on the basis of a breach of statutory duty. In his speech in *Paris* v. *Stepney Borough Council* [12] Lord Oaksey said that the duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. The evidence here relating to the circumstances connected with the operation of this machine leads me to a conclusion that there was a failure to exercise reasonable care for the safety of the plaintiff. That failure consisted in not having provided a guard or protection which the defendants knew would have availed to prevent injuries of the kind which they knew were taking place. There clearly could have been some form of protection. Mr. Cockerill said in his evidence more than once that the kind of protection that he contemplated would have availed to prevent the injury which the plaintiff in fact sustained. It does appear that in the case of other similar machines in other factories in Sheffield any guard beyond the

[12] [1951] A.C. 367, 384; [1951] 1 All E.R. 42.

upper guard was exceptional. But whatever may have been the position in other factories, the position here, it seems to me, was truly remarkable, and, as I think, quite alarming.

My Lord has referred to the passages in the evidence of Mr. Cockerill, and I do not propose to repeat any citation made by my Lord. I only add one very brief one. Almost at the start of his evidence Mr. Cockerill gave evidence as follows: "(Q.) Let "me deal, first of all, with this point which has just been raised. "It has been said that in the last three years prior to the "accident, 1950 to 1953, there have been 18 eye accidents in "your factory? (A.) I believe it to be true. (Q.) Have you "looked through the records? (A.) I have looked through the "records. (Mr. Drabble): In the ropery, not the factory. (Mr. "Payne): Were those 18 eye accidents in the ropery? (A.) In "the ropery, yes, they were."

My Lord has referred to the evidence showing that there were 600 accidents recorded in the accidents book. There was evidence further that a great many people who had accidents refrained from reporting them. There was the evidence of Mr. Cockerill that some of the reported accidents may have been due to particles of wire breaking off. It seems to me that if there is an end of a wire revolving at over 800 revolutions a minute, and somebody is struck, it may be very difficult for the person to know whether he or she has been struck by an end of the wire or by a particle from the wire. But the source of the danger was the periodical existence of these lashing ends of wire revolving at over 800 revolutions a minute. It seems to me that it was quite immaterial whether an injury was caused by the end of a piece of lashing wire or by an end from a piece of lashing wire. In view of the accident experience of which the defendants had knowledge, as the entries in their books showed, and had knowledge as referred to by Mr. Cockerill in his evidence, it seems to me that they were negligent in failing to prevent injury from those revolving loose wires.

Mr. Waller submitted that there was no evidence of the forseeability of an eye injury, and he submitted that there was no negligence in allowing the lashing or flailing to continue. I cannot take that view. Upon the evidence as to the extent of and the number of the incidents and accidents, I cannot think that they should be regarded as trivial. I think the evidence leads irresistibly to the view that there was a reasonable anticipation of damage. I consider that it was obligatory on the defendants to have taken steps, which they failed to take, which would have prevented the injury that the plaintiff suffered.

I only refer briefly to the other part of the case. It was accepted by Mr. Waller that there was a breach of section 14 in not having some fencing on the lower part of the machine. The cases to which my Lord has referred—*Nicholls* v. *Austin* [13] and

[13] [1946] A.C. 493.

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Carroll v. *Barclay* [14]—show the nature of the statutory obligation imposed. The obligation to fence a dangerous machine is satisfied if the dangerous parts are so screened as to prevent the body of the operator coming into contact with them. The evidence in the present case shows that the defendants had it in mind to attach metal sheets so as to screen the lower part of the machine. Had they done so at a date before that on which the plaintiff was injured, then the injury to the plaintiff would not in fact have occurred: that is clear from the evidence of Mr. Cockerill. But it seems to me that the defendants were not obliged, so far as their statutory obligation was concerned, to use metal sheets. They might have adopted some other form of fencing, and it may be that they could have satisfied their statutory obligation in such a way as would not have prevented the escape of some flying particle of wire. I doubt, therefore, whether it is shown that the plaintiff's injury resulted from a breach of the defendants' obligation under section 14. But furthermore, it can in this case be postulated that section 14 is not designed to protect against the ejection from a machine of material or articles which have been introduced into the machine. That being so, an injury caused by such an ejection is not an injury against which the legislation was designed to protect.

My Lord has referred to *Grant* v. *National Coal Board* [15] and has quoted some of the observations made in the speeches in that case. Lord Reid said [16] this: "If the statute is only aimed "at preventing a certain kind of injury, then it seems reasonable "to hold (as in *Gorris* v. *Scott*) that civil liability only results if "that kind of injury is caused by a breach." Lord Keith in his speech said [17]: "Reference was made to the case of *Gorris* "v. *Scott*.[18] This case might be in point if it could be "postulated that section 49 was confined to protecting workmen "from injury through being hit by falling material." Applying that passage, and other passages cited, Mr. Waller submits that it can in the present case be postulated—because it has been so laid down—that the object of section 14 is to prevent workmen coming into contact with the machine but not to prevent them coming into contact with materials which are being worked on in a machine.

Lord Somervell of Harrow said in his speech that he could not agree that the mischief of derailment by a fall from an insecure roof was not within the ambit of the section. That was section 49 of the Coal Mines Act, 1911. Mr. Waller submits in the present case that the "ambit of the section" was to protect a workman from contact with the machine and not to protect a workman against injury caused by the ejection of some material

[14] [1948] A.C. 477.
[15] [1956] 2 W.L.R. 752.
[16] Ibid. 759.
[17] Ibid. 765.
[18] (1874) L.R. 9 Exch. 537.

from a machine, and, accordingly, that injury so caused does not form the basis of civil liability for a breach of the section.

I think that Mr. Waller's submissions on those points are correct. But, for the reasons that I have earlier given, it seems to me that there was clearly, in this case, negligence at common law for which the defendants should be held liable.

ROMER L.J. I also think that there was evidence of negligence at common law and that the appeal should be allowed on that ground. I can express my reasons for that view in a sentence or two. It appears to me that if the judge had accepted (as I venture to think he ought to have accepted) a certain hypothesis, he would have arrived at the same conclusion on this point as we have reached. He said in the course of his judgment, "If the defendants fell below the standard of guard required "from an employer in failing to take steps to protect their "employees from injuries by flailing wire—and this they could "have done by guarding the machine, by putting on what I have "described as the lower guard—then it seems to me that they "cannot escape liability for a serious injury such as the plaintiff's, which they could not foresee, if such an injury would "not have occurred but for their want of care in guarding against "trivial injuries which they knew did occur." He refused to accept the hypothesis which appears at the beginning of that statement, on the ground that the injuries to these workpeople from the flailing wires were trivial; and it is on that point that I find myself at variance with the learned judge.

For the reasons which my brethren have stated and which I do not repeat, it is not really possible, I think, to treat these injuries—amounting, as they appear in the accidents book alone, to over 600—as trivial, having regard not only to the number of the injuries but to their nature, and bearing in mind the fact that some of them occurred to the faces of the girls. Accordingly, I think that the learned judge ought to have accepted the hypothesis which he rejected, and, if so, the liability of the defendants follows, upon the principle stated by Warrington L.J. in the *Polemis* case [19] and adopted and elaborated by Asquith L.J. in the subsequent case of *Thurogood* v. *Van den Berghs*.[20]

On the question of statutory liability, I would merely say that it is unnecessary to express a concluded view upon it. But, as at present advised, it appears to me, having regard to the principles stated by the House of Lords in *Nicholls's* case,[21] combined with the principles stated by their Lordships in *Grant's* case,[22] that

[19] [1921] 3 K.B. 560.
[20] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; sub nom. *Thorogood* v. *Van den Burghs* [1951] 1 All E.R. 682.
[21] [1946] A.C. 493.
[22] [1956] 2 W.L.R. 752.

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it is impossible for the plaintiff to succeed in establishing a breach by the defendants of section 14 of the Act.

Appeal allowed.
Case remitted for new trial on damages.

Solicitors: *Gibson & Weldon for John Whittle, Robinson & Bailey, Manchester; Bell, Brodrick & Gray for Harold Jackson & Co., Sheffield.*

A. W. G.

[PROBATE, ETC., DIVISION.]

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* RAMSEY *v.* RAMSEY.

Practice—Interrogatories—Documents lost or destroyed—Power to allow—Documents to be necessary to establish case—R.S.C., Ord. 31, *r.* 2.
Practice—Summons adjourned into court—For judgment—Counsel's right to make further submission.
Husband and Wife—Practice (in matrimonial causes)—Interrogatories—Lost or destroyed letters.

There is power in the court in a proper case to allow interrogatories as to the contents of a document which has been lost or destroyed if secondary evidence of that document would be admissible at the trial or hearing.

Wolverhampton New Waterworks v. *Hawkesford* (1859) 5 C.B. (N.S.) 703 applied.

But where, in a defended divorce suit on the ground of desertion, the case of the wife petitioner was one of simple desertion, and the husband by his answer, in which he sought no relief, alleged that he had been driven out and had had just cause for leaving, and referred to a finding by justices against the wife of adultery, and it was ordered by the registrar that the husband should answer interrogatories as to the dates when he had received certain letters from the wife which he had stated in a list of documents to have been burnt, as to the number of those letters, and as to their contents:—

Held, on appeal, that such interrogatories should not in the circumstances be allowed, for

(1) On the pleadings, the interrogatories and the matters that might there be elicited were not necessary for the wife to establish her case of simple desertion (although the letters might be relevant in a general sense).

Dictum of A. L. Smith L.J. in *Kennedy* v. *Dodson* [1895] 1 Ch. 334, 341 applied.

(2) The interrogatories were not "necessary either for disposing "fairly of the case or for saving costs"—within the meaning of R.S.C., Ord. 31, r. 2.

Per curiam. When a summons is adjourned into court for judgment it is always open to counsel on either side to make any further submission which he may wish to make.

SUMMONS (adjourned into court).

The following statement of facts is taken from the judgment: The wife by her petition alleged that the husband deserted her

in January, 1947, the parties having been married in June, 1946. There was one child of the marriage, a daughter born in June, 1947; and on June 15, 1952, the wife gave birth to a child of which the husband was not the father. The wife in her petition asked for the exercise of the court's discretion in her favour and filed a discretion statement. There had been various proceedings between the parties before the justices. On January 18, 1947, the wife obtained an order on the ground of her husband's desertion, and after certain variations as to amount the order was revoked on the husband's application on August 8, 1952, on the ground that the wife had committed adultery. On that same day the wife obtained an order for the custody of the child of the marriage. On September 3, 1953, the order with regard to the custody of the child was varied and the husband was given the custody of the child.

The issue in the suit was one of simple desertion. The wife alleged that the husband had left her in 1947 without cause. The husband alleged that she had driven him out, and, alternatively, that he had had just cause for leaving her. He stated in his answer that the justices' order had been discharged on the ground of the wife's adultery, but he merely asked that the prayer in the petition be rejected. There was, therefore, no issue of adultery in the suit; the sole issue was desertion.

It was agreed between the respective solicitors that lists of documents should be supplied by each side, and the form which the husband's solicitors used for the husband's list of documents was the printed form which is frequently used for affidavits of documents. The question before the court arose under paragraph 4 of that list of documents. The affidavit form (though it was not sworn, the words "make oath" being struck out) which was signed by the husband stated at paragraph 3: "I have had, "but have not now, in my possession or power the documents "relating to the matters in question in this suit set forth in the "second schedule hereto." Emphasis was placed in argument on behalf of the husband on the words "relating to." The second schedule referred to "letters petitioner to respondent, "dates unknown. Letters respondent to petitioner. Dates "unknown." The important part was "letters petitioner to "respondent. Dates unknown." Paragraph 4 read: "The last-"mentioned documents were last in my possession or power, as "to (a) the letters sent by me, on the date of posting of the "same, and as to (b) the letters received by me, shortly after "the date of receipt of the same when I burned them."

It was on the statement that the husband had had, but no longer had, in his possession or power letters from his wife to him, which he had burned shortly after the receipt, that the present application and consequent order for interrogatories were made. The interrogatories, as initialled by Mr. Registrar Kinsley, were as follows: "(1) When did you receive from the [wife] the

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"letters set forth in the second schedule on your list of documents, stating to the best of your ability the approximate date of each such letter? (2) How many such letters did you receive? (3) To the best of your recollection, what were the contents of each such letter?" The husband appealed.

The main objection on behalf of the husband on his appeal was to the third interrogatory.

James Fox Andrews and *B. R. O. Carter* for the husband.
Dimitri Tolstoy for the wife.

Argument was for the most part in chambers, as indicated in the judgment.

Cur. adv. vult.

DAVIES J. stated the facts substantially as set out above and continued: This appeal came before me first in chambers on December 20, 1955, when, at the request of both counsel, having had the benefit of a very full argument, I adjourned the summons into open court with a view to giving judgment. Later, a message was conveyed to me that before I gave judgment Mr. Tolstoy, for the wife, wanted to mention one further point. Rightly or wrongly, even without any such message, I take the view that when a summons is adjourned into open court it is always open to counsel on either side to make any further submission which he may wish to make.

Counsel for the husband does not object very strongly to interrogatories nos. 1 and 2, but he does object to interrogatory no. 3, that is to say, he objects to having to answer what were the contents of these various letters. Speaking for myself, I take the view that really they stand or fall together. If interrogatory no. 3 should not be answered, then I cannot see any reason for allowing nos. 1 and 2; if, on the other hand, interrogatory no. 3 is a proper interrogatory, then I can see no objection to interrogatories nos. 1 and 2.

The two points made on behalf of the appellant husband are these. First, he says that it is not proper to interrogate as to the contents of written documents, and, secondly, he says that, even assuming that in a proper case the court can make an order for such interrogatories, in the circumstances of this case it would be wrong to allow these interrogatories, particularly no. 3. He says that for two reasons, if I understand aright: first, that despite the fact that they are included in his client's list of documents as being relevant documents, there is no issue in this suit as to the correspondence; secondly, he says, referring to the words of R.S.C., Ord. 31, r. 2,[1] that the interrogatories in general,

[1] R.S.C., Ord. 31, r. 2: "A copy of the interrogatories proposed to be delivered shall be delivered with the summons or notice of application for leave to deliver them at least two days before the hearing thereof . . . and the particular interrogatories sought to be delivered shall be sub-

and no. 3 in particular, are not "necessary either for disposing "fairly of the cause or matter or for saving costs."

On the first point I am quite satisfied on an authority that has been cited to me that there is power in the court in a proper case to allow interrogatories as to the contents of a non-existent document. When I say "non-existent" I mean in the sense of lost or destroyed. Two cases were cited to me on this point. The first one, *Herschfeld* v. *Clarke*,[2] does not, I think, advance the matter very much further; but the second one, *Wolverhampton New Waterworks* v. *Hawksford*,[3] is obviously of great importance. It is not necessary, I think, for me to consider that case in detail. Suffice it to say that I am quite satisfied that the court in that case was saying that an interrogatory may only be administered as to the contents of a written document if secondary evidence of that document would be admissible at the trial or hearing. In that particular case, documents had never reached the possession of the party seeking to administer interrogatories, so that that party would not have any personal knowledge of their contents. Therefore, if it is shown that a document is lost or destroyed, a party who has knowledge of its contents may be interrogated about its contents if he could have been asked the same question in court. If, on the other hand, there is no evidence that the document is lost or destroyed, then, just as secondary evidence of its contents would not be admissible in court, interrogatories are not permissible. As a corollary to that, the proper way to obtain evidence of the contents would seem to be (a) if the document is in the possession of the other party, by discovery in the ordinary way on affidavit of documents and notice to inspect, and (b) if it is in the possession of a third party, by taking the ordinary steps to obtain production by subpoena duces tecum or otherwise. In *Wolverhampton New Waterworks* v. *Hawksford*[3] it was made perfectly plain with regard to the documents which were no longer in existence that interrogatories should be allowed. I need quote only one sentence from the judgment of Williams J.[4]: "With respect to the sixth and seventh,"—that is to say, of the interrogatories—"I do not see why the benefit of the act should "not be extended to a case of this sort, when satisfactory "evidence is given of the loss of the instrument the contents of "which are sought to be proved by secondary evidence."

I am satisfied, therefore, that in a proper case such an order can be made. But the question is whether it ought to be made

"mitted to and considered by the "court or judge. In deciding upon "such application, the court or judge "shall take into acount any offer, "which may be made by the party "sought to be interrogated to deliver "particulars, or to make admissions, "or to produce documents relating to "any matter in question, and leave "shall be given as to such only of the "interrogatories as shall be considered "necessary either for disposing fairly "of the cause or matter or for saving "costs."

[2] (1856) 11 Exch. 712.

[3] (1859) 5 C.B.(N.S.) 703.

[4] Ibid. 707.

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in the present case. As I have already indicated, there is on the pleadings no issue as to correspondence at all. Obviously, as was pointed out by Mr. Tolstoy, in any case between a husband and wife where desertion is alleged on one side or the other, correspondence leading up to, or, as in this case, correspondence subsequent to the separation may be most material or most relevant as a part of the whole story. There are many cases in which there is in the pleadings a reference to letters: for example, where the petitioner alleging desertion pleads that after the respondent had left the petitioner wrote a number of letters asking for a resumption of cohabitation and that those letters, or those parts of those letters, were ignored by the respondent, or the offers made in them were rejected. This is not one of such cases; and although the letters may be relevant in a general sense, I cannot say that any issue arises with regard to this correspondence at all. My attention was called to the well-known passage in the judgment of A. L. Smith L.J. in *Kennedy* v. *Dodson*,[5] though, as was emphasized by Mr. Tolstoy this morning, the facts of that case were, of course, far removed from those of the present case. The passage relied on for the appellant was at the opening part of the judgment[6]: "In my opinion, the "legitimate use, and the only legitimate use, of interrogatories "is to obtain from the party interrogated admissions of facts "which it is necessary for the party interrogating to prove in "order to establish his case; and if the party interrogating goes "further, and seeks by his interrogatories to get from the other "party matters which it is not incumbent on him to prove, "although such matters may indirectly assist his case, the "interrogatories ought not to be admitted."

On the pleadings as they are before me in this suit, are these interrogatories as to how many letters the wife wrote to the husband, when he got them, and what was in them, and the matters that might there be elicited, necessary for her to establish her case? In my opinion they are not. As I said, the case is one of simple desertion, and I cannot say that it is necessary for her to prove these letters in establishing her case.

There is another point, which is in fact part of the second point under R.S.C., Ord. 31, r. 2. Are these interrogatories necessary either for disposing fairly of the case or for saving costs? If the wife wrote a number of letters to her husband, as no doubt she did, she knows what she wrote in them; if she wants to prove the contents of those letters she can say in the witness box what was in them. It is perfectly true that it would be very handy for her by means of these interrogatories to force the husband, who is not asking for cross-relief, to set out affirmatively what he says was in the letters. But supposing the husband is minded to give inaccurate answers about the contents of the letters (I use the word "inaccurate" advisedly).

[5] [1895] 1 Ch. 334. [6] Ibid. 341.

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is he less likely to give inaccurate answers to this interrogatory than he would on oath in the witness box? What sort of benefit is the wife likely to derive from these interrogatories and what saving of costs is likely to ensue if I allow them? I put the question in that way and the answer seems to be plain: none.

In those circumstances, though there is, in my judgment, plainly the power to allow these interrogatories, I fail to see that they are necessary within the meaning of R.S.C., Ord. 31, r. 2. In my judgment, therefore this appeal succeeds. The appeal will be allowed and the order of the registrar discharged.

Appeal allowed.

Solicitors: *Walter Jennings & Son; Whitlamsmith, Law Society, Divorce Department.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

* *In re* A SOLICITOR'S CLERK.

1956
Apr. 20, 24.

Lord Goddard C.J., Cassels and Donovan JJ.

Solicitor — Discipline — Solicitor's clerk — False affidavit—Allegations against solicitor unsubstantiated—Power of disciplinary committee to make order against clerk—Solicitors Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 46), *s.* 16 (1) (*b*).

A complaint was preferred on behalf of the Law Society against a solicitor alleging that he had been guilty of professional misconduct in that he had (a) caused or permitted to be filed in the High Court of Justice a false or misleading affidavit, and (b) that he had failed adequately to supervise his clerk. An inquiry was held and the disciplinary committee of the society found that neither of the allegations had been substantiated. The affidavit, which was the subject of the complaint, was prepared and filed by the clerk himself while his principal was absent from the office, and as a result of the disclosure of certain facts during the inquiry, an application was made to the disciplinary committee for an order under section 16 (1) of the Solicitors Act, 1941,[1] that no

[1] Solicitors Act, 1941, s. 16: "(1) (*b*) where it appears to the "Society—(i) in the course or as a "result of any proceedings before the "Disciplinary Committee under the "disciplinary enactments, or (ii) in "the exercise of their powers under "rules made under the Solicitors Act, "1933, or this Act, that a person, "who is or was a clerk to a solicitor "but is not himself a solicitor, has "been a party to any act or default "of such solicitor, in respect of which "an application or complaint has "been or might be made against such "solicitor to the Disciplinary Com-"mittee under any enactment, an "application may be made by or on "behalf of the Society to the Disci-"plinary Committee that an order be "made directing that as from a date "to be specified in such an order, no "solicitor shall in connection with his "practice as a solicitor take or retain "the said person into or in his em-"ployment or remunerate the said "person without the written permis-"sion of the Society . . ."

[Reported by Miss J. EPHRON, Barrister-at-Law.]

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solicitor should employ the clerk without the written permission of the society. The committee, after holding an inquiry, made the order in those terms. The clerk appealed on the ground that since the allegations against his principal had failed there was no act or default to which he could be a party and that, therefore, the committee could make no order against him:—

Held, that section 16 (1) (*b*) of the Act of 1941 did not require that the solicitor should be found guilty of acts or defaults before his clerk can be dealt with by the disciplinary committee and that in all the circumstances it was right that the order should be upheld.

APPEAL from an order of the disciplinary committee.

On April 26, 1955, a complaint was preferred on behalf of the Law Society against a solicitor alleging that he had been guilty of professional misconduct in that he had (a) caused or permitted to be filed in the High Court of Justice an affidavit which he knew or ought to have known was false or, alternatively, misleading in a material respect, and (b) failed adequately to supervise his clerk. An inquiry was duly held by the disciplinary committee of the society. The committee found that a false and misleading affidavit had been filed and used in a proceeding in which the solicitor was acting for the party on whose behalf the affidavit was prepared and filed but that the solicitor did not know and in fact could not have known of the contents of the affidavit. Nevertheless, they considered he was not altogether blameless in that he should have exercised special care in the particular case because there was a possibility of a conflict of interest between the client and the solicitor's clerk. The clerk had had certain financial dealings with the client and as managing clerk to the solicitor he was undertaking the conduct of the proceedings. The affidavit had been prepared and filed by the clerk, the solicitor being absent from his office.

In the course of the inquiry before the committee facts appeared, relative to the preparation of the affidavit, which in the opinion of the Professional Conduct Committee (a body acting on behalf of the Law Society) justified an application to the disciplinary committee for an order under section 16 (1) of the Solicitors Act, 1941, that no solicitor should employ the clerk without the written permission of the society. The disciplinary committee held an inquiry at which the clerk was represented and on January 27, 1956, made an order in those terms.

The clerk appealed against the order on the ground that since the disciplinary committee had already found the allegations against his principal not to have been substantiated, there had been no act or default within the meaning of section 16 (1) (*b*) of the Act of 1941, on the part of his principal to which he could have been a party and accordingly the committee could not make an order in respect of him.

Neil Lawson Q.C. and *John G. Wilmers* for the solicitor's clerk.

J. R. Cumming-Bruce for the disciplinary committee.

Case referred to in argument: *Lloyd* v. *Grace Smith & Co.*[2]

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Cur. adv. vult.

April 24. LORD GODDARD C.J. read the following judgment of the court, in which he stated the facts and continued: At the close of the argument we announced that the appeal was dismissed, but as we believe this to be the first case in which an order against an unadmitted clerk under section 16 of the Act of 1941 has come before this court on appeal, and as we are upholding the order on somewhat different grounds to those given by the committee in their report, we thought it desirable that we should put the reasons for our judgment in writing.

[His Lordship read section 16 (1) (*b*) of the Act of 1941, and continued:] The main and, indeed, the whole objection which was made on the part of the appellant was that as the committee had found the complaints against the solicitor to have failed, no order could be made against the clerk in that he could not be a party to an act or default of a solicitor in respect of which an application or complaint had been made if the committee found the case not proved against the solicitor.

In order to invoke these proceedings it must first appear to the society that a clerk, who is not himself a solicitor, has been a party to an act or default of a solicitor, and that such act or default is one in respect of which an application or complaint could be made against the solicitor. That no doubt means that there must be reasonable grounds for the society to take action under the section. As it was admitted that the affidavit was, at least, misleading and that the clerk took part in its preparation and filed it, it was obvious that there were reasonable grounds for the society taking action and indeed the committee found that there was a prima facie case calling for an answer so we need not deal further with this point. Then it must be remembered that an application or complaint to the disciplinary committee by a person who is alleging an act or default must be made against a solicitor. It is only the society who can complain of the conduct of a clerk and the conduct of which the society can complain must appear in the course or as a result of proceedings before the committee against a solicitor. Accordingly, we have to see whether there was a complaint with regard to an act or default on the part of the solicitor. The act complained of was the preparation and filing of this affidavit and that must be regarded as the act of the solicitor who was the solicitor on the record.

It is not disputed that for any consequences which might result and cause damage to any person the solicitor would be responsible, for he was the solicitor on the record and it matters not whether he prepared and filed the affidavit personally or by

[2] [1912] A.C. 716; 28 T.L.R. 547.

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the hand of his clerk. The committee find, and it is not disputed, that the clerk was a party to the preparation and filing, and, indeed, he was the actual person who prepared and filed the affidavit and he knew that it was misleading. The solicitor escaped punishment because he neither knew nor was in a position to know the misleading character of the affidavit and therefore it would not be right to make him, what may be called for this purpose, criminally liable for what was done. But the section does not require that the solicitor himself should be found guilty or punished before the clerk can be dealt with by the committee. He has been a party to the act. Had the solicitor known of the misleading character of the affidavit he would have been dealt with by the committee and it is not disputed that in such a case the clerk could also be dealt with by them. It would be a strange result if because the solicitor shows that he had no knowledge of what his clerk did that the clerk could escape the consequences of his misconduct. It would mean that a clerk who was able to conceal his misconduct from his master could escape any punishment by the disciplinary committee. As soon as it is discovered that a false affidavit has been filed in an action or proceeding it is clear that an application can be made against the solicitor who is responsible as the solicitor on the record for the filing of the affidavit. He may be able, as in this case, to show for whatever reason that he did not know that the affidavit was false. The clerk was clearly a party to the act for which the solicitor would have to accept civil liability if any resulted. In our opinion, therefore, there is no doubt that the society, who had learned of the clerk's action in the course of the inquiry against the solicitor, could take the proceedings authorized by the section.

It appears from their report that the committee considered that as they had found that the solicitor could not be held blameless, that was an act or default on his part to which the clerk was a party. We understand by that that the committee found that the clerk was a party to the offence alleged against the solicitor, that he failed adequately to supervise his clerk, but we find it difficult to see how the clerk can be a party to the failure of his principal to exercise proper supervision over him. Failure by a principal to exercise supervision over a clerk is a failure on the part of the principal only, and the solicitor was acquitted of that charge. The result of the failure was that the clerk was able to do certain acts without the knowledge of his employer. That is the offence for which, in our opinion, the clerk was liable to be dealt with by the disciplinary committee. Accordingly, we uphold the order of the committee though it may be on different grounds to those which we understand the committee gave, but it is quite clear that the committee found that the appellant caused an affidavit to be filed which he knew was false

or misleading. We therefore uphold the order of the committee and dismiss the appeal with costs.

Appeal dismissed.

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Solicitors: *Paisner & Co.*[1]; *Hempsons.*

[1] Who had not employed the clerk concerned.

[LIVERPOOL ASSIZES.]

* WILLIAMS *v.* PORT OF LIVERPOOL STEVEDORING CO. LTD. AND ANOTHER.

1956 *Feb.* 13, 14, 15, 23.

Lynskey J.

[1954 W. No. 3533.]

Negligence—Common employment—Joint negligence—Gang of workmen jointly negligent in unloading cargo—Member of gang injured—Whether duty owed to injured workman by fellow workmen—Liability of employer.

The plaintiff, who was a member of a gang of six workmen employed by a firm of master stevedores, sustained injuries when a number of bags of sodium carbonate, which formed the cargo of a barge being unloaded by the gang, fell upon him. The collapse of the bags was due to their instability arising from the method of unstowing adopted by the gang contrary to the express and repeated instructions of the hatch foreman in charge and others. The plaintiff, who was of equal status with his fellow workmen in the gang, was himself expressly instructed to deal with the cause of the instability of the bags and warned of the danger they presented; but he ignored the instructions and he and the other members of the gang continued, in the absence of the hatch foreman, to unstow the cargo by their own method instead of in the manner in which they were instructed:—

Held, (1) that there was a duty owed to the plaintiff by each member of the gang to take reasonable care in the actual work of unstowing and in the method of work employed, and accordingly, even though the plaintiff tacitly consented to the method of unstowing contrary to instructions, the employers were liable vicariously for the negligence of his fellow workmen.

Stapley v. *Gypsum Mines Ltd.* [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478 and *Laszczyk* v. *National Coal Board* [1954] 1 W.L.R. 1426; [1954] 3 All E.R. 205 applied.

Per curiam. If a number of men engage in an occupation which is contrary to instructions, and also which is dangerous, there nevertheless is a duty owed by one to the other to use reasonable care, and that duty is not abrogated by joining together and carrying out a common operation. Even the assent to carrying out that operation might in certain circumstances amount to a breach of duty to a man who is also carrying it out; it is a breach of duty that one man owed to the other.

(2) That the plaintiff was guilty of contributory negligence, and as his consent had been necessary to the carrying out of the work

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[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

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in the prohibited way, his share of the responsibility was one-half and the damages recoverable would, in accordance with the provisions of section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945,[1] be reduced accordingly.

Dicta of Lord Reid in *Stapley* v. *Gypsum Mines Ltd.* [1953] A.C. 663, 682 applied.

ACTION.

The plaintiff, John Williams, was on March 21, 1954, a member of a gang of six workmen of equal status employed by the first defendants, Liverpool Stevedoring Co. Ltd., in unloading bags of sodium carbonate from the barge *Oswald*, owned by the second defendants, Imperial Chemical Industries Ltd., which was lying alongside the steamship *Sarmiento* in the North No. 1 Canada Dock, Liverpool.

The normal method of unloading a cargo such as that carried by the barge *Oswald* was to make a " sink " in the cargo, i.e., to remove a number of bags from a part of the hold down to a depth of about half-a-dozen bags, and then to " level off " by discharging all the bags in the hold to the level of the " sink." That method of unloading ensured that there was never a dangerously high tier of bags and the cargo could be discharged with safety. When the gang commenced unloading, a sink had already been made in the cargo and the hatch foreman, who was also employed by the first defendants, told the gang to clear off the upper layers of bags in the hold until they reached the level of the sink. The hatch foreman waited a short while to see that his order was carried out; but when he went away to attend to other duties the gang apparently decided to continue unloading in their own way and made a further sink before clearing the bags in the first sink, so that at one part of the hold of the barge there was left a stack of bags some 12 bags high. The members of the gang were working in pairs on different sides of the hold and the plaintiff and his mate were working about mid-ship on that line of bags. When the hatch foreman returned and saw that the gang were not complying with his order he instructed them to level off the top bags so as to reduce the risk, and told them that there might be trouble if they did not; but when he went away the gang again reverted to their own method of unloading. During a break in work at mid-day the hatch foreman told the plaintiff to take the bags off the top as they were getting dangerous, and the plaintiff promised to do so. In fact he did not do so, but resumed working as before. The master, the mate and the engineer of the barge also told the gang that they ought to take the bags off the top but their warnings went unheeded.

[1] Law Reform (Contributory Negligence) Act, 1945, s. 1: " (1) Where " any person suffers damage as the " result partly of his own fault and " partly of the fault of any other " person or persons, a claim in respect " of that damage shall not be defeated " by reason of the fault of the person " suffering the damage, but the " damages recoverable in respect " thereof shall be reduced to such ex- " tent as the court thinks just and " equitable having regard to the " claimant's share in the responsibi- " lity for the damage: "

As a result of the method of unstowing adopted by the gang there was left in the hold three tiers of bags, 12 bags high, and while the plaintiff was making a sling a pile of bags collapsed and injured the plaintiff.

The plaintiff brought this action claiming damages on the ground, inter alia, of negligence by the first and second defendants. The claim as originally pleaded was based almost entirely upon allegations of bad stowage, but Lynskey J. found that the cargo was properly stowed and that the accident would not have happened if the proper method of unstowing had been adopted. His Lordship held that the claim against both defendants would have failed had it rested as originally pleaded and as the case was opened, but gave leave for the statement of claim to be amended. By his amendment the plaintiff pleaded alternatively against the first defendants (1) an unsafe method of unstowing by their servants or agents (other than the plaintiff), and (2) the failure of the first defendants' servants or agents (other than the plaintiff) to observe the order of the hatch foreman and the warnings of the barge officers.

By their amended defence the first defendants in effect put in issue the question whether the members of the gang (other than the plaintiff) were in breach of any duty to him and alleged that the plaintiff voluntarily undertook the unstowing of the bags with full knowledge of the risks involved.

J. S. Watson Q.C. and *George Bean* for the plaintiff.
H. I. Nelson Q.C. and *J. M. Davies* for the first defendants.
Gordon Clover for the second defendants.

The following case, in addition to those referred to in the judgment, was cited in argument: *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.*[2]

LYNSKEY J., after stating the facts substantially summarized above, said: In any event I am bound to find for the Imperial Chemical Industries Ltd., because the only allegation against them is bad stowage. The plaintiff has failed to establish that, and there will be judgment for the second defendants. With regard to the employers, in his final speech, counsel for the plaintiff said that even although one did not accept the evidence for the plaintiff, nevertheless he was still entitled to ask for partial damages at least, because the employers would be vicariously liable for the negligence of the other five men who, with the plaintiff, were engaged in the general operation of unstowing.

Counsel for the plaintiff applied to me for leave to amend his pleadings in order to raise that case, which was, of course, an abandonment of his own case, and the setting up of a new case

[2] [1953] 1 W.L.R. 1472.

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based on the defendants' own evidence. Counsel for the first defendants resisted the application, but I felt it right to grant it, because it seemed to me that it was the duty of the court to do justice as far as it could, and not to allow defects in pleading to prevent justice being done; and I reserved the question of costs, and gave leave to amend. The plaintiff has now amended his pleadings by pleading: "(v) Alternatively, their servants or "agents (other than the plaintiff) unstowed the said bags vertic- "ally downwards from only part of the forward section of the "hold of the barge instead of removing the said bags uniformly "by sinking and levelling off over the whole area of the said "section and thereby left a wall of bags which were liable to fall; "further or alternatively—(vi) Their servants or agents (other "than the plaintiff) failed to pay regard to or observe the order "of their hatch foreman to work the top bags off the tiers and/or "failed to heed the warnings of the master, the mate, and the "engineer of the said barge that the tiers of bags were "dangerously high and might fall and the suggestions of the said "officers that such servants or agents ought to step or level "off the said tiers."

In other words, for the purpose of their alternative claim the plaintiff is adopting the defendants' case and accepting it as being accurate; and on that contends that he is entitled to make the employers pay at least partial compensation. In further and better particulars the plaintiff sets out the names of the five witnesses who appeared in this case. The result is that the plaintiff now claims that his evidence, and that of all his witnesses, must be disregarded. It is a curious position at which to arrive, but there it is.

The first defendants' reply, so far as is material, reads: "They [the first defendants] admit and affirm that their servants "or agents including the plaintiff unstowed the said bags vertic- "ally downwards . . . instead of removing the said bags "uniformly by sinking and levelling off over the whole area . . . "and they further allege that the plaintiff acted in concert and "together with his said fellow servants, and that he and "they together were in breach of their contract of employment "and/or duty to the first defendants their employers, but of no "other duty. . . . That the plaintiff tacitly agreed with their "said servants or agents . . . to ignore and disobey the orders, "warnings, and suggestions, and to unstow the said bags in a "dangerous manner as aforesaid, and by reason of such conduct "and tacit agreement none of the said servants or agents owed "any duty to the plaintiff with regard to the said method of "unstowing. Further and/or in the alternative by his conduct "and tacit agreement as aforesaid, and with a full knowledge and "appreciation of the risks involved, the plaintiff voluntarily "undertook to unstow the said bags in the said manner with the "said servants or agents."

In other words, the first defendants are saying in that reply

that the individual servants themselves had no duty to the plaintiff to take care and, as they had no duty to the plaintiff to take care, therefore, the employer cannot be vicariously liable. Alternatively, they are saying in effect, that even if that is not right, the plaintiff, by joining in this dangerous system of work, was tacitly consenting to accept the risks of such work, and in those circumstances the doctrine of volenti non fit injuria applies.

There is authority of the House of Lords in *Stapley* v. *Gypsum Mines Ltd.*,[1] where very similar circumstances arose. That was a case where two miners of equal status were employed in the respondents' gypsum mine. They were directed by the foreman of the respondents to bring down the roof of a stope in which they were proposing to work, as it was unsafe and likely to fall. After attempting unsuccessfully to bring it down, they jointly agreed to cease their efforts and to carry on with their normal work. Shortly after resuming work one of the miners was killed by a fall of part of the roof. The House of Lords, by a majority, held that the employer was liable, because the accident was partly caused or contributed to by the workman who was not killed, and although the deceased man himself was guilty of negligence in carrying on despite the foreman's order, nevertheless the employer was still liable for the negligence of the fellow employee who had joined with him in carrying out some scheme to disobey the orders of the foreman.

It was said by counsel for the first defendants that the duty which one servant owed to another was not argued in that case; and that if it had been argued, it would have been open to the court to come to the conclusion that where a number of men jointly engage in doing an act which is a negligent and dangerous act, no duty is owed each to the other; and therefore, that if no duty is owed, there cannot be any negligence. It may sound an attractive argument, but I think I am bound by the authority of the *Gypsum* case.[1] In a case to which I have been referred by counsel for the plaintiff, *Laszczyk* v. *National Coal Board*,[2] that question was again not argued; but it was said in that case also, that there was a duty owed by one employee to another, and in my view it must be so. It certainly is so in the ordinary case of individual negligence hurting another man, even though that is in disobedience of orders, as long as it is in the course of his employment. It seems to me that if a number of men engage in an occupation which is contrary to instructions, and which is also dangerous, there nevertheless is a duty owed by one to the other to use reasonable care, and that duty is not abrogated by joining together and carrying out a common operation. Even the assent to carrying out that operation might in certain circumstances amount to a breach of duty to a man who is

[1] [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478.

[2] [1954] 1 W.L.R. 1426; [1954] 3 All E.R. 205.

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also carrying it out; it is a breach of duty that one man owed to the other.

Having regard to *Stapley* v. *Gypsum Mines Ltd.*,[3] I am bound to hold that there was a duty owed by each of the gang of six to each other to take reasonable care in the actual work of unstowing and in the method of work employed. In my view in the present case, although the plaintiff gave tacit consent to the operation of unstowing in this way, contrary to orders given to himself personally at one time, nevertheless he is entitled to hold his employer liable vicariously for the negligence of his fellow workmen; the only test that one can apply being not whether it was contrary to orders, but whether it was work done in the course of his employment. The result is, in my view, that the plaintiff is entitled to compensation for the damage he has sustained in an accident, which I hold was due to the negligence both of his fellow workmen and himself, and there is contributory negligence as far as he is concerned. [His Lordship assessed damages, on the basis that the plaintiff was not guilty of negligence, at £1,947 6s. 9d., and continued:]

That brings me to the final question: as the employer was vicariously liable for the negligence of the other members of the gang, and as the plaintiff is also guilty of negligence, in what proportion ought I to allocate responsibility for the damage? It is not by any means an easy question to decide. I was tempted at one time to say that, as the employer had taken every step he could to try to avoid this accident, I ought to increase the plaintiff's responsibility in relation to the vicarious liability, but I am afraid that the words of the Law Reform (Contributory Negligence) Act, 1945, prevent me from doing that, much as I would like to do; but I mention it so that it can be taken up elsewhere, if it is thought worth while taking up. The Act provides that in proceedings against any person for contribution, the amount of contribution recovered should be such as may be found by the court to be just and equitable having regard to that person's responsibility for the damage; and gives power to exempt from liability or award complete indemnity. That means that this court has to have regard to what is just and equitable in deciding that contribution, and regard has to be had to that person's responsibility for the damage.

I have to consider the responsibility of the plaintiff and the other members of the gang, but in doing so I am helped by the observations of Lord Reid in the *Gypsum* case.[4] He said[5]: "Normally one would not disturb such an award, but Sellers J. "does not appear to have taken into account the fact that "Stapley deliberately and culpably entered the stope. By doing "so it appears to me that he contributed to the accident much

[3] [1953] A.C. 663.
[4] Ibid.
[5] Ibid. 682

" more directly than Dale. The Act directs that the damages " ' shall be reduced to such extent as the court thinks just and " ' equitable, having regard to the claimant's share in the " ' responsibility for the damage ' (section 1 (1)). A court must " deal broadly with the problem of apportionment and in con- " sidering what is just and equitable must have regard to the " blameworthiness of each party, but ' the claimant's share in " ' the responsibility for the damage ' cannot, I think, be assessed " without considering the relative importance of his acts in " causing the damage, apart from his blameworthiness."

In other words, one is directed to take more or less a jury view of responsibility in these cases, taking into account: first, the causation of the damage, secondly, blameworthiness, and thirdly, trying to do what is just and equitable. The view I take in this case is not that put forward by counsel for the plaintiff. He says that where there is a gang of six working together and they all tacitly agree to ignore instructions or indulge in a system of work which is dangerous, then they are all equally to blame, and the plaintiff is entitled to recover five-sixths of the damages. It does not seem to me that this is a mathematical problem, but one of doing what is equitable, having regard to the responsibility and culpability.

The view I take is that the employers are liable here, not for the individual acts of each individual person employed in the work, but for a dangerous method of work which was tacitly adopted by those six men. That was the real cause of this accident, and the employers are not liable for the individual acts of these men in carrying out the unstowing, but for the acts of the men as a gang, and as a group, tacitly agreeing to adopt a system of work which was contrary to the order of the hatch foreman, and was dangerous. Looking at it from that point of view, it seems to me that the plaintiff, although he was only of equal status with his fellow workers in the gang, could, if he had liked, have seen that the foreman's method of work was carried out; and his tacit assent was essential to the carrying out of the work in the way it was done. That seems to me to be the fair inference to draw from the evidence of the hatch foreman, who told me that at 11 o'clock he actually spoke to the plaintiff himself, and told him to take the top bags off; and the plaintiff replied: " All right, Jim; I will do that." It seems to me that the effect of that was that the plaintiff himself was saying: " Right you are, Jim; I will see that that is done "; and if he had not been an assenting party to this method, it could have been stopped. I think that the plaintiff was equally responsible with the other five men in the gang in carrying out this wrong method of work, because it required the consent of all the gang to carry it out, and the plaintiff could have stopped it if he had

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wanted. In my view, the proportion of responsibility is "fifty-"fifty," and I reduce the amount the plaintiff is to recover by one half.

Judgment for the plaintiff against the first defendants.
Judgment for the second defendants against the plaintiff.

Solicitors: *Canter, Levin & Mannheim, Liverpool; Weightman, Pedder & Co., Liverpool; J. W. Ridsdale.*

[CHANCERY DIVISION.]

1956
Apr. 16, 30.

Upjohn J.

* *In re* KOUYOUMDJIAN.
Ex parte THE TRUSTEE *v.* LORD AND ANOTHER.

[No. 30 of 1954.]

Bankruptcy—County court—Transfer of proceedings to High Court—Application to transfer motion in bankruptcy to High Court—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 100, 122—*Bankruptcy Rules,* 1952 (*S.I.* 1952, *No.* 2113), *rr.* 21, 26, 27.

Where bankruptcy proceedings are being conducted in a county court, there is no jurisdiction under section 100 of the Bankruptcy Act, 1914, to order that a motion in the bankruptcy be transferred from the county court having conduct of the proceedings to the High Court apart from the rest of the bankruptcy proceedings. The reference in section 100 (2) to the transfer of "any pro-"ceedings" from one court to another is a reference to the whole proceedings which initiated the bankruptcy.

In re Marquis of Huntly [1917] 2 K.B. 729 considered.

MOTION.

By an order of the Manchester County Court dated August 10, 1954, one Haroutune Kouyoumdjian was adjudicated bankrupt. By a motion dated December 14, 1955, his trustee asked for a declaration that a payment of £3,000 on May 21, 1954, to the respondent, Cyril Lord, or alternatively to the respondent company, Brindles Ltd., through their agent Cyril Lord, was fraudulent and void as against the trustee under section 1 (1) (*b*) of the Bankruptcy Act, 1914; alternatively that it was fraudulent and void under section 172 of the Law of Property Act, 1925, or void under section 42 of the Bankruptcy Act, 1914.

By a motion dated April 11, 1956, the trustee applied to the judge sitting in bankruptcy for an order transferring the first motion to the High Court. The grounds of the application were that it would be more convenient if the motion were heard in

London, as a number of witnesses required for cross-examination were resident in London, and that the matter being of some complication was expected to last more than one day. The respondents did not oppose the application.

N. E. Wiggins for the trustee in bankruptcy.
G. R. F. Morris for the respondents.

The case cited in argument is referred to in the judgment.

UPJOHN J., having stated the facts, continued: Before I consider the merits of the application I have to consider whether there is jurisdiction under the Bankruptcy Act, 1914, to transfer such a motion to this court while the general administration of the bankrupt's affairs remains in the county court in Manchester, the court in which the order of adjudication was originally made. The application is made under section 100 of the Bankruptcy Act, 1914.[1] [His Lordship read sections 100 and 122 of the Act and rules 21, 26 and 27 of the Bankruptcy Rules, 1952, and continued:] I understand that an application was made informally to the registrar of the Manchester County Court asking him to request the High Court to deal with this motion pursuant to section 122, but that he felt himself bound, and in my opinion

[1] Bankruptcy Act, 1914, s. 100: "(1) Subject to the provisions of this "Act, every court having original "jurisdiction in bankruptcy shall have "jurisdiction throughout England. "(2) Any proceedings in bankruptcy "may at any time, and at any stage "thereof, and either with or without "application from any of the parties "thereto, be transferred by any pre-"scribed authority and in the pre-"scribed manner from one court to "another court, or may, by the like "authority, be retained in the court "in which the proceedings were com-"menced, although it may not be the "court in which the proceedings ought "to have been commenced. (3) If "any question of law arises in any "bankruptcy proceeding in a county "court which all the parties to the "proceeding desire, or which one of "them and the judge of the county "court desire, to have determined in "the first instance in the High Court, "the judge shall state the facts in "the form of a special case for the "opinion of the High Court. The "special case and the proceedings, or "such of them as may be required, "shall be transmitted to the High "Court for the purposes of the deter-"mination."

S. 122: "The High Court, the "county courts, the courts having "jurisdiction in bankruptcy in Scot-"land and Ireland, and every British "court elsewhere having jurisdiction "in bankruptcy or insolvency, and "the officers of those courts respec-"tively, shall severally act in aid of "and be auxiliary to each other in all "matters of bankruptcy, and an order "of the court seeking aid, with a re-"quest to another of the said courts, "shall be deemed sufficient to enable "the latter court to exercise, in regard "to the matters directed by the order, "such jurisdiction as either the court "which made the request, or the court "to which the request is made, could "exercise in regard to similar matters "within their respective jurisdictions."

Bankruptcy Rules, 1952, r. 21: "The judge of the High Court may "order the proceedings in any matter "under the Act to be transferred from "a county court to the High Court, or "from the High Court to a county "court."

R. 26: "A matter transferred from "one court to another shall receive a "new distinctive number."

R. 27: "The official receiver of "the court to which proceedings "are transferred shall become the "official receiver of the debtor's estate "in place of the official receiver of "the court from which they are "transferred."

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rightly, by the decision of the Divisional Court in *In re Marquis of Huntly* [2] to indicate that he could not make the order.

Before I consider the actual words of the section, my approach to its construction is this: it is clear from the rules that I have read that at all events the draftsman of the rules thought that a transfer of proceedings under section 100 would be a transfer of all the proceedings and not merely of some motion or other application pending in the bankruptcy proceedings. Again, it seems to me that section 122 is directed to asking the assistance of courts other than that in which the bankruptcy is proceeding to assist in particular matters such as this; but there is no doubt that the ambit of that section has certainly had a judicial gloss put upon it in the *Huntly* case [2] which renders its ambit somewhat circumscribed in extent.

Reliance, however, is placed upon that case, for Horridge J., in the course of his judgment, said this [3]: "By section 100 of "the Bankruptcy Act, 1914, the matter might have been trans- "ferred to London if there was ground for the exercise of the "power of transfer. The legislature has invested the county "courts to whom bankruptcy jurisdiction is assigned with the "same powers as I have." It is said that Horridge J. thought that the particular application in that case could by itself have been transferred. I do not regard that authority, however, as being of assistance to me, because I do not know whether Horridge J., in referring to "the matter," referred to the whole of the bankruptcy proceedings or merely the application pending before him, and, of course, the question of the precise jurisdiction under section 100 was not in issue before that court.

There is one other matter which must affect the approach to section 100, and that is subsection (3). If there is jurisdiction to transfer any motion or other application under subsection (2), it would hardly seem necessary to have inserted subsection (3). It would seem more convenient that the motion should be determined from start to finish by the High Court to which it would be transferred.

Those matters, however, only indicate the approach that I adopt to section 100 (2). The precise jurisdiction conferred on the court must depend on the exact words used in the section. It starts in the widest possible way. "Any proceedings in bank- "ruptcy" are certainly wide words, and the question is whether those words are sufficiently wide, notwithstanding other matters that I have indicated and, in particular, the rules made under the Act, to confer upon this court the jurisdiction claimed by the applicant.

I think the clue to the matter is that, although the opening words of the subsection are very wide, there is a reference to "proceedings" later in the subsection. The exact words are: the proceedings "may . . . be retained in the court in which the

[2] [1917] 2 K.B. 729. [3] Ibid. 732.

" proceedings were commenced, although it may not be the court " in which the proceedings ought to have been commenced." It is possible, although I think most unlikely, that the legislature was contemplating a case where, although the bankruptcy was proceeding in a particular county court, someone might make an application either in the High Court or in another county court in those bankruptcy proceedings. Of course, he would in fact be in grave practical difficulties in getting any other court to issue any summons; but I think it was most unlikely that the legislature had that state of affairs in mind. Indeed, if it had, it is plain that, if the motion were started in this court, it could be heard here, although wrongly issued. That has not been suggested. I think that the proceedings which the legislature had in mind in the concluding part of subsection (2) were the proceedings which initiated the bankruptcy. It sometimes happens that bankruptcy proceedings may be initiated in the wrong court, the commonest cause being that the petitioning creditor has mistaken the proper address of the debtor and therefore starts the proceedings in the wrong court. This subsection provides that the court may, notwithstanding, have jurisdiction to entertain the bankruptcy proceedings.

If that be the true meaning to be placed upon the word " pro- " ceedings " towards the end of subsection (2), I think that it is an indication that, although the opening words are very wide, this subsection is concerned with the case of the proceedings in bankruptcy, in the sense of transferring the proceedings initiating the bankruptcy and everything that follows thereon. No one, of course, doubts that the whole bankruptcy proceedings can at any time and at any stage be transferred from court to court, but I do not think that this subsection is concerned at all with the case of a transfer of a particular application or motion in any particular bankruptcy. It is only referring to the transfer of the whole bankruptcy proceedings. Power to transfer part only of the bankruptcy proceedings would also, in my judgment, be productive of great administrative inconvenience.

Accordingly, there is, in my judgment, no jurisdiction in this court to accede to this application.

I propose, therefore, only to say very few words about the merits. The principal ground upon which the application was based was that the matter involved the attendance for cross-examination of some six professional men, all of whom are in London. I should not myself regard that as a sufficient reason. It has, in addition, been said that the matter is of great complication which might last two or three days. That is perhaps a slightly more convincing ground, but I must not be taken, in case this case should go further, as indicating that I am altogether satisfied that, had I jurisdiction, I would make the transfer of this particular motion. It is a matter which, so far as I am concerned, remains open.

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The application is supported by the respondents, but, for the reason I have given, I am unable to accede to it.

Application dismissed.

Solicitors: *Norton, Rose & Co. for Blackburn, Walker & Co., Manchester; H. H. Wells & Sons.*

I. G. R. M.

[COURT OF APPEAL.]

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April 23.

Jenkins and Hodson L.JJ.

* POLSKIE TOWARZYSTWO HANDLU ZAGRANICZNEGO DLA ELEKTROTECHNIKI "ELEKTRIM" SPOLKA Z OGRANICZONA ODPOWIADZIOLNOSCIA *v.* ELECTRIC FURNACE CO. LTD.

[1951 P. No. 1580.]

Practice and Procedure—Trial—Mode of trial—Damages for breach of contract — Direction on plaintiff's application that liability be determined by judge and quantum of damages subsequently by official referee — Discovery as to damages to be deferred until liability established — No sufficient demarcation of the issues as pleaded — Separation impracticable and inconvenient — R.S.C., Ord. 36, *r.* 7.

In an action by the plaintiff company alleging that the defendant company had committed breaches of certain contracts for the supply to them of plant, the judge directed that the issue as to liability should be determined first at the trial of the action and that all questions as to the quantum of damages, if the defendants were found to be liable, should be referred subsequently to the official referee. The judge further directed that discovery in relation to the quantum of damages should be deferred until after the issue of liability had been established:—

Held, that having regard to the pleadings the line of demarcation between questions of quantum and questions of liability was not, and possibly could not be, sufficiently defined to make the division practicable, and that the order should be discharged.

Per curiam. Without laying down any general rule which might fetter judicial discretion the kind of case in which an order of this kind could usefully be made was one in which the matter directed to be tried first would, when decided one way or the other, be likely to dispose of the case. An order of this type should not be made unless there was on the pleadings a clear line of demarcation between the issues which it was sought to decide separately.

Decision of Devlin J. reversed.

APPEAL from Devlin J.

The following statement of facts is taken substantially from the judgment of Jenkins L.J.

The plaintiffs, Polskie Towarzystwo Handlu Zagranicznego Dla Elektrotechniki "Elektrim" Spolka Z Ograniczona Odpowiadziolnoscia (hereafter called "the Polish company"),

brought an action against the defendants, the Electric Furnace Co. Ltd. (hereafter called "the British company"), claiming damages for breach of certain contracts for the supply by the British company to the Polish company of certain plant.

By the statement of claim dated April 29, 1952, the Polish company stated that they were "a corporation maintained by the "Polish Republic for the purpose (inter alia) of purchasing "industrial plant to be used in the production of steel by the "Central Steel Board . . . of the said republic (hereinafter "called 'the board')." In paragraph 2 the Polish company pleaded a contract for the supply of a furnace of 300 kilograms cast steel capacity, which they referred to as the first installation, for the price of £10,650, the date for delivery to the Polish company being in August, 1950. Paragraph 3 alleged that "The "defendants [the British company], at the time when the first "contract was made, well knew that the plaintiffs [the Polish "company] required the first installation for the purpose of its "transfer to and use by the board in the production of cast "steel and that when the said installation was in operation the "annual production of steel therefrom would be about 600 tons." In paragraph 4 there was an allegation of an advance payment of 20 per cent. of the price by the Polish company to the British company in October, 1948. In paragraph 5 further payments on account were alleged. In paragraph 6 the Polish company pleaded a further order for furnaces at the total price of £11,550 for delivery, again, in August, 1950. An allegation was made as regards that contract in paragraph 7 in the same terms, mutatis mutandis, as the allegation in paragraph 3, that is to say that, to the knowledge of the British company, the plant was being acquired for use by the board, and that when the installation was in operation the annual production of steel therefrom would be about 450 tons. In paragraph 8 there was an allegation of a payment in advance in respect of the second contract, and in paragraph 9 of certain payments on account. Further payments were mentioned in paragraph 10.

The Polish company went on to allege that the British company repudiated the contract at a conversation which took place on December 6, 1950, and in paragraph 12 that the Polish company, by letters from their solicitors, elected to treat the contracts as discharged by reason of such repudiation.

Paragraph 13 contained a general allegation of damages, and propounded alternative methods of calculating the damages. The first basis propounded adopted as the measure the Polish company's loss of production on the footing that they could not get any substitute installations. It was put that the Polish company had lost the production for an indefinite period, being the production which they would otherwise have obtained from such installations; and they put the production at about 1,050 tons per annum. Then they valued the production at about £48,000, and took 17 per cent. of such value, making £8,287, as a

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reasonable estimate of the annual damage suffered by the Polish company. Alternatively, a calculation was made on the assumption that it was possible for the Polish company to get similar installations elsewhere; and on that basis the damage was laid at a sum representing the additional cost of comparable plant, together with the loss of production which would have ensued owing to the unavoidable delay in getting such alternative installations. In paragraph 14 the Polish company pleaded, alternatively, that the board had suffered the said loss and damage, and that the Polish company would have to make it good to the board. Paragraph 15 alleged: "Further, the said "shipments of part of the first and second installations, without "the completion of the said installations, are valueless and could "not be used for the purpose of any alternative installation."

Additional paragraphs were introduced by amendment in December, 1953, and arose out of the apparent necessity for a licence from the authorities in this country covering any export to Poland of installations of this kind. It was alleged by the Polish company, in effect, that any difficulties arising on the question of a licence could not be relied upon by the British company, because those difficulties were of their own making. These pleas were apparently included in the statement of claim by way of anticipation of reliance by the British company on the licence position.

The defence, in essence, was a denial of repudiation by the British company, and an allegation that, on the other hand, the Polish company had repudiated. The British company also said that before the Polish company had accepted any repudiation by the British company the further performance of the contracts became impossible because further export of goods of this kind to Poland was prohibited.

On January 10, 1956, the Polish company took out a summons for further directions in the action asking: "1. That only the "questions of the above-named defendants'" [the British company's] "liability for the repayment of the several sums in the "amended statement of claim herein mentioned and the "damages therein claimed be determined at the trial of this "action and that all questions of the amount of such damages, "if any, shall after such determination be referred to the "official referee in rotation or as the trial judge may order. "2. That until after the determination of such questions of "liability or further order, discovery in relation to the quantum "of the said damages shall be deferred. . . ." Master Clayton, on February 8, 1956, refused to make the order asked for, but, on appeal, Devlin J. made the order in the terms asked. The British company appealed.

Maurice L. Lyell Q.C. and *R. J. Parker* for the British company.

D. N. Pritt Q.C. and *L. J. Solley* for the Polish company.

In addition to the cases referred to in the judgments the following were cited in argument: *Liverpool, Brazil, and River Plate Steam Navigation Co.* v. *London and St. Katherine Steam Navigation Co.**; *Monk* v. *Redwing Aircraft Co. Ltd.*†; *Parker* v. *Wells* ‡; *Fennessy* v. *Clark.*§

JENKINS L.J., having stated the facts, said: It would be apparent to anyone that the calculation of damages in the event of the Polish company making good their case as to the contracts and the British company's repudiation of them would be a matter of considerable complication and difficulty; but Mr. Lyell, for the British company, says that, difficult as the calculation of the quantum of damages may be, there is no justification in this case for the order made by the judge.

The jurisdiction to make the order is contained in Ord. 36, r. 7, which provides: "Subject to the provisions of the preceding "Rules of this Order, the court or a judge may, in any cause or "matter, at any time or from time to time, order that different "questions of fact arising therein be tried by different modes of "trial, or that one or more questions of fact be tried before the "others, and may appoint the places for such trials, and in all "cases may order that one or more issues of fact be tried before "any other or others." There is no doubt, therefore, as to the jurisdiction of the court to make such an order; and it is clear, also, that the question whether such an order should or should not be made in any given case is a matter for the discretion of the judge. Mr. Lyell, however, contends that, discretionary as this order was, it ought not to be allowed to stand on account of the serious embarrassment to the British company which would ensue. He said, I think rightly, that the making of an order of this sort at the instance of a plaintiff was a rare occurrence. He did not dispute that it could be done, but he said that it was a kind of order which should only be made in exceptional circumstances.

He referred us to a number of authorities. I do not propose to take up time by reading all of them. The first was *Emma Silver Mining Co.* v. *Grant.*[1] In that case Sir George Jessel M.R. said[2]: "I do not intend to lay down any general rule for "the proper construction of Ord. 36, r. 6"—that is the present Ord. 36, r. 7, which is in substantially the same terms—"because, first of all, I think one judge has no right to embarrass "other judges by laying down general rules of construction; and, "in the second place, I think it is very undesirable to limit the "operation of a rule expressed in general terms by stating the "circumstances, or all the circumstances under which the judge "thinks the discretion ought to be exercised. The discretion is

* [1875] W.N. 203.
† [1942] 1 K.B. 182; 58 T.L.R. 94; [1942] 1 All E.R. 133.
‡ (1881) 18 Ch.D. 477.
§ (1887) 37 Ch.D. 184; 4 T.L.R. 127.
[1] (1879) 11 Ch.D. 918.
[2] Ibid. 926.

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"general. Of course it is a judicial discretion, and there must "be sufficient reason for exercising it; but what I intend to do "is to state one or two cases in which I have been asked to put "the rule in force, and what I have done, and why; and then I "shall state why I think I ought to put the rule in force in the "present instance." Sir George Jessel M.R. went on to give a number of examples in which he had allowed a preliminary point to be dealt with separately, or some particular point in the case to be dealt with separately, before the rest of the case, these being all instances where he was satisfied that there was a real probability that the direction that that particular issue should be heard would one way or the other dispose of the action.

In that particular case, which had arisen out of an action in respect of frauds in relation to the promotion of a company, Sir George Jessel M.R., at the instance of the plaintiffs, directed, as I understand it, that the issue whether two particular persons concerned in the affairs of the company were promoters of the company should be tried first; but that direction was only made upon terms that the plaintiffs should give up any other cause of action against those two defendants which was not covered by the issue directed to be tried and also undertake to consent to the discontinuance of such portion of the action as and when the court should direct. So that was a very different case; but it is useful as showing, first, that no general rule ought to be laid down to define the circumstances in which orders of this sort ought to be made and, secondly, that, without attempting to lay down any general rule, the kind of case in which an order of that sort can usefully be made is a case in which the matter directed to be tried first will, when decided one way or the other, really be likely to dispose of the case.

I only intend to refer to one other of the authorities under Ord. 36, r. 7. That is *Smith & Co.* v. *Hargrove & Co.*,[3] and the headnote, I think, gives a fair example of one kind of case where an order such as the order made here is appropriate. The headnote says: "Where liability and also the amount of damages are "disputed in an action, and the question as to the amount of "damages is one of such detail or nature that it probably will "be referred to some other tribunal than a jury, it is a proper "exercise of discretion under Ord. 36, r. 8, to order the question "of liability to be tried, and the question of damages to be "postponed until afterwards." There seems to have been a renumbering of the rules, because I see it is said in argument[4] that *Piercy* v. *Young*[5] was decided on the former Ord. 36, r. 6, "which is almost identical with the present r. 8 of Ord. 36, "under which the master's order was made." So that what was r. 6 appears to have become r. 8 and now to be r. 7.

That being an example of the type of case that can suitably be dealt with in the way in which the judge thought this case

[3] (1885) 16 Q.B.D. 183.
[4] Ibid.
[5] (1880) 15 Ch.D. 475.

could be dealt with, I add that, generally speaking, an order such as this ought not to be made unless there is on the pleadings a clear line of demarcation between issues bearing on liability and issues bearing on quantum of damages. It is on that aspect of this matter that I feel difficulty. To put it at its shortest, the action is one in which the Polish company claims against the British company damages for breach of contract. The contract is alleged, repudiation is alleged and the Polish company's election to treat the contract as discharged by repudiation is alleged. It may be said that nearly all the other issues go to quantum of damages. Once the breach of contract is established liability is established for the damages, whatever they may be, which have flowed from the breach, and the remaining issues may all, in a sense, be said to be directed to the question of quantum.

Looking at the statement of claim here from that point of view one finds first an allegation in paragraph 1 that the Polish company are a corporation maintained by the Polish Republic for the purpose of purchasing industrial plant to be used by the Central Steel Board. That might or might not be said to be an allegation directed to liability; but it might well be said to affect the quantum of damages, inasmuch as if the Polish company purchased plant that was not for their own use, they might make no loss if the plant was not supplied. Then one has the allegations in paragraphs 3 and 7, which allege certain knowledge on the part of the British company, namely, that the Polish company required these installations for transfer to and use by the board and that the annual production of steel therefrom was to be about 600 tons in one case and 450 tons in the other case. Both those two paragraphs may, I suppose, be said to go to quantum of damages. The point of alleging that the British company knew these matters would be, I take it, to seek to hold them liable for loss based on an output of 600 tons or 450 tons, as the case may be, on the principle of *Hadley* v. *Baxendale*.[6] Then paragraph 13 propounds the alternative methods of measuring damage, that is, either by production or by the increase of cost incurred in purchasing comparable plant; and paragraph 14 alleges that "alternatively the board has suffered the said loss and damage "and the plaintiffs will have to make the same good to the "board." That, again, in a sense, might be said to go to liability, for it embraces the question whether the British company are liable to the Polish company for damage suffered by the board. It raises also the question whether the Polish company themselves are under any liability to the board. Nevertheless, it could also be said to go to the quantum of damage. If the Polish company were under no liability to the board then the damage the Polish company would have suffered under this head would perhaps be 40s. only, whereas if they were liable to the board, or

[6] (1854) 9 Exch. 341.

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at all events if they were, to the knowledge of the British company, under a liability to the board, the quantum of damages would, I suppose, be such as to include the damage suffered by the board which the Polish company had to make good. Then there is an allegation in paragraph 15 that the shipments made of parts of the first and second installations, without completion of them, were valueless. That, I suppose, might be said to go to quantum of damage inasmuch as it is saying that no sum should be set off against the Polish company's loss on the strength of the value of the partial deliveries.

There are thus in this pleading, as it seems to me, several allegations which are on debatable grounds as regards distinguishing between liability and quantum of damage. These same allegations, or some of them, seem to me to raise issues of fact which would more suitably and conveniently be tried by the judge at the trial in the ordinary way than made the subject of a reference. That, in my view, applies to paragraph 3 and paragraph 7 of the statement of claim, those being the paragraphs which allege that the British company knew about the proposed transfer to and use by the board of the installations and as to the tonnage of the output of steel therefrom. It seems to me that those issues would be more suitably dealt with at the trial in the ordinary way. It seems to me also that the allegations as to the relationship between the Polish company and the board made in paragraphs 1 and 14 of the statement of claim are likewise matters more suitable to be dealt with by the judge than by an official referee. These matters seem to me to be likely to raise questions possibly of some difficulty and complication as to the relationship under Polish law of the Polish company and the board.

Arising out of the various allegations to which I have referred there is a question which at some time will have to be dealt with by somebody, and that is the question raised in paragraph 13 as to the proper principle to be applied in assessing the damages. That, I suppose, would turn, inter alia, on whether the Polish company were held to have established paragraphs 3 and 7 of the statement of claim. I think a question of general principle such as that is more suitable for the judge at the trial to determine than for a reference to an official referee.

I would further observe, as regards the questions of fact which I have noticed and characterized as being in a debatable area, that where there is an intricate question of fact and it is decided at the trial in the ordinary way then the dissatisfied party has the right of appeal to this court; but, as I understand the position, the decision of an official referee on questions of fact is final; there is no appeal from him to this court except on a question of law. So far as these paragraphs involve questions of law, it seems to me, again, that it would be better dealt with by the judge at the trial. The residuum, which would more conveniently and quickly be dealt with by an official referee,

consists, to my mind, of the calculations and investigations into figures and matters of detail, which would have to be performed on a considerable scale in order to work out the correct figure of damages after all the facts have been ascertained and the principles to be applied have been laid down.

For the reasons which I have endeavoured to state (and I state them with diffidence, as I am differing from the view taken by Devlin J. in the exercise of his discretion) I do not think that this is a case in which the questions of liability and questions of quantum ought at this stage to be separated for the purposes of trial. It seems to me that the line of demarcation between these two types of issue is not sufficiently defined in the pleadings, and it may not at this stage be possible sufficiently to define it to make it practicable for a division to be effected. It would be highly inconvenient if the parties went before the court for the trial of the issue of liability and there ensued a difference, perhaps an irreconcilable difference, in their respective views as to where the judge's jurisdiction was to end for the purposes of that particular hearing. For these reasons, as I have said, I do not consider that the direction given in paragraph 1 of the order ought to have been made; and, in my judgment, the order of Master Clayton on that part of the application should be restored.

Mr. Lyell also objected to the limitation on discovery imposed by the second paragraph of the order, and he did so mainly on the novel and interesting ground that, if discovery bearing on quantum of damage was restricted, he would be unable to avail himself effectively of the privilege of payment into court. That is an argument which on its merits would have appealed more strongly to me if the British company had in the early stages of this action, which began on June 11, 1951, displayed a greater sense of urgency with regard to discovery. However, the point is a new and interesting one on which I find it unnecessary today to express any opinion, for it was, I understood, agreed that, if the first part of the order was discharged, the direction as to the limitation of discovery should go with it. I understand that to have been said on the ground that a departure from the general order for discovery originally made could only be justified as a direction ancillary to another order under Ord. 54, r. 9. Be that as it may, the parties were agreed that the provision for discovery should go with the other part of the order if it was discharged.

For these reasons I would allow the appeal.

HODSON L.J. I agree, and have nothing to add.

Appeal allowed.

Solicitors: *Linklaters & Paines; Harold Miller & Fraser.*

E. D.

[COURT OF APPEAL.]

C. A. 1956 *April* 27.

Denning, Birkett and Parker L.JJ.

*FRANK W. CLIFFORD LTD. *v.* GARTH AND ANOTHER.

[1954 F. 1953.]

Building — Licence — "Cost-plus" basis — No licence issued — Work executed in excess of free allowance—Right of contractors to recover up to limit of free allowance.

In 1954 the plaintiff contractors agreed with the defendant owners of premises, which were in a poor state of repair, to execute certain works converting the premises into a coffee bar and restaurant together with whatever work of strengthening and repair might be found necessary as the work progressed, the payment for the work being effected on the "cost-plus" basis.

No building licence was issued; at the time that the work was executed it was lawful, under the provisions of the Control of Building Operations (No. 19) Order, 1953, to execute up to £1,000 of licensable work in 1954 on any one property. On the refusal by the defendant to pay, on the ground that the work, the cost of which exceeded £1,000, was wholly illegal:—

Held, that in a contract of such a nature where the work to be done and the final cost could not be foreseen, there was nothing unlawful until the free limit was exceeded, so that the plaintiffs were entitled to recover any amount properly within that limit.

Semble, that an entire contract to execute for a lump sum of over £1,000 a single and indivisible work without obtaining a licence would have been wholly illegal.

Decision of Harman J. affirmed.

APPEAL from Harman J. (sitting as an additional judge of the Queen's Bench Division).

In 1954 the first defendant, who was the owner of certain premises in Shepherd Market, W., engaged the plaintiffs, a firm of builders, to carry out certain work on the premises, which was done between April 3 and July 11 of that year. During that period the provisions of regulation 56A of the Defence (General) Regulations, 1939, regarding the control of building operations were in force, but by virtue of article 3 of the Control of Building Operations (No. 19) Order, 1953, it was permissible to execute licensable work on any single property in the year 1954 to the extent of £1,000 without obtaining a licence.

The first intention of the defendant was to construct a coffee bar on the ground floor, but she later decided also to instal a restaurant in the basement. It was found that the premises were in a bad state of repair, and, in the result a substantial amount of strengthening and reconstruction had to be done, which was carried out by the plaintiffs under the supervision of the defendant's architect. It was agreed, as the amount of the work necessary to be done could not be foreseen, that the plaintiffs should do whatever was necessary, being paid on a "cost-plus" basis. In the result, the total value of the work executed, some of which did not require a licence under the

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regulations, was £1,911 1s. No building licence had been obtained.

The defendant paid a certain sum on account, but disputed the balance. In an action brought to recover the balance of £1,324, the defendant contended that as there was no building licence in force, and as the work done had exceeded the free limit of £1,000, the plaintiffs' claim was void for illegality. Harman J. held that the plaintiffs were entitled to recover in respect of certain items which were non-licensable under the regulations, and in respect of licensable work up to the limit of £1,000; he gave judgment for £1,078, comprising (a) £1,000 in respect of licensable work, less £146 licensable work previously done on the premises by other contractors, and (b) £224 in respect of non-licensable work. The defendant appealed as to the £854 awarded for licensable work, and as to the quantum awarded in respect of one of the non-licensable items.

J. T. Molony Q.C. and *L. J. Belcourt* for the defendants.
J. C. Lawrence for the plaintiffs.

Cases cited in argument: *Bostel Bros. Ltd.* v. *Hurlock* [1]; *Jackson, Stansfield & Sons* v. *Butterworth* [2]; *Dennis (J.) & Co. Ltd.* v. *Munn* [3]; *Young* v. *Buckles* [4]; *Muir* v. *James* [5]; *Brewer Street Investments Ltd.* v. *Barclays Woollen Co. Ltd.* [6]; *Strongman (1945)* v. *Sincock.* [7]

DENNING L.J. In 1954 the limit of building work that could be done without licence was the sum of £1,000. If a builder, householder or architect did building work in excess of the free limit of £1,000, without a licence, he was guilty of an offence.

We are here concerned with premises Nos. 31 and 33 Shepherd Market in the West End. A Miss Susan Garth had the idea of turning the ground floor into a coffee bar. She met an architect, Mr. Sanderson, who thought it was a good idea, and he acted for her in the work. It was not a work which could be designed and planned beforehand; the amount of work could only be ascertained from time to time as the alterations were made. After the builders, Clifford Ltd., had started the work and got on with the coffee bar, Miss Garth decided it would be a good thing to make a restaurant below; and, when they got below into the basement, it was found out that, in order to make the structure safe and stable, even more work had to be done. All those works would have to be done within the free

[1] [1949] 1 K.B. 74; 64 T.L.R. 495; [1948] 2 All E.R. 312.
[2] 64 T.L.R. 481; [1948] 2 All E.R. 558.
[3] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616.
[4] [1952] 1 K.B. 220; [1952] 1 T.L.R. 271; [1952] 1 All E.R. 354.
[5] [1953] 1 Q.B. 454; [1953] 2 W.L.R. 423; [1953] 1 All E.R. 494n.
[6] [1954] 1 Q.B. 428; [1953] 3 W.L.R. 869; [1953] 2 All E.R. 1330.
[7] [1955] 2 Q.B. 525; [1955] 3 W.L.R. 360; [1955] 3 All E.R. 90.

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limit or else within a licence. In addition, there was a large amount of other work to be done, such as laying linoleum and putting in shelves and tables, which would not need a licence at all.

In the upshot the total bill of the builders came to the sum of £1,911 1s. A certain amount was paid on account, but, when the builders sued for the balance, Miss Garth raised the defence of illegality, saying that the free limit was £1,000, and the builders had acted unlawfully in doing the work.

There were two items of work previously carried out on these premises by other contractors—plumbing work and electrical work—together amounting to £146, which used up part of the free limit. The only free amount remaining available for these premises for Messrs. Cliffords was £854. The main question before us is whether that £854 can be recovered. Miss Garth says that, if the builders break the law and exceed the free limit, they cannot recover anything, not even the free amount, because the whole is unlawful.

There have been many cases in these courts where work has been actually licensed. In those cases it has been held that, if work is done in excess of the licence, it is only the excess which is unlawful. The builder can recover payment for the licensed figure, but not for the excess. Further, the builder cannot in a single contract add on the free limit to the licence, so as indirectly to increase the licensed figure. We have now a case, I think for the first time, where there is no licence at all, but only a free limit.

I would be disposed to agree that, if there was an entire contract for a lump sum, say, of £1,500 or £2,000 for a single and indivisible work, and a builder went on with that work without a licence at all, it would all be illegal and the whole would be irrecoverable; but that is not this case. This is a case where the price could not be ascertained beforehand at all; where the work was put in hand without anyone knowing what it would cost. It was a contract for work to be done as required. The price was not stipulated; that could not be fixed. The work was done on a "cost-plus" basis, sometimes called a cost of works basis. In a contract of that kind, when no one knows what the final figure will be, it is, I think, perfectly lawful for the builder to go on with the work, using the full extent of the free limit. It does not become unlawful unless and until he exceeds the free limit. So in this case, right up to the time when the £1,000 was reached the work was perfectly lawful. It only became unlawful in respect of the excess. For the excess, therefore, the builder cannot recover; but for every amount that comes properly within the free limits he can recover. That is what the judge held. I find myself in entire agreement with him.

Mr. Molony, for the defendants, referred us to regulation 56A

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and, in particular, to paragraph 6 (E),[1] seeking to show that, on the true construction of the regulations, if the free limit is exceeded, the whole is unlawful. I do not agree with that contention. The position when there is a free limit is the same as when there is a licence. It is only the excess that is unlawful.

[His Lordship then dealt with the disputed item, and held that the appeal failed on this point.]

I, therefore, would be in favour of dismissing the appeal.

BIRKETT L.J. I agree with the decision announced by my Lord, and I also agree with the reasons he has given for that decision, and I do not think I can add anything useful to what he has said. I do agree that this appeal ought to be dismissed.

PARKER L.J. I also agree.

Appeal dismissed.

Solicitors: *Beach & Beach; Wilkinsons.*

F. R. D.

[1] Defence (General) Regulations, 1939, reg. 56A (as amended), para. 6 (E): "For the purpose of the last "foregoing four paragraphs" [which deal with the assessment of fines on the basis of the amount of work unlawfully done] "the cost of the execution "of any operation or the carrying out "of any work shall be reduced by the "amount of any cost the incurring "of which was lawful by virtue of "the proviso to paragraph (1) or "paragraph (2) of this regulation or "by virtue of any licence or authorization in force under this regulation, and the cost of the execution "of any part of an operation or the "carrying out of part of any work "shall be reduced proportionally."

[CHANCERY DIVISION.]

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April 13.
Harman J.

* *In re* GRESHAM'S SETTLEMENT. LLOYDS BANK LTD. *v.* GRESHAM AND OTHERS.

[1956 G. No. 168.]

Power of Appointment—Unascertainable class—Power not coupled with duty—Settlement—Discretionary power—Uncertainty—Power to pay income of trust fund in certain events to specified persons and classes of persons—One class not ascertainable—Impossibility of identifying a given person as member of the class—Validity of power.

A marriage settlement after conferring a protected life interest in the income of the trust fund on the husband provided that during the parts (if any) of the life of the husband (sic) during which he

[Reported by Miss JENNIFER L. WEST, Barrister-at-Law.]

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should not be entitled to receive the income of the trust fund or during such shorter period as the trustee bank should in its absolute discretion think fit the bank should pay all or any part of the said income to or apply the same for the maintenance and personal support or benefit of all or any one or more of the following persons, namely, the husband and his wife, if any, and his children or remoter issue and any persons in whose house or apartments or in whose company or under whose care or control, or by or with whom the husband might from time to time be employed or residing in such proportions and manner as the bank should in its absolute discretion from time to time think proper.

On the hearing of a summons taken out to ascertain whether the discretionary power was valid or void for uncertainty:—

Held, that the provision was void for uncertainty; it was a single unseverable power and owing to the ambiguity of its expression and in particular the use of the word "residing" there could be a number of persons of whom it could not be postulated whether they were or were not within the designated class, and the uncertainty so created avoided the whole provision.

In re Gestetner Settlement [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150 and *In re Coates* [1955] Ch. 495; [1954] 3 W.L.R. 959; [1955] 1 All E.R. 26 distinguished.

ADJOURNED SUMMONS.

A settlement dated June 1, 1936, and made between the first defendant (hereinafter called "the husband") of the first part, Lady Rosemary Constance Ferelith Gresham, his wife, of the second part, and Lloyds Bank Ltd. (hereinafter called "the "bank") of the third part, after reciting that previous to their marriage it was agreed that such settlement should be made and that certain investments and property had been transferred to the bank, provided, inter alia, as follows:

By clause 4 the bank was to pay the income of the trust fund (i.e., the said investments and property and such other investments and property as should for the time being represent the same) to the husband during his life or until some act or event should be done or happen whereby the said income or some part thereof if belonging absolutely to him would become vested or charged in favour of some other person.

By clause 6 (i) during the parts (if any) of the life of the husband during which he should not be entitled to receive the income of the trust fund, or during such shorter period (either continuous or discontinuous) as the bank should in its absolute discretion think fit, the bank should pay all or any part of the said income to or apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the others of the following persons, namely the husband and his wife (if any) for the time being and his children and remoter issue for the time being in existence whether minors or adults, and any persons in whose house or apartments or in whose company or under whose care or control or by or with whom the husband might from time to time be employed or residing and the other persons for the time being entitled or interested (whether

absolutely, contingently or otherwise) to or in the trust fund under the trusts therein contained to take effect after the death of the husband in such proportions and manner as the bank should in its absolute discretion from time to time think proper.

By clause 6 (ii) subject to the discretionary trust or power contained in clause 6 (i) aforesaid the bank should hold the income or so much thereof as had not been applied under the trust or power aforesaid upon the trusts and for the purposes upon and for which the said income would for the time being be held if the husband were then dead.

By clause 7 (ii) the husband might by will or codicil appoint to or for the benefit of any woman who might become his widow an interest for her life or for any less period in the whole or any part of the trust fund.

By clause 8 after the death of the husband and subject to clause 7 the bank should stand possessed of the capital and future income of the trust fund upon such trusts for the children of the marriage of the husband and Lady Rosemary as were therein declared.

By clause 10, if there should be no child of such marriage, then subject to the trusts powers and provisions thereinbefore declared and contained and to the powers thereby or by law vested in the bank and to every or any exercise of such representative powers, the bank should stand possessed of the trust fund and the income thereof in trust for the husband absolutely.

By clause 11 the husband might after any subsequent marriage by will or codicil revoke the trusts powers and provisions contained in clause 8 and appoint that the trust fund should after his death be held upon such trusts and subject to such powers and provisions and generally in such manner for the benefit of any children or remoter issue of such subsequent marriage in all respects as he should think fit.

Lady Rosemary died on May 19, 1944, and there were no issue of that marriage. In 1948, the husband married his present wife, Diana Gresham, the second defendant, and there were issue of that marriage two children, namely the third and fourth infant defendants, Frank James Gresham and Ann Gresham.

The husband wished, in the events which had happened, to put an end to the settlement. In the circumstances the bank submitted to the court the question whether clause 6 (i) of the settlement was valid, or whether its provisions were void for uncertainty, as that clause remained the only limitation that stood between the husband and the express trust in his favour of both capital and income contained in clause 10.

Accordingly, by this summons, to which the defendants were the husband, his present wife and their two infant children, the bank asked, inter alia: whether the discretionary trust or power set out in clause 6 (i) of the settlement was valid or was void for uncertainty or otherwise.

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J. A. Brightman for the plaintiff.
G. A. Rink Q.C. for the first and second defendants.
John Bradburn for the third and fourth defendants.

Cases cited in argument but not referred to in the judgment: *In re Coxen* [1]; *In re Gape.* [2]

HARMAN J. The husband entered into a settlement in June, 1936, in pursuance of articles made prior to his first marriage. It was a marriage settlement, and in a great many respects it is in ordinary form. The wife of that marriage died in 1944, sine prole. The husband remarried in 1948, and has of that second marriage his wife (the second defendant), and two infant children (the third and fourth defendants). He is desirous of putting an end to the settlement if he can. The bank is, in the circumstances, well entitled to come to the court and ask for its directions. The first question which it asks is whether a so-called protective trust (I call it that without prejudice) is valid. The importance of that matter is not that the husband has committed any act of forfeiture, but that it is the only limitation that now stands between him and an express trust in his own favour in the events which have happened, there being neither wife nor issue of his first marriage. There is a power in the settlement to resettle on his second marriage, but only by will. So far as I know, the husband has not attempted to deal in any way with the ultimate remainder by which the fund reverts to him, it having been in origin his fund.

By the settlement the husband assigned certain interests to the bank, all now in possession and of a value of something over £50,000; the income is payable to the husband during his life until the happening of some event of forfeiture such as would prevent him giving a good receipt for the income. This is an ordinary forfeiture clause. The life interest, therefore, runs on until an act of forfeiture happens and then ceases.

The clause on which the doubt arises is intended to fill, or partly to fill, the gap which remains open between the act of forfeiture and the death of the husband when, in the events which have happened, he will become absolutely entitled to the fund subject only to his power to resettle by will on the wife and children of the second marriage. The clause is in these words: "During the parts (if any) of the life of the husband during which "he shall not be entitled to receive the income of the trust "fund"—that is an inaccurate phrase: if he ceases to be entitled during his life to the income of the trust fund he ceases once and for all, and there can only, therefore, be one part of his life during which that will happen—and then it goes on: "or "during such shorter period (either continuous or discontinuous)

[1] [1948] Ch. 747; [1948] 2 All E.R. 492.

[2] [1952] Ch. 743; [1952] 2 T.L.R. 477; sub nom. *In re Gape's Will Trusts* [1952] 2 All E.R. 579.

" as the bank shall in its absolute discretion think fit the bank " shall pay " the income or apply it in a way to which I will come. The obligation, therefore, although in terms it is imperative, is only for the period of forfeiture or during such shorter period, continuous or not, as the bank think fit, and that (as is conceded) turns what would be a trust into a mere power in the bank which it is not bound to exercise over any period when it does not choose so to do. There is a power, therefore, after a forfeiture has been incurred, to pay or apply income or some part of it as follows. If the power be not exercised, the subsequent limitations would come into force.

The objects of the power of application are stated in a strangely tortuous clause. The application is to be " for the " maintenance and personal support or benefit of all or any one " or more to the exclusion of the others " of the objects (that is to say, I think, that individuals alone and not juridical persons can qualify for benefit), first " the husband "; second, " his " wife (if any) " (that is, the second defendant, at present); third, his " children and remoter issue for the time being in " existence " (that is, at present, the third and fourth defendants).

So far there is no difficulty. Then, I leave out the controversial passage for the moment, the clause goes on: " and the " other persons for the time being entitled or interested . . . to " or in the trust fund under the trusts herein contained to take " effect after the death of the husband." Those other persons have no existence so far as they are not already comprehended in the class of wife, children and remoter issue in the earlier part. So far there is a power to support any wife or any child or remoter issue for the time being in existence. Then, there are added these words, " and any persons in whose house or apartments or " in whose company or under whose care or control or by or with " whom the husband may from time to time be employed or " residing."

What the draftsman was trying to do I do not know—presumably trying to say shortly what needs saying at very much greater length—but if one reads it literally, " any persons in whose " company the husband may be employed " (whatever that may mean) would be eligible; or " under whose care he may be " employed "; or " with whom he may be employed," or, apparently, " by whom he may be residing," whatever that may mean. Mr. Bradburn says, however, that this is not to be construed strictly, but treated as a protective trust intended to benefit the principal beneficiary, namely, the husband, and given a benevolent construction.

I am inclined to accede to that view and to read it like this, " and any persons by or with whom the husband may from " time to time be employed or residing, whether in their house " or apartments, or in their company or under their care and " control." Supposing that it means that, is it possible to say

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who is an object of this benevolence? It seems to me that the difficulty comes when one gets these words, "in whose "company" he is "residing," or "with whom" he is "residing." What does "residing" mean for this purpose? Is he to reside for a week, or a month, or a year? Is he permanently to reside? It does not say so. If it had said "permanently "reside" I could see that might be much easier.

Who is it that is envisaged by the instrument as an object of the possible bounty of the bank? I confess that I do not find it possible to say with any certainty. It seems to me, giving the most benevolent meaning to the clause that I can, that there must be a number of persons, or may be a number of persons, of whom it could not be postulated that they were (or were not) within the dragnet of this rather unusually constructed clause. The question is whether that is fatal to the clause. I must hold that it is, because of my decision in *In re Gestetner*.[1] That was a case of a very large class, but it was conceded that the class, though large, was not one as to the limits of which there was any doubt: one did not know all the people who were in it, but one could postulate of any given person whether he were or were not; and I appear to have said that that made all the difference. I did decide that case on the ground of certainty. I said that it was sufficiently certain if an object could be certainly identified—it being a power, be it said, not accompanied by a duty, a power collateral, as is this power here. But the bank to whom such a power is given does have this to consider—whether it will exercise the power in favour of any postulated person: if the bank is left uncertain whether the person is an object or not, then there does seem to me to be imported that very vice of uncertainty which was urged upon me in *In re Gestetner* [2] and which in that case I found myself able to reject.

That case has been applied lately by Roxburgh J. in *In re Coates*.[3] I do not propose to go into the case; it was a question of the testator empowering his wife to nominate certain friends of his as objects of bounty to some limited extent. The judge founded himself on *In re Gestetner*,[4] and came to the conclusion that he could see plainly enough what the limits of the possible category were, and held that the gift was good. That was a very strong decision. I do not dissent from it in any way but it did depend ultimately on the maxim id certum est quod certum reddi potest: the wife could, by her evidence, supply the court, if necessary, with enough facts to make it clear whether a man ought to rank as a forgotten friend of the testator or no. I do not feel here that the court could get that assistance.

Mr. Bradburn argued, nevertheless, that as this is only one bad category among three or four good ones, one should therefore, if one finds it too vague to enforce, reject the bad category and

[1] [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150.
[2] Ibid.
[3] [1955] Ch. 495; [1954] 3 W.L.R. 959; [1955] 1 All E.R. 26.
[4] [1953] Ch. 672.

leave the rest standing, since they consist of perfectly ascertainable persons and, in fact, there are four of them in existence, namely, the four defendants. The whole edifice, he argued, need not be destroyed because it has a bad brick in it. I think that one must destroy it because this is not a series of different powers, but one power to benefit a certain category of people. It does not matter (as *In re Gestetner*[5] showed) how wide the category be, but its limits must be marked, and if a portion of the category be unmarked one cannot postulate that there is any end to it or any limit to the bank's discretion.

The vice of the phrase which I have read must taint the rest with that degree of uncertainty which obliges the court to say that the whole clause is void and of none effect. I am unwilling to come to such a conclusion, but the clause seems to me to produce so many questions that no adequate meaning can be applied to it.

Declaration accordingly.

Solicitors: *Fladgate & Co.*

[5] [1953] Ch. 672.

[CHANCERY DIVISION.]

* *In re* WEINER, DECD. WYNER *v.* BRAITHWAITE AND OTHERS.

[1954 W. No. 291.]

Trust and Trustee — Company — Shares vested in trustees — Trust for sale — Shares in private company — Controlling interest held by trustees — Appropriation in respect of shares of residue — Control of company—Right of beneficiary absolutely entitled to transfer of his proportion of appropriated shares of company—Opposition of beneficiaries entitled to a settled share of residue — "Special "circumstances."

A testator devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion. He directed that, upon the death of his widow, his estate should be divided into four shares, certain of which were settled. His personal estate consisted of shares in a private limited company in which his estate held at all times a controlling interest.

In the events which had happened, the plaintiff had become absolutely entitled to 45 per cent. of the income and the capital of the residuary personal estate: certain other beneficiaries, having a settled share therein, would eventually become entitled to 55 per cent.

The plaintiff claimed an order directing the trustees to pay and transfer to him the said 45 per cent. share to which he was entitled; his application was opposed by those interested in the settled share

[Reported by Miss JENNIFER L. WEST, Barrister-at-Law.]

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who contended that the trustees should be forbidden to transfer the plaintiff's share of the estate as it was desirable in the interests of the beneficiaries as a whole that the trustees should retain control of the company by keeping in their own hands all the shares:—

Held, that the plaintiff was entitled to an order directing the trustees to transfer to him 45 per cent. of the residuary personal estate since those who opposed his claim had not adduced any such special circumstances as to defeat the right of a beneficiary entitled indefeasibly in possession to claim his share of the trust property.

In re Marshall [1914] 1 Ch. 192 and *In re Sandeman's Will Trusts* [1937] 1 All E.R. 368 followed.

ADJOURNED SUMMONS.

Joseph Weiner, by his will dated February 28, 1940, devised and bequeathed the residue of his real and personal estate to trustees, namely, his wife, Joan Miriam Isa Elizabeth Weiner (who at the date this summons was taken out had remarried and become Lady Braithwaite) and Reginald Charles Bromhead (hereinafter called "the trustees") upon trust for sale and conversion with power to postpone such sale and with power, inter alia, to invest in the private limited company known as J. Weiner Ltd. (thereinafter and hereinafter called "the "testator's company").

The testator directed his trustees to pay to his said wife during her life in every year either 35 per cent. of the gross income of his trust fund (i.e., the real and personal residuary estate hereinbefore referred to which included 20,000 ordinary shares in the testator's company) for such year or else if this should be the greater the sum of £3,000 so long as 25 per cent. of the shares in the testator's company were retained by the trustees and the sum of £2,000 thereafter, the said sums respectively to constitute if necessary charges upon capital. He then directed that any surplus income after such payment should be divided between four funds (thereinafter and hereinafter defined) and paid as to two-thirteenths to those entitled to the first fund, as to four-thirteenths to those entitled to the second fund, as to two-thirteenths to those entitled to the third fund, and as to five-thirteenths to those entitled to the fourth fund. After the death of his said wife, the testator directed the trustees to divide the trust fund into four parts (the funds hereinbefore referred to) and to hold the first fund of 45 per cent. of the trust fund in trust for Patrick Denis Wyner, his adopted son (hereinafter called "the plaintiff") upon his obtaining 21 years absolutely: to pay the income of the second fund of 20 per cent. of the trust fund to John Weiner, his son (hereinafter called "the third defendant"), and after his death to hold the income and capital thereof for his children upon their obtaining 21 absolutely: to hold the income and capital of the third fund of 10 per cent. of the trust fund upon trust for Millicent Mesloh, Marcelita Weiner and John Weiner, the children of the third defendant (hereinafter called "the fourth, fifth and sixth "defendants") upon their attaining 21 absolutely: to pay the

income of the fourth fund of 25 per cent. of the trust fund to certain employees of the testator's company, namely, Charles William James, Victor Thomas Farrant and Francis Spaul Ferris (hereinafter called "the seventh, eighth and ninth defendants") for so long as they should be employed by the testator's company and after the death of all of them or upon failure of the aforesaid trusts, the capital to go over and to accrue to the third fund.

The testator died on July 26, 1941.

By a deed of assignment dated July 25, 1952, the testator's widow assigned all her beneficial interets in the trust fund to the plaintiff to hold the same unto him for his own benefit absolutely.

The said deed accelerated the division of the trust fund and the interests in remainder, and the plaintiff became entitled thereby to 45 per cent. of the capital of the trust fund absolutely. He was entitled by virtue of his interest under the will to 10 per cent. of the income and by virtue of the said deed to 35 per cent. of the income subject only in respect of this 35 per cent. to his rights against the capital of the trust fund hereinbefore recited.

The residuary personal estate consisted at the date of the summons of 125,000 ordinary shares in the testator's company, the increase in the number of shares held by the estate being the result of bonus issues. The estate at this date held 75 per cent. of the issued capital of the testator's company.

The plaintiff took out the present summons to have determined whether or not he was entitled to an order directing the trustees to pay and transfer to him 45 per cent. of the residuary personal estate of the testator.

The trustees did not oppose his claim upon the plaintiff agreeing to release any rights which he might have against the capital of the residuary personal estate by virtue of the said deed of assignment. The seventh, eighth and ninth defendants, also, who were interested only in income of the estate, did not oppose his claim.

The third, fourth, fifth and sixth defendants, who had a settled interest in the estate and would between them eventually become entitled to 55 per cent. of the capital of the residue opposed the claim and contended that the trustee should refuse to make such transfer having regard to the interests of the beneficiaries as a whole.

Harold Lightman Q.C. and *A. C. Sparrow* for the plaintiff.

G. D. Johnston for the trustees.

R. L. Edwards Q.C. and *A. F. Maurice Berkeley* for the third, fourth, fifth and sixth defendants.

Ian Campbell for the seventh, eighth and ninth defendants.

HARMAN J. By this summons the plaintiff, the adopted son of the testator, asks for a direction to the trustees to transfer to him as the person absolutely interested 45 per cent. of the residuary estate of the deceased. This estate consists

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almost entirely so far as liquid assets go of shares in a private company in which the estate now holds 75 per cent. of the issued capital. The estate has throughout controlled the company, and it could, no doubt, under the law deal with it at will.

The opposition to the plaintiff's claim, as I understand it, is that it is said on behalf of the third, fourth, fifth and sixth defendants, who between them have a settled share in the estate and will eventually become entitled to the other 55 per cent. of these shares, that 55 per cent. plus 45 per cent. of the shares in a private company are not so valuable severally as they are when they are put together; and, therefore, it is right that the trustees should be enjoined and forbidden to distribute these shares in the interests of the beneficiaries as a whole. The plaintiff, of course, is entitled to take his own view about his 45 per cent. interest, but those holding the other 55 per cent., or rather the third defendant, who is life tenant of some portion of that interest, regards it as desirable that the shares should be retained by the trustees and not divided. The question is whether the plaintiff is entitled to be paid out as he claims.

It is necessary first to reach the conclusion that the plaintiff has an indefeasible right to his portion of the estate.

[His Lordship reviewed the facts and came to the conclusion that the plaintiff had an indefeasible right to his portion of the estate subject only to certain potential rights which he might have against capital and which the plaintiff, therefore, agreed to release. His Lordship continued:] The real defence is that, these being shares in a private company, they ought not to be distributed, because it will injure the settled 55 per cent. It will equally injure, I suppose, the unsettled 45 per cent. but Mr. Edwards, on behalf of the former, said that whatever the plaintiff thought about the distribution, those entitled to the settled share would like the whole retained, and had a right to insist that they should be retained. Mr. Edwards relied first on *In re Kipping*,[1] which decided that, where an estate consisted of realty before 1925 a person was not entitled to have his undivided share handed over to him upon becoming absolutely entitled, because it was notorious that such a course was less advantageous than retaining the whole of the real property. It was not considered there, nor in the earlier case of *In re Horsnaill*,[2] whether there should be a right to have an appropriation.

However that may be, in the case of *In re Marshall*[3] it was said, and said quite clearly, in the Court of Appeal that the principle of *In re Kipping*[4] has no application to personal estate. *In re Marshall*,[5] I may say, was a case of the dividing of shares in a public company. Lord Cozens-Hardy M.R. said[6]: "Speaking generally, the right of a person, who is entitled

[1] [1914] 1 Ch. 62.
[2] [1909] 1 Ch. 631.
[3] [1914] 1 Ch. 192.
[4] [1914] 1 Ch. 62.
[5] [1914] 1 Ch. 192.
[6] Ibid. 199.

"indefeasibly in possession to an aliquot share of property, to "have that share transferred to him is one which is plainly "established by law." Then he said that that was not true in the case of real estate if the person were to take an undivided share. He continued: "But that doctrine, it seems to me, has "no application, apart from special circumstances, to personal "property."

Lord Cozens-Hardy then made certain observations about limited companies, and showed that the Court of Appeal in *In re Marshall* [7] did inquire into the circumstances of the company there in question. It was not a private company, and it was suggested to me that the Master of the Rolls at least hinted that it would have been a different matter altogether had the company been a private company, and he did say this [8]: "There "may be cases with reference to the particular position of a "company like this, at a particular time, which may justify the "trustees in exercising their discretion, if they can satisfy the "court that these special circumstances exist; but the case of "the present trustees is not put upon that ground at all."

In re Marshall [9] was essentially different from this case, in that the trustees were there insisting that, as they had a power to postpone sale, they were entitled to exercise that power willy nilly for the beneficiaries, and it was held that they were not. In this case the trustees have taken no such action. They say that they are quite willing to divide and do not seek to exercise their power of postponement in any way. The pressure comes not from the trustees, but from other beneficiaries.

Swinfen Eady L.J. said [10]: "This summons was taken out "by the trustees, and they make no case upon the facts that it "is expedient that they should be allowed to retain the shares "for some longer time, but they rely in their defence upon a "matter of law, their contention being that, having regard to the "true construction of the will, they are entitled to retain the "shares as long as they think fit," and he goes on to say that there has been no attempt to prove special circumstances.

Phillimore L.J. said [11]: "If there is such a right"—that is, to refuse to allow division—"it rests upon the duty of the "trustees to do their best for all the beneficiaries, it being their "consequential duty to keep as large a block of shares as possible "together so as to have large voting power."

Mr. Edwards put his case as high as this, as I think he must, and argued that in the case of any private company where the trustees held a control, no special circumstances need be adduced at all; the mere fact that a controlling interest was held and would not be held if the shares were to be divided was enough to make the court refuse to make the trustees divide. I cannot take that view at all. It would mean, in effect, that

[7] [1914] 1 Ch. 192.
[8] Ibid. 200.
[9] [1914] 1 Ch. 192.
[10] [1914] 1 Ch. 192, 201.
[11] Ibid. 202.

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there never could be a division, because that must always involve the loss of control. I cannot see that there is anything short of some special circumstances which would justify me in holding up these shares. The trustees have not come forward and said that there are good reasons why they do not wish to divide now, since they may be able to effect some scheme within the next year or so, and they happen to know that the plaintiff is opposed to the scheme. No special circumstances are made here. There are a certain amount of derogatory observations by the third defendant, in America, who says that he does not think very much of the plaintiff's application to business. These remarks seem to me to be entirely an impertinence on the part of the third defendant and to have nothing to do with the matter.

Even if I took a different view, I think that *In re Sandeman's Will Trusts* [12] would really carry the case the plaintiff's way. In that case there was a private company, and there was a power to retain the shares. The trustees did desire to retain them for the purpose of maintaining control of the company, and Clauson J. held that they had no right to exercise their power to postpone so as to keep the plaintiffs out of their rights. He said [13]: "I can conceive that there might be circumstances—"they would have to be very special—which would justify "the court in refusing to give effect to the plaintiffs' rights; "but I cannot find, on the evidence before me, anything "to suggest that such circumstances exist in this case." A little later he said [14]: "I cannot see that any harm will be done "to anybody by giving effect to the *prima facie* right of the "plaintiffs to have their shares, and the voting power on their "shares, in their own control."

It is said that there is a difference between the present case and *In re Sandeman*,[15] because here there is a trust for sale and in *In re Sandeman* [16] there was not; but, in my view, a person who has 45 per cent. of some shares subject to a trust for sale is entitled to say to a trustee: "Do not sell, hand me my "shares instead," the shares being things of themselves easily divisible and not at all the same as real estate, where there may be no such right.

Consequently, I am of opinion that the plaintiff is justified in calling on the trustees to hand him over his 45 per cent. of this estate, and I propose to direct the trustees to do so.

Order accordingly.

Solicitors: *Philip Conway, Thomas & Co.; G. A. Herbert; Canter & Martin; Wood & Sons.*

[12] [1937] 1 All E.R. 368.
[13] Ibid. 373.
[14] Ibid.
[15] [1937] 1 All E.R. 368.
[16] Ibid.

[COURT OF CHANCERY OF THE COUNTY PALATINE OF LANCASTER.]

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[1955 S. No. 6393 (T).]

Trade Union—Membership—Transfer of—Trades Union Congress principles for avoidance of disputes between affiliated organizations—"Bridlington Agreement"—Breach of agreement by union's admission to membership of person transferring from another union—Purported expulsion of members in compliance with award of T.U.C. disputes committee—Whether implied term of contract of membership of union that member shall conform to and union shall have right to implement lawful agreements of union.

Contract—Implied term — Trade union — Membership of trade union affiliated to Trades Union Congress—Whether term to be implied in contract of membership enabling union to comply with award of T.U.C. disputes committee—Contemplation of parties.

In 1939, at Bridlington, the Trades Union Congress, of which the defendant society and the Transport and General Workers' Union were affiliated organizations, reaffirmed and revised certain principles for the avoidance of disputes between affiliated organizations and adopted certain recommendations, collectively referred to as the "Bridlington Agreement," relating to the transfer of members from one union to another. In breach of the Bridlington Agreement the defendant society in 1955 admitted to membership the plaintiff and other registered dock workers in the port of Liverpool, where the T. & G.W.U. had formerly enjoyed an exclusive monopoly of the membership. The dispute consequently arising between the defendant society and the T. & G.W.U. was submitted to the arbitration of the disputes committee of the T.U.C. in accordance with its rules, and in June, 1955, the committee awarded that the defendant society should exclude from its organization all members recruited by it in certain ports, including Liverpool, since August 17, 1954. In order to implement the award the defendant society instructed its appropriate branch secretaries to inform its members affected by the award, of whom the plaintiff was one, that they were excluded from membership.

In an action by the plaintiff claiming, inter alia, a declaration that the purported expulsion was ultra vires, illegal, unconstitutional and void, the defendant society contended, inter alia, that the expulsion was valid by reason of an alleged implied term of the plaintiff's contract that the defendant society should have a right to comply with its lawful and proper agreements and had determined the plaintiff's membership in pursuance of that right and that there was a further implied term that the plaintiff should conform to the union's lawful and proper agreements:—

Held, granting the declaration, that the award of the disputes committee must be understood as requiring a lawful exclusion from membership which the purported expulsion of the plaintiff was not, for, in the circumstances of the case and since the plaintiff was unaware of the Bridlington Agreement at the time of his admission to membership, the alleged implied terms could not be imported into the plaintiff's contract.

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

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Dictum of MacKinnon L.J. in *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 227; 55 T.L.R. 611; [1939] 2 All E.R. 113 applied.

Held, further, that the Bridlington Agreement was a morally binding code of conduct regulating the relationship between trade unions and imposed obligations on the trade union as an entity and not upon the individual members.

ACTION.

The plaintiff, Francis Spring, a registered dock worker in the port of Liverpool, had since 1940, except for war service and a short period during which he was not working in Liverpool Docks, been a member of the Transport and General Workers' Union (hereinafter referred to as the T. & G.W.U.) which had a membership, excluding its railway members, of over 1¼ million. Until August, 1954, the defendant society, the other union to which stevedores and dockers belong, had a membership of a little under 7,000, confined to London and Rochester. The stevedore and docker members of the T. & G.W.U. were not only in London, where the two unions were in competition, but in all the other ports, and in those the T. & G.W.U. had a monopoly of membership.

Both unions were affiliated to the Trades Union Congress (hereinafter referred to as the T.U.C.) which, in 1924, had laid down certain principles for the avoidance of disputes between affiliated organizations in connexion with the transfer of members from one union to another. Those principles were reaffirmed and revised and certain recommendations were made by the Bridlington Congress of the T.U.C. in 1939, to which both unions were parties, which came to be generally referred to as the Bridlington Agreement. The principles and recommendations (set out in a pamphlet entitled "Relationships between unions," published by the T.U.C. in September, 1952, in which they are referred to as the "Bridlington proposals") provided, inter alia as principles, that a union should not accept a man into membership without inquiry of his present or former union, and that a member should not be allowed to escape his financial obligations by leaving one union while in arrears and joining another; and recommended, inter alia, that a union should not accept a member of another union where inquiry showed that he was in arrears with contributions, and should not start organizing activities at any establishment or undertaking in respect of any grade or grades of workers in which another union had the majority of workers employed and negotiated wages and conditions, unless by arrangement with that union.

On October 27, 1954, the defendant society, in default of its giving an undertaking to cease the organizing activities which had followed on the expression by dockers at Hull and Birkenhead of their dissatisfaction with the T. & G.W.U. and their desire to join the defendant society, was suspended from membership of the T.U.C. until the next annual congress. In November, 1954,

by a petition addressed to the defendant society and at a meeting, a large number of Liverpool dockers expressed a desire to join the defendant society. At first, recruiting in Liverpool took place on the basis that a recruit to be acceptable must be clear on the books of the T. & G.W.U. and must have notified that union of his intention to resign. Ultimately, however, resort was had to a rule of the T. & G.W.U. which provided that "any member "... exceeding thirteen weeks in arrears shall be deemed to be "no longer a member ..." and, thereafter, recruiting proceeded on the basis that a member of the T. & G.W.U. to whom the rule applied was no longer a trade unionist. It was upon this basis that the plaintiff was admitted to membership of the defendant society on April 2, 1955, his contributions to the T. & G.W.U. then being more than 13 weeks in arrears.

The dispute consequently arising between the T. & G.W.U. and the defendant society was, in accordance with the rules of the T.U.C., submitted to the arbitration of its disputes committee who upheld the contention of the T. & G.W.U. that the defendant society had accepted members in breach of the Bridlington Agreement, and awarded that the defendant society should exclude from its organization all members recruited by it in Liverpool and certain other ports since August 17, 1954. Thereafter, the acting general secretary of the defendant society on July 6, 1955, sent the following letter to the secretaries of the branches affected by the award: "Implementation of T.U.C. disputes committee "decision: I am to inform you that to comply with the accepted "decision of the T.U.C. disputes committee, you are instructed "... to inform members that from the date of this letter they "are all excluded from membership of the National Amalgamated "Stevedores and Dockers. You are ... not to accept any obliga- "tions or commitments, financial or otherwise, in the name of "the National Amalgamated Stevedores and Dockers as from the "above date." The plaintiff was duly informed of the terms of the letter, but he and others of the Merseyside dockers refused to consider themselves excluded and continued to carry on their trade union activities in the name of the defendant society as they had done before, except that they ceased sending any delegates or money to the London headquarters of the union.

The plaintiff brought this action claiming, inter alia, a declaration that the purported action of the executive committee or council of the defendant society in excluding or causing him to be expelled from membership was ultra vires, illegal, unconstitutional and void; a declaration that notwithstanding the purported exclusion or expulsion, he was and had always been a member of the defendant society since April 2, 1955, and was entitled to the benefits and privileges of such membership; and an injunction restraining the defendant society from preventing him from exercising his privileges and rights as a member of the defendant society. By his statement of claim the plaintiff alleged, inter alia, that the rules of the defendant society (registered on

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February 24, 1928) did not in the circumstances confer upon it any power to expel or exclude him from membership; and that the executive council of the defendant society in unlawfully purporting to exclude him from membership had placed his employment as a port worker in jeopardy.

By its defence the defendant society alleged that the plaintiff, by signing an acceptance form, made certain representations in reliance upon which he was admitted to membership, which representations were not true, whereby the defendant society was under a mistake of fact when the contract of membership was made. It was further alleged that the defendant society, as an affiliated member of the T.U.C., was bound by the Bridlington Agreement; that the award of the disputes committee was correct; and that the continuance of the plaintiff's membership would be a breach of the terms of the award of the disputes committee. The defendant society contended that it was an implied term of the plaintiff's contract of membership that it should have the right to perform and comply with its lawful and proper agreements and had determined the membership of the plaintiff in pursuance of that right; that, further or alternatively, it was an implied term of the plaintiff's contract of membership that he should act in conformity with the lawful and proper agreements of the defendant society and that by reason of the award of the disputes committee he ought to submit to the determination of his membership. The defendant society claimed, by way of counterclaim, a declaration that the plaintiff's contract of membership was void and, alternatively, rescission of the contract.

The plaintiff by his reply and defence to counterclaim joined issue and alleged that the defendant society had been expelled from the T.U.C. and was readmitted on condition that it accepted the award of the disputes committee; that the award did not bind him and the purported expulsion pursuant thereto was contrary to the rules of the defendant society; that the implication that future awards of the disputes committee should be binding on the plaintiff and the defendant society was not within their contemplation and intentions on April 2, 1955; that the purported expulsion constituted a breach of good faith and fair dealing owed to the plaintiff as a member of the defendant society; that the defendant society had enjoyed the benefit of the plaintiff's subscriptions and those of thousands of other recruited dockers in the Liverpool area; and that the attempted act of mass-expulsion was an attempted confiscation of the plaintiff's rights of property and privileges as a member of the defendant society.

The facts more fully appear from the judgment.

Neville Gray Q.C. and *J. J. Somerville* for the plaintiff.

I. J. Lindner Q.C. and *John Monckton* for the defendant society.

The following cases, not referred to in the judgment, were

cited in argument: *Bonsor* v. *Musicians' Union* [1]; *Rigby* v. *Connol* [2]; *Harington* v. *Sendall* [3]; *British Movietonews* v. *London and District Cinemas* [4]; *Andrew* v. *National Union of Public Employees* [5]; *Williams* v. *Powell*. [6]

SIR LEONARD STONE V.-C. referred to the pleadings, and continued: The important issues raised by the pleadings in this case may affect the lives of many of those who work in the docks and cannot be approached without some knowledge of the history and background against which the dock strikes of 1954 and 1955 took place, and also some knowledge of the inter-relationship of the trade unions with the Trades Union Congress as their ultimate and authoritative link.

The defendant union was founded in 1872 and was registered as a trade union on March 23, 1898. In 1924 at the Trades Union Congress certain principles were laid down with regard to inter-trade union relationship for the purpose of avoiding disputes between trade unions. On February 28, 1928, the current edition of the rules of the defendant union was adopted, there being no mention in them of the principles laid down at the Trades Union Congress of 1924. In 1939 the Trades Union Congress was held at Bridlington, and the principles of 1924 were affirmed and revised, and are generally referred to as the Bridlington Agreement. They are of fundamental importance to every issue I have to determine in this action, and I propose to refer to them at once and in full. They are conveniently set out in a pamphlet issued by the Trades Union Congress called "Relationships "between unions." Under the heading of "Main principles for "the avoidance of disputes, re-affirmed and revised by the Brid-"lington Congress, 1939," are set out four principles:

"1. The application for membership form of the union should "contain an inquiry to be answered by the candidate as to "whether he is or has been a member of any other union, and, "if so, what his financial relationship to that union is.

"2. As a general principle no man who is or has recently "been a member of any trade union should be accepted into "membership in another without inquiry of his present or former "union. The present or former union shall be under obligation "to reply within 14 days of the inquiry, stating:—

"(a) Whether the applicant has tendered his resignation;

"(b) Whether he is clear on the books;

"(c) Whether he is under discipline or penalty;

"(d) Whether there are any other reasons why the applicant "should not be accepted.

"Under no circumstances should a union accept a member

[1] [1954] Ch. 479; [1954] 2 W.L.R. 687; [1954] 1 All E.R. 822; [1955] 3 W.L.R. 788; [1955] 3 All E.R. 518.

[2] (1880) 14 Ch.D. 482.

[3] [1903] 1 Ch. 921; 19 T.L.R. 302.

[4] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[5] *The Times*, July 9, 1955.

[6] [1894] W.N. 141.

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" who is at the time of his application in dispute with his union " or the subject of disciplinary action or penalty.

" 3. No member should be allowed to escape his financial " obligations by leaving one union while in arrears and by joining " another.

" 4. Under no circumstances should a union accept members " from any other union which is engaged in a trade dispute. It " should be a general understanding that both national and local " officials of trade unions should refrain from speaking or acting " adversely to the interests of any other union during any period " in which the members of the latter union are participating in a " trade dispute. Much trouble could be avoided if unions about " to participate in a trade dispute would take care to inform other " unions whose members would be likely to be affected thereby."

Those principles are followed by some recommendations also adopted at the Bridlington Congress of 1939, which I need not read in full. Suffice it to say that recommendations Nos. 2, 3, 4 and 6 implement main principle No. 2, whereas recommendations Nos. 1 and 5 add something to the main principles, and I will read them: [" Congress recommends that each union shall:—"]

"1. Consider the possibility of joint working agreements with " unions with whom they are in frequent contact; such agree- " ments to deal, where possible, with:—

" (a) Spheres of influence;

" (b) Recognition of cards;

" (c) Machinery of composing difficulties;

" (d) Conditions for transfer of members.

" 5. Not commence organising activities at any establishment " or undertaking in respect of any grade or grades of workers in " which another union has the majority of workers employed and " negotiates wages and conditions, unless by arrangement with " that union."

Then there are set out some regulations governing the procedure in regard to disputes between unions, and, finally, two forms which it is recommended should be used when one trade union is making the inquiry referred to in the principles from another union. The first form headed " Inquiry Form " leaves blank spaces for the insertion of the name of the inquiring union and the name of the union to whom the inquiry is addressed, and continues: " We have received an application:—

" Dated..... from

" Name.....

" Address..... .....

" Employed at.....

" to join our union.

" Before accepting the application we should be glad if you " would, in accordance with the decision of the Trades Union " Congress, let us have your comments on the points raised " overleaf."

The second form, headed " Reply to Inquiry," bears at the

top a quotation from main principle No. 2: "The present or "former union (of a member making application to another "union) shall be under obligation to reply within 14 days of the "inquiry," and the form proceeds:

"In regard to the person named overleaf, I desire to reply "as follows:—

"(1) Has the applicant tendered his resignation?

"Answer.....

"(2) Was he clear on the books on the date he made "application?

"Answer.....

"(3) Was he under discipline or penalty on that date?

"Answer.....

"(4) Any other reason why application should not be "accepted?

"Answer....."

That has to be signed by the former union of the applicant.

Printed in the same pamphlet are rules 12 and 13 of the rules and standing orders of the Trades Union Congress. Rule 12 empowers the general council of the Trades Union Congress to use its influence to promote a settlement in the case of any dispute between affiliated organizations and, if necessary, to investigate cases of dispute; and the rule goes on to provide power for the general council to summon contending affiliated organizations to appear before the disputes committee of the general council to submit all evidence and information which the disputes committee may deem essential, and there is a provision as to payment of costs. There follows clause (f): "Should any "affiliated organisation not carry into effect any decision of the "general council in connexion with cases under this rule the "general council may at once issue a report to all affiliated "organisations. If the decision of the general council is still "not carried out, the general council may, at its discretion, adopt "either of the following methods of procedure:

"The general council may report the matter to the next "annual congress to deal with as may be decided upon; or deal "with the organisation under clauses (b), (c) and (d) of rule 13."

Now those clauses become of importance in this case. Clause (b) is as follows: "If after such investigation the general "council decides that the activities of the organisation concerned "are detrimental to the interests of the Trade Union Movement "or contrary to the declared principles of Congress, the general "council shall direct the organisation to discontinue such "activities forthwith and undertake not to engage therein in the "future.

"(c) Should the organisation disobey such direction, or fail "to give such undertaking, the general council is hereby em-"powered in its discretion to order that the organisation be forth-"with suspended from membership of the Congress until the "next annual congress.

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"(d) The general council shall submit a report upon the "matter to the next annual congress."

Mr. Victor Feather, the assistant secretary of the Trades Union Congress and the officer whose duty is the settlement of inter-union and industrial differences before they reach the stage of open dispute, said in his evidence that the principles laid down at Bridlington were not points of law. He described them as being a morally binding code of conduct made between persons of similar views. I understand from his evidence that that is the view of the Trades Union Congress, and it is one which I think it would be difficult to challenge as being otherwise than an accurate definition of the Bridlington principles.

The stevedores and dockers in this country belong to either the defendant union or to the Transport and General Workers' Union. Up to August, 1954, the membership of the defendant union was a little under 7,000, the membership being stevedores and dockers in London and some in Rochester. The Transport and General Workers' Union, on the other hand, had a membership of over a million-and-a-quarter, excluding its railway members, and the stevedore and docker members of the Transport and General Workers' Union were not only in London, where the two unions were in competition, but in all the other ports, and in those the Transport and General Workers' Union had an exclusive monopoly of the membership. The plaintiff, as a checker at Liverpool Docks, had joined the Transport and General Workers' Union in 1940 at the age of 17 and, except for war service in the Royal Navy and a period of about a year in 1953 when he temporarily left his work in Liverpool Docks, he had been a member of the Transport and General Workers' Union until the events immediately relevant to this action occurred.

The rules of the Transport and General Workers' Union were registered on August 19, 1939, and, like the rules of the defendant union, they make no reference to the principles which had been laid down at the Trades Union Congress of 1924. By the second schedule to the Transport and General Workers' Union rules, clause (e), it is provided that: "any member, except members "covered by rule 18, clause 13," which relates to members who are at sea, "exceeding thirteen weeks in arrears shall be deemed "to be no longer a member of the union unless the branch and/or "the district committee as the case may be, decides by resolution "to keep his name on the books. Should a person allow his "membership to lapse and be desirous of resuming his member-"ship or of rejoining the union, it shall be within the discretion "of the branch and/or the district committee as the case may be "to decide the terms of his readmission." As will hereinafter appear, that rule was invoked during the break away from the Transport and General Workers' union of its members who intended to join the defendant union.

In August, 1954, there was a dock strike at Hull and the stevedores and dockers became dissatisfied with the way in which

their union, the Transport and General Workers' Union, were handling matters on their behalf. Ultimately, such dissatisfaction spread from Hull to Birkenhead, to Manchester, and to Liverpool. Whether there was any justification for any such dissatisfaction is quite irrelevant to any issue I have to determine, and I say nothing about it. What is relevant, however, is that a representative of the dockers at Hull came to the main executive council of the defendant union sitting in London and told the council that the Hull dockers wanted to leave the Transport and General Workers' Union and come over in a body to the defendant union as members.

Mr. Barrett was the general secretary of the defendant union at that time, and he took the view that provided a member of the Transport and General Workers' Union was clear on the books, that is to say, had paid all his contributions and dues to date and had notified his previous union of his intention to resign, the spirit of the Bridlington principles had been complied with. There was, indeed, some reason for this view, which is conflicting with the actual terms of the Bridlington principles, because, as appears from paragraph 57 of the proceedings before the disputes committee of the Trades Union Congress made much later, but which referred to the relationship between these two unions in London in August, 1954, and previously, it is stated: "Both "the National Amalgamated Stevedores and Dockers and the "Transport and General Workers' Union, in response to a query "from the chairman, agreed that they accepted members of each "other's organisation without inquiry, providing the work-"people concerned were clear on the books." Accordingly, having ascertained that a very large number of the dockers at Hull wanted to come over to the defendant union, the defendant union had two forms printed for the purpose of their recruitment.

The first form is called an application form. It is headed with the name of the defendant union, and after various blank spaces which are to be filled up with the date, the name of the applicant, his age, his registered number in the docks, and also his address, it continues: "I am making an application for "membership of the National Amalgamated Stevedores and "Dockers. In making this application for membership of the "National Amalgamated Stevedores and Dockers I am acting "freely, without duress, or any soliciting by the National Amal-"gamated Stevedores and Dockers and will leave my present "union with a clear trade union card in order that I may be "acceptable for membership of the National Amalgamated Steve-"dores and Dockers." The second form is called a form of acceptance. Again it is headed with the name of the defendant union and appropriate blank spaces are left for filling up the same particulars as before. The form continues: "I . . . having made "application for membership into the National Amalgamated "Stevedores and Dockers by filling in the form of application "issued at my request, confirm that my acceptance and entry

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" in the National Amalgamated Stevedores and Dockers is in " accordance with the conditions stated on the application form " for membership.

" Further, having been a member of the . . . union I have " notified the said trade union of my intention to withdraw from " membership, and from the date as above by payment of the " entrance fee as determined by the executive council of the " National Amalgamated Stevedores and Dockers, have assumed " membership of that union."

It was not long before a complaint was made by the Transport and General Workers' Union to Sir Vincent Tewson, the general secretary of the Trades Union Congress, and during the early part of September, 1954, Sir Vincent was writing to Mr. Barrett about fixing a date for the disputes sub-committee to meet, but events at the ports were moving quickly. On Sunday, September 12, 1954, a mass meeting of dockers was held at Birkenhead at which the following resolution was passed and conveyed to the defendant union: " This mass meeting of Birkenhead dockers hereby " declares that we have no further confidence in the officials and " policy or the undemocratic structure of the T. & G. W. U. " We therefore resolve to dissociate ourselves from the T. & G. " W. U. and make application for membership of the National " Amalgamated Stevedores and Dockers' Union," which resolution was said to be carried with not one vote against. A mass meeting of the defendant union's London members was held on October 1 to hear reports on the positions at Hull and Birkenhead, where recruiting for the defendant union had been in active progress. On October 8 Sir Vincent Tewson called on the defendant union to give an undertaking to cease forthwith any organizing activities such as the admission of members, the collection of contributions, and the convening of meetings. No such undertaking being forthcoming, the defendant union was, on October 27, 1954, suspended from membership of the Trades Union Congress until the next annual congress.

On November 6, 1954, Mr. Waterson, on behalf of the Liverpool dockers, wrote the following letter to Mr. Barrett: " Dear Bro. Barrett, On behalf of Merseyside port workers, I " respectfully forward this application for membership of the " Amalgamated Stevedores Dockers' Union.

" On Tuesday last, a campaign was started in all control points, " 1–11, and Garston.

" Reports from all control meetings, and mass meetings of " control representatives, show an overwhelming desire to join " your union.

" Signatures to date total over 8,000, out of a total of " approximately 12,500. Trusting this application meets with the " approval of your union."

But the defendant union was cautious and, having interviewed Mr. Waterson, they required more concrete proof of the wish of the men themselves to join the defendant union. Accordingly, Mr.

Waterson returned to Liverpool and a petition was organized by the Liverpool men themselves which is headed "Application to join "N.A.S.D.U.," and a large number of sheets of paper with that heading were signed by men in Liverpool Docks and forwarded to the defendant union. On November 14 a meeting of Liverpool dockers was held in Liverpool Stadium which was addressed by Mr. Barrett, who, however, withdrew before any resolution was put to the vote; for the officers and delegates of the defendant union, notwithstanding the suspension of their union imposed by the Trades Union Congress, were still keeping to their original plan that any move to join the defendant union must come spontaneously from the dockers of the northern ports without persuasion from them. The vote being in favour of joining, six members of the defendant union from London, who were either delegates or officers, came to Liverpool to enrol all such members of the Transport and General Workers' Union who wished to leave that union and join the defendant union.

I have heard a great deal of evidence about what happened in Liverpool at this time and subsequently, but, analysed, there is no material conflict between the witnesses of the plaintiff and those of the defendant. At first, recruiting took place on the basis that a man, to be accepted, must be clear on the books of the Transport and General Workers' Union and must have notified his union of his intention to resign. However, from the commencement at Liverpool the application form was dispensed with and a docker on joining was required to pay up all his arrears to the Transport and General Workers' Union and to sign the acceptance form; though Mr. Freeman, the present president of the defendant union, and Mr. Newman, who was formerly assistant general secretary, had to admit under cross-examination that the acceptance form, even before December 20, was only used for the purpose of record, that is to say, as a convenient form on which such particulars as name, age, address, and registered number with the Dock Labour Board, could be recorded for the defendants' registers of members.

By December 20 the six representatives from London, or most of them, having trained local men to take their places as organisers and branch delegates, had returned to London. Starting on January 1, 1955, the defendant union circulated on Merseyside what is called "N.A.S. & D. Mersey Broadsheet—"News of the 'Blues'—Official Organ of the National Amalga-"mated Stevedores and Dockers Union," the price of which was one penny. The aims of the broadsheet, declared in its first issue, are as follows: "This bulletin, which is an official publica-"tion of the N.A.S.D.U., will appear weekly. Its aim will be: "To report on the progress and developments of the Union in "Merseyside. To inform new members to which branch they "belong. To publish the times and places of branch meetings "and the names of branch officials when elected. To give news "from the branch and, whenever possible, to give prior notice of

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"important items coming up for discussion. To answer attacks "made upon our union. To present news from other ports. To "supply information on the national policy of our union." Those broadsheets continued to be issued weekly up to and including May 31. On January 3, 1955, the first local man, Mr. William Johnson of Birkenhead, became a paid official of the defendant union, and on January 17 Mr. Aylward and Mr. Constable, two of the officials of the defendant union from London, went to Liverpool to speed up recruiting. On January 23 there was another mass meeting at Liverpool Stadium which was addressed by Mr. Barrett; yet in spite of all these activities the numbers coming in to join the defendant union were disappointing to the defendant union. By the end of January it seems that only about 1,100 members had been recruited, and it was Mr. Johnson, as local organiser, and himself a Birkenhead man, who suggested that the reason was the insistence of the defendant union that a recruit, before he could be accepted to membership, not only had to pay an entrance fee of five shillings, but was also required to be clear on the books of his former union.

There is no doubt that the London members of the main executive council were divided on this question whether, as a matter of propriety, this requirement could or should be dispensed with; but there is also no doubt that those who were working on the spot did in fact discard the requirement, and in lieu thereof the clause in the rules of the Transport and General Workers' Union to which I have already referred, which provides that if a member should be 13 weeks in arrears with his contributions he should be deemed to be no longer a member of that union, was resorted to, and the dockers were told that they were then no longer trade unionists. This led to an increase in membership, as also did the success, from the Liverpool dockers' point of view, of a short three-day strike at the end of March called the "Book Strike." It was either on March 31, a Thursday, or April 2, a Saturday, that the plaintiff, who was then more than 13 weeks in arrear with his contributions to the Transport and General Workers' Union, signed an acceptance form, paid his five shillings, and was accepted into membership by the defendant union; his acceptance form being filled up in the handwriting of Mr. Kerrigan, himself a local man, who had become chairman of the Merseyside executive council and a delegate to the national council which was set up in London, and which, as ultimately composed, consisted of six delegates from the London Docks, three from Liverpool, one from Hull, one from Birkenhead, and one from Manchester. This composition, be it noted, caused the north and south to be equally represented on the national council.

Although the point has been contested throughout, it is, in my judgment, an untenable proposition to maintain that the defendant union was misled or made any mistake in its acceptance

of the plaintiff. The defendant union knew long before the end of March, 1954, that it was recruiting men who were 13 weeks in arrear with their contributions to the Transport and General Workers' Union and who were said by the defendant union's own officers and delegates to be no longer trade unionists, because of the rule whereby they were to be deemed to be no longer members of the Transport and General Workers' Union.

I am satisfied that at Liverpool the acceptance forms were used for record purposes only; though in the earlier days, that is to say, in December, 1954, a recruit was required to pay up his arrears to the Transport and General Workers' Union. With the success of the defendant's recruitment of new members of March and April, the Merseyside committee I have already mentioned was set up, and equal representation on the national executive council in London, as it was then called. In addition to 16 branches on Merseyside with their unpaid delegates, there were five men from the northern ports who became paid officials of the defendant union. Perhaps the expansion was too rapid. It is sufficient to say, without going into detail, that starting in May of 1955 there was a six-weeks' dock strike known as the "strike for recognition," and that under the stresses of that strike differences of opinion began to develop. Sometimes, as the minutes of the strike committee show, the voting of delegates on vital matters was equally divided.

On June 17, 1955, Mr. Barrett, as general secretary, tendered his resignation, which was accepted. A few days later an approach was made to the Trades Union Congress for removal of the suspension, and on June 24 and 27, 1955, the defendant union and the Transport and General Workers' Union appeared before the disputes committee of the Trades Union Congress, which made the following award: "The disputes committee "therefore award that the National Amalgamated Stevedores "and Dockers shall now exclude from their organisation all "members recruited by them in Hull, Birkenhead, Liverpool "and Manchester, since August 17, 1954, and shall not proceed "to re-establish organisation in those ports except in accordance "with the terms of the Bridlington agreement."

As I read that award, the disputes committee must be taken to have intended that the exclusions should be by lawful means. Indeed, Mr. Feather in his evidence said that he did not think that the general council considered that there might be cases of breaches of contract involved in the exclusion award. However, on July 6, 1955, to implement that award, the defendant union wrote the following letter to all the branches in the northern ports. It is addressed to all branch secretaries in Hull, Liverpool, Birkenhead, Garston and Manchester: "Dear Sir and "Brother, re: Implementation of T.U.C. disputes committee "decision: I am to inform you that to comply with the "accepted decision of the T.U.C. disputes committee, you are

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"instructed by the executive council to call special branch meetings and to inform members that from the date of this letter they are all excluded from membership of the National Amalgamated Stevedores and Dockers. You are also instructed by the executive council not to accept any obligations or commitments, financial or otherwise, in the name of the National Amalgamated Stevedores and Dockers as and from the above date. Yours fraternally, signed, S. Wood, Acting General Secretary." Meetings were summoned pursuant to that letter and the members were informed of its contents.

During the early stages of this action the plaintiff in the witness box produced a card apparently of the defendant union, paid up to date. That card came as a complete surprise to counsel for the defendant union and to the solicitors instructing them. I adjourned the case for the position to be considered and clarified, with the result that the following facts have emerged. After the mass exclusions effected by the letter of July 6 the members of the defendant union in the northern ports, or at any rate on Merseyside, refused to consider themselves excluded, and as by then they had become completely organised with branches, delegates to sectional committees, and to a Merseyside committee, they have carried on in the name of the defendant union ever since, with this difference, that they have not sent any delegates or any money to London. It was to one of the branches of this Merseyside committee that the plaintiff was, and still is, continuing to pay his contributions. Not unnaturally, perhaps, both sides felt when these circumstances were disclosed that they were vulnerable to the suggestion that this is a collusive action; but not only have I the assurance of counsel on both sides that that is not so, but from the manner in which this case has been conducted, such a suggestion could not be entertained for a moment. The case is now in its sixth day. It has been prosecuted energetically and most stubbornly and vigorously defended. Witnesses on both sides have been cross-examined often with severity, and every argument and point of law has been taken by the defence and tenaciously developed. I am completely satisfied that the case of the defendant union has been conducted in loyalty to the Trade Union Congress award and with the object of defeating the plaintiff's claim.

That brings me to the question of the implied terms raised in paragraphs 14 and 15 of the Defence, namely: that it was an implied term of the plaintiff's contract of membership of the defendant union that the union should have the right to do all things which may be necessary and proper to comply with its lawful and proper agreements; and further, an implied term that members would act in conformity with the lawful and proper agreements of the defendant union, meaning of course, thereby, the Bridlington Agreement.

To that line of defence several submissions have been made by counsel for the plaintiff. The first is that the plaintiff in his evidence, which I entirely accept, said that it was not until the recognition strike, that is to say, some five or six weeks after he had been accepted as a member of the defendant union, that he first heard of the Bridlington Agreement. Even in this court his ideas about its effect were quite inaccurate and imperfect. I have been referred to the well-known passage in the judgment of MacKinnon L.J. in *Shirlaw* v. *Southern Foundries (1926) Ltd.*,[1] where he said[2]: "I recognize that the "right or duty of a court to find the existence of an implied "term or implied terms in a written contract is a matter to be "exercised with care; and a court is too often invited to do so "upon vague and uncertain grounds. Too often also such an "invitation is backed by the citation of a sentence or two from "the judgment of Bowen L.J. in *The Moorcock*.[3] They are "sentences from an extempore judgment as sound and sensible "as all the utterances of that great judge; but I fancy that "he would have been rather surprised if he could have foreseen "that these general remarks of his would come to be a favourite "citation of a supposed principle of law, and I even think that "he might sympathize with the occasional impatience of his "successors when *The Moorcock*[3] is so often flushed for them "in that guise. For my part, I think that there is a test that "may be at least as useful as such generalities. If I may quote "from an essay which I wrote some years ago, I then said: "'Prima facie that which in any contract is left to be "'implied and need not be expressed is something so obvious "'that it goes without saying; so that, if, while the parties were "'making their bargain, an officious bystander were to suggest "'some express provision for it in their agreement, they would "'testily suppress him with a common "Oh, of course!"'"

If that test were to be applied to the facts of the present case and the bystander had asked the plaintiff at the time he paid his five shillings and signed the acceptance form, "Won't "you put into it some reference to the Bridlington Agreement?," I think (indeed, I have no doubt) the plaintiff would have answered "What's that?" In my judgment, that is sufficient to dispose of this case, but as two further grounds have been argued with regard to the Bridlington Agreement being applied to the terms of this contract, I intend to express my views upon them out of deference to the arguments.

It is said that when the Bridlington Agreement is examined, every term of it contains something which a trade union as an entity must do or abstain from doing, and that there is nothing in it which a member of a trade union has to do or abstain from doing. That is so, and I do not know how a member who is

[1] [1939] 2 K.B. 206; 55 T.L.R. 611; [1939] 2 All E.R. 113.

[2] [1939] 2 K.B. 206, 227.

[3] (1889) 14 P.D. 64; 5 T.L.R. 316.

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intending to join a new union and does in fact do so can, by the importation of some implied term, be made liable for some infraction by the trade union of principles which are laid down as a morally binding code of conduct in the relationship between trade unions. Further, there is no power of expulsion in the Bridlington Agreement. That code is concerned with the admission of new members and nothing at all is laid down in it about getting rid of them. The only sanctions contained in the Bridlington Agreement are set out in rule 13, that is to say: "the general "council shall direct the organisation to discontinue such "activities forthwith and undertake not to engage therein in the "future. Should the organisation disobey such direction, or "fail to give such undertaking, the general council is hereby "empowered in its discretion to order that the organisation be "forthwith suspended from membership of the congress until "the next annual congress."

There is nothing else—no other sanction and no other power in the general council to inflict a penalty on a union which it holds to be in default.

Counsel have throughout this case, while doing their duty, refrained from using any language which might re-kindle any of the feelings of bitterness that some of the facts of this case would at one time have provoked, and I hope that nothing that has fallen from me could do so either. The defendant union, in loyalty to the award imposed on it, has by this action done its best to expel the plaintiff. That it has failed in law to do so is not its fault.

As to the relief to which the plaintiff is entitled, Mr. Lindner has urged that none of the relief claimed, the declarations or an injunction, being equitable forms of relief, should be granted in the circumstances. But I think the answer to that is that the defendant union, by its invitation to the plaintiff to allow his contributions to the Transport and General Workers' Union to become in arrear and to join the defendant union, has not only induced the plaintiff materially to alter his position, but has also conferred upon him contractual rights, and that he is entitled to the relief claimed; but as an injunction granted today would not give the defendant union any opportunity of making any arrangements to meet the embarrassing circumstances in which it may well be placed, and Mr. Gray for the plaintiff not objecting, I will only make the two declarations asked for by the Statement of Claim: that is to say, a declaration that the purported action of the executive committee or council of the union in excluding or causing the plaintiff to be expelled from membership of the union is ultra vires the union, and is illegal, unconstitutional, and void; secondly, a declaration that the plaintiff, notwithstanding such purported exclusion or expulsion from the union, was and has always been a member of the union since April 2, 1955, and is and has been entitled to all the benefits and privileges of

membership of the union from such date upon payment of all arrears of quarterly contributions now due and payable by him and henceforth to become due and payable by him to the union. Then I will give liberty to apply for an injunction.

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Declarations accordingly.
Counterclaim dismissed.

Solicitors: *Canter, Levin & Mannheim, Liverpool; Shaen, Roscoe & Co.*

[QUEEN'S BENCH DIVISION.]

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May 1.

Lord Goddard C.J., Jones and McNair JJ.

Road Traffic—Public service vehicle—Carrying capacity—Omnibus—Conductor—Standing passengers carried on omnibus in excess of number allowed—Conductor charged with permitting breach of regulation—Regulations provided that no standing passengers should be carried except in certain circumstances "there may be "carried . . . a number of standing passengers . . . not exceeding "eight"—Whether the conductor was correctly charged with permitting a breach of the regulations—Transport Charges etc. (Miscellaneous Provisions) Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 64), *s.* 9—*Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations,* 1954 (*S.I.* 1954, *No.* 1612), *reg.* 4.

An omnibus conductor was charged with failing to comply with the provisions of regulation 4 of the Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954, in that he permitted a stage carriage to be used to carry passengers in excess of the maximum number permitted by the regulations contrary to section 9 of the Transport Charges etc. (Miscellaneous Provisions) Act, 1954. The justices found that the stage carriage was carrying as standing passengers 15 adults and three children. Regulation 3 states that except as otherwise provided "no standing passengers "may be carried on any vehicle" and regulation 4 provides that in certain circumstances "there may be carried on a public service "vehicle, when being used as a stage carriage . . . a number of "standing passengers not exceeding . . . eight . . ." The justices convicted the conductor. On appeal:—

Held, that the offence created by regulation 4 was that of carrying standing passengers in excess of the permitted number; since it was not the conductor who carried the passengers, but the owner of the vehicle, the conductor could not be guilty of "permitting" the carriage of passengers in breach of the regulation 4.

Per curiam. In such circumstances a conductor should be charged with aiding and abetting and not with the commission of a substantive offence.

Per McNair J. Regulations 3 and 4 are ambiguous and do not make it sufficiently clear upon whom rests the obligation to prevent the carriage of excess passengers.

CASE STATED by Leightonstone justices sitting at Huntingdon. The appellant, Robert Spires, was charged on an information

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preferred by William Thomas Smith, that he, on July 25, 1955, at Alconbury, did unlawfully fail to comply with the provisions of regulation 4 of the Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954,[1] in that he permitted a stage carriage of registration mark KNG 254 to be used to carry passengers in excess of the maximum number permitted by the regulations, contrary to section 9 of the Transport Charges etc. (Miscellaneous Provisions) Act, 1954.[2]

The justices found the following facts: The appellant was an omnibus conductor employed by the Eastern Counties Omnibus Co. Ltd. On July 25, 1955, he was conductor of a double-decker stage carriage, registered mark KNG 254, which was on passenger service from Peterborough to Cambridge. At Alconbury the stage carriage was carrying as standing passengers 15 adults and three children.

It was contended for the appellant that the words of section 9 and regulation 4 referred solely to the "carrying" of passengers, and that, while it was an offence to "carry" an excess number of passengers, no offence of "permitting" the use or "using" a public service vehicle for that purpose was created by the section or regulation. It was further contended that the offence of "carrying" an excessive number of passengers in a public service vehicle could only be committed by the carrier, that was the owner of the vehicle who held the necessary licence for the carriage of passengers, who conducted the passenger service and who received payment for that carriage. It was also contended that the master (the Eastern Counties Omnibus Co. Ltd.) was responsible for the acts of its servants where the statute creating the offence did so in terms which imposed an absolute prohibition; and that the appellant might have aided and abetted his master in the commission of the offence but that he was not so charged.

[1] Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954, reg. 3: "The "number of seated passengers "carried on any vehicle shall not "exceed the number for which the "vehicle has seating capacity and, "except as otherwise provided by "these regulations, no standing "passengers may be carried on any "vehicle: . . ."

Reg. 4: "Subject to the pro- "visions of regulation 7 of these "regulations, during the hours of "peak traffic or in circumstances in "which undue hardship would be "caused to such passengers if they "were not so carried, there may be "carried on a public service vehicle, "when being used as a stage car- "riage . . . a number of standing "passengers not exceeding one-third "of the number of passengers for "which the vehicle, or in the case "of a double-decked vehicle the "lower deck, has seating capacity, "or eight, whichever number is the "less."

[2] Transport Charges etc. (Miscellaneous Provisions) Act, 1954, s. 9: "(1) The Minister may make "regulations with respect to public "service vehicles . . . providing "for—(a) the determination by or "under the regulations of the number "of the seated passengers and stand- "ing passengers respectively whom "any vehicle is constructed or "adapted and fit to carry; (b) the "determination by or under the "regulations of the number of such "passengers respectively who may "be carried in any vehicle; . . . "(2) If any person contravenes or "fails to comply with any such "regulation he shall for each offence "be liable on summary conviction "to a fine not exceeding £20."

It was contended for the respondent that while regulation 4 was permissive yet, if standing passengers were carried, not more than eight standing passengers could be carried without a breach of the regulations, and that in that respect regulation 4 had to be read in conjunction with regulation 3.

As to user, the attention of the court was called to *Gifford* v. *Whittaker*[3] and *James & Son Ltd.* v. *Smee; Green* v. *Burnett.*[4] It was also contended that the regulations had to be read in conjunction with section 9 of the Act of 1954, by subsection (2) of which a penalty was provided for failure to comply with any regulations made by the Minister under the powers conferred on him by the Act; that the appellant had permitted more than eight passengers to stand and had thus permitted the vehicle to be used otherwise than in compliance with the regulations.

The justices were of the opinion that the respondent's submissions were correct, and accordingly they convicted the appellant and fined him £5.

The omnibus conductor appealed.

F. H. Lawton for the appellant.

Neil McKinnon for the respondent.

Ackroyds Air Travel Ltd. v. *Director of Public Prosecutions*[5] was cited in argument.

LORD GODDARD C.J. This case raises a very curious point. At first sight it appears to have no merits in it at all, but I can see the possibility of a state of affairs arising in which it might become material. It is a point which can be cleared up by the Minister if he chooses to make some regulations, and, of course, the appellant is always entitled to take advantage of the way in which the regulations are drawn, if he can, and say: "The act "which is alleged against me is no breach of the regulations." If the regulations are drawn in such a form that they are difficult to understand, they must also be construed in favour of the appellant. [His Lordship referred to the facts, read section 9 of the Transport Charges etc. (Miscellaneous Provisions) Act, 1954, and regulations 3 and 4 of the Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954, and continued:] The regulation in question is regulation 4, but I say at once that the offence which is created by the statute is failing to comply with the regulation and we, therefore, have to see who is bound by the regulation.

To see what are the elements of an offence against regulation 4 one has to look back to regulation 3, which is not mentioned in the information and which provides that except as otherwise

[3] [1942] 1 K.B. 501; 58 T.L.R. 195; [1942] 1 All E.R. 604.

[4] [1955] 1 Q.B. 78; [1954] 3 W.L.R. 631; [1954] 3 All E.R. 273.

[5] [1950] 1 All E.R. 933.

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Lord Goddard C.J.

provided by the regulations no standing passengers may be carried on any vehicle.

The charge in the present case is a failure to comply with regulation 4. Omitting the first words of regulation 4, which deal with peak traffic hours and undue hardship, the regulation provides that there may be carried on a public service vehicle, when being used as a stage carriage, a number of passengers not exceeding one-third of the number for which the vehicle is constructed or eight, whichever number is the less. Therefore, one can, I suppose, say that the offence which has been committed is carrying passengers exceeding that number, the number of passengers in excess of one-third of the number for which the vehicle has carrying capacity or the number in excess of eight, whichever number is the less. One finds out which number is the less, and one charges him with carrying in excess of that number.

Now who carries? It is not the conductor and it is not the driver. They are not the owners of the vehicle; they do not run the service. It seems to me that the only person who carries is the company or the individual owner of the vehicle as the case may be. One cannot say that the conductor of a public service vehicle is himself the carrier of the passengers. Then if it is said that he permitted the breach, if the permitting of something is prohibited, allowing it to be done is a substantive offence, but I do not find any prohibition here against the conductor permitting a number of passengers to board the vehicle. As I say, I think that the substantive offence is the carrying of the excess number of passengers. Therefore, if the conductor allows more people to get on the bus than its seating capacity he is not himself committing a substantive offence. He is not failing to comply with the regulation because he is not carrying them. What he is doing is aiding and abetting the commission of an offence by the company. It is a very fine point, and it is a point which in nine cases out of ten I do not suppose would have any possible effect, but it would be very simple for the Minister to redraft these regulations in such a way that he would impose a duty upon the conductor. It can, I think, be done, but I am not expressing a final opinion. It looks as though the regulations could be redrafted in such a way as to make these facts an offence on the part of the driver or the conductor. I am bound to say that for myself I think that the only substantive offence that is created by these regulations is the offence of carrying, and the carrier is the owner of the bus and not the conductor. Therefore, if it is sought to charge the conductor in these circumstances he must, I think, be charged with aiding and abetting, and not with the commission of a substantive offence. For these reasons I think that the appeal succeeds.

JONES J. I agree.

McNair J. I agree with the result proposed by my Lord, but for my part I would prefer to say that regulations 3 and 4 are ambiguous. They do not make it sufficiently clear upon whom rests the obligation to prevent the carriage of excess passengers. Accordingly, these being penal regulations, it would, I think, be wrong in law to charge the conductor as a principal offender upon the allegation that he has permitted the prohibited state of affairs.

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SPIRES v. SMITH.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co. for Rigby, Williams & Co., Peterborough; Treasury Solicitor.*

C. J. E.

[CHANCERY DIVISION.]

* *In re* MURRAY, DECD.
MURRAY *v.* MURRAY AND OTHERS.

1956
April 27; *May* 1.

[1955 M. No. 2446.]

Harman J.

Will—Construction—Codicil—Revocation—Name and arms clauses—Substituted clause in codicil held void for uncertainty—Whether clause in will takes effect—Express words of revocation in codicil—Doctrine of dependent relative revocation.

By his will a testator settled an estate known as the Coles Park Estate upon the plaintiff for life, with remainder over. He provided by clauses 8, 9, 10 and 11 of his will that every person who under the trusts therein before declared should become entitled as tenant for life or in tail male to the said estate should be required to take and use the surname of "Murray" in substitution for his or her usual surname and to apply for proper authority to bear and use the family arms of the testator and if he or she should neglect to comply with these directions within one year after he or she should become so entitled there followed certain divesting provisions. In 1953, the testator made a codicil to his will and directed as follows: "I hereby revoke clauses 8, 9, 10 and 11 of my said "will and direct that my said will shall be read as if it contained "the following clauses in the place of those which I have hereby "revoked." There followed directions that the tenant for life and his successors in title should be required to assume the surname of "Murray" and to apply for proper authority to bear and use the testator's family arms but no directions for forfeiture on discontinuance. The testator died on August 11, 1953, and the provisions in the codicil were held invalid by the Court of Appeal on July 30, 1954, on the ground of uncertainty: see *In re Murray, decd.* [1955] Ch. 69; [1954] 3 W.L.R. 521; [1954] 3 All E.R. 129.

The question then arose whether or not clauses 8, 9, 10 and 11 of the will were still operative under the doctrine of dependent relative revocation and the plaintiff took out the present summons to have that question, inter alia, decided:—

[Reported by Miss JENNIFER L. WEST, Barrister-at-Law.]

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MURRAY, DECD., *In re.*

Held, that clauses 8, 9, 10 and 11 were absolutely revoked by the express words of revocation contained in the codicil; the form of words used in the codicil imported a change of substance in the gift and not simply a change of machinery, and it must be a matter of speculation whether or not the testator's intention would have been to allow the form of words used in the will to stand when the form used in the codicil proved ineffective.

Onions v. *Tyrer* (1716) 1 P.Wms. 343; *Quinn* v. *Butler* (1803) 7 Ves. 348; *In re Bernard's Settlement* [1916] 1 Ch. 552; and *Ward* v. *Van der Loeff* [1924] A.C. 653; 40 T.L.R. 493 considered.

ADJOURNED SUMMONS.

The testator, John George Murray, by his will dated January 11, 1951, settled his Coles Park Estate in strict settlement on the plaintiff Richard Patrick Gordon Dill, who by deed poll dated September 17, 1954, renounced and abandoned that name and assumed in lieu thereof the name of Richard Patrick Gordon Murray (hereinafter called "the plaintiff").

Clauses 8, 9, 10 and 11 of the will provided as follows:—

"8. Provided always that every person who under the trusts "hereinbefore contained becomes entitled as tenant for life or in "tail male or in tail by purchase to the possession or to the "receipt of the rents and profits of the Coles Park Estate shall "unless prevented by death or accident take and use and "continue to use in all deeds and writings which he or she shall "sign and upon all occasions the surname of Murray in sub-"stitution for any other surname and also bear and use and "continue to bear and use my family arms and apply for and "endeavour to obtain a royal licence and take such steps as "may be requisite to authorize the use and bearing of the said "surname and arms.

"9. Provided also that in case any person becoming so "entitled shall refuse or neglect to take use and bear the "surname of Murray and arms aforesaid then and in every such "case if the person who shall refuse or neglect to take use and "bear the surname of Murray and arms aforesaid or to take such "steps as aforesaid or shall at any time discontinue to use and "bear the said surname and arms as aforesaid then and in "every such case if the person who shall so refuse or neglect "or discontinue as aforesaid shall be tenant for life of the Coles "Park Estate the interests of that person shall absolutely deter-"mine and become void and the Coles Park Estate shall be "held during the residue of the life of the person whose interest "for life so determines upon trust from time to time during "the residue of the life of that person to pay the rents and "profits of the premises to or permit the premises to be received "or enjoyed by the person or persons who would for the time "being be entitled thereto under the trusts hereinbefore con-"tained if that person were dead and if the person who shall "so refuse or neglect or discontinue as aforesaid shall be tenant "in tail male or in tail general then the entailed interests of "that person shall absolutely determine and the premises hereby

" settled shall immediately go to the person next in remainder " upon the trusts hereinbefore contained in the same manner " as if the person whose entailed interests are so made to deter- " mine were dead and there was a general failure of issue " inheritable to the interests which are so made to determine.

" 10. Provided further that the obligations to take use and " bear and continue to use and bear the surname and arms " aforesaid and to take such steps as aforesaid and the proviso " for cesser of estates hereinbefore contained shall not apply to " a peer or to an infant unless and until the infant attains the " age of 21 years or to a person who would forfeit another estate " of greater value by compliance with the obligations or (except " so far as relates to a discontinuance to use and bear the sur- " name and arms aforesaid) to a person who already uses and " bears the same.

" 11. Provided also that in every case (except a case of " discontinuance to use and bear the surname and arms afore- " said) one year from the date when the obligations become " binding shall be allowed for compliance therewith and (except " in a case of discontinuance as aforesaid) the proviso for for- " feiture or cesser of interests shall be postponed accordingly but " shall take effect immediately upon the expiration of such one " year if the obligations have not been complied with."

By a codicil dated June 3, 1952, the testator directed as follows: " I hereby revoke clauses 8, 9, 10 and 11 of my said " will and direct that my said will shall be read as if it contained " the following clauses in the place of those which I have hereby " revoked."

He then provided that the tenant for life of the Coles Park Estate and his successors in title should be required to assume the surname of " Murray " and to apply for proper authority to bear and use his family arms within one year after he or she should so become entitled and the testator declared it his earnest wish and desire that every such person should continue to use the surname of " Murray " and to bear his family arms.

The testator died on August 11, 1953.

By an order of the Court of Appeal dated July 30, 1954,[1] it was declared that upon the true construction of the testator's will and codicil thereto the provisions contained in the said codicil in regard to the assumption of the surname of Murray and the application for proper authority to bear and use the family arms of the testator were void on the ground of uncertainty. It was indicated by counsel in the Court of Appeal that it might be contended by those persons, other than the plaintiff, beneficially entitled to the Coles Park Estate that the clauses substituted for clauses 8, 9, 10 and 11 of the will being held invalid, the revocation of the clauses in the will was ineffective and the said original clauses might be resurrected.

[1] [1955] Ch. 69; [1954] 3 W.L.R. 521; [1954] 3 All E.R. 129.

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Accordingly, on August 5, 1954, the plaintiff applied for the royal licence to assume the testator's arms and by deed poll dated September 17, 1954, he took the surname of Murray in substitution for that of Dill in compliance with the conditions contained in the will. The plaintiff desired, however, to revert to his former name and took out the present summons, therefore, in 1955 to have determined, inter alia, whether or not clauses 8, 9, 10 and 11 of the will had been absolutely revoked by the codicil. The first defendant, Joseph Lumley Murray, the fourth defendant, John Mitchell Nicholson, and the fifth defendant, Thomas Hadley Nicholson, did not oppose the plaintiff's claim and took no part in the argument: the second and third defendants, Martins Bank Ltd., and Donald John Dean, were the trustees of the testator's will: the sixth, seventh, eighth and ninth defendants, namely Keith Wyndham Murray, Clive Wyndham Murray, William Edwin Murray and Dorothy Betty Bersuson respectively, opposed the plaintiff's claim as the persons, other than the plaintiff and the first, fourth and fifth defendants, beneficially interested under the trusts of the testator's will.

By the summons the plaintiff applied so far as is relevant to this report for a declaration that upon the true construction of the will and codicil clauses 8, 9, 10 and 11 of the said will were absolutely revoked by the said codicil and were void and of no effect whether under the doctrine of dependent relative revocation or otherwise.

Reginald Goff Q.C. and *G. D. Johnston* for the plaintiff.

B. S. Tatham for the second and third defendants.

E. J. A. Freeman for the sixth, seventh, eighth and ninth defendants.

Cases cited in argument and not referred to in the judgment: *Ex parte the Earl of Ilchester*[2]; *In re Robinson*.[3]

HARMAN J. stated the facts and continued: In the course of the discussion in the Court of Appeal in *In re Murray*,[1] counsel for the remaindermen put forward the view that if the codicil were declared invalid, the result would be to revive the more stringent provisions of the will in its place, under the doctrine of dependent relative revocation. The Court of Appeal confined itself very carefully to saying that, on the words actually used in the codicil, there was an uncertainty which vitiated the clause, and did not make any general pronouncement about the goodness or otherwise of what might be in the will, or on names and arms clauses in general: and a new summons now comes before me, taken out by the plaintiff, seeking to say that having got rid of the codicil, he has not been caught by the provisions of the

[2] (1803) 7 Ves. 348.

[3] [1930] 2 Ch. 332; 46 T.L.R. 542.

[1] [1955] Ch. 69.

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will. He has, nevertheless, ex cautela, for the time being adopted the name of "Murray" as his grandfather, the testator, wished him to do, and thinks that he has good reason for wishing to reject that name again if the law allows him to do so. With that, I have nothing to do. I do not feel any enthusiasm for a person who takes the benefit and then will not submit to the condition which it imposes, but, if the law allows him to do so, it is a matter between him and his conscience.

The doctrine of dependent relative revocation is only a branch of the ordinary law of construing wills. The question always arises on a codicil, to what extent it revokes the will, and it is elementary that no codicil revokes a will more than is required for the purposes of the codicil. That does not, of course, mean that all revocation is dependent on the efficacy of the codicil, because the latter document may show that an out-and-out revocation of the will was intended in any event, and where that is shown, nothing will revive the will which has been revoked.

By this codicil the testator used words of express revocation, which I shall read. After saying that this is a codicil to his will, he says: "I hereby revoke clauses 8, 9, 10 and 11 of my said "will and direct that my said will shall be read as if it contained "the following clauses in the place of those which I have hereby "revoked," and then those clauses are set out which are to be read as part of the will.

Those are very formidable words. The testator does not give any reason why he substituted the new clauses for the old and I shall not speculate as to why he did so. The cases, however, show that words of revocation of this sort, or any sort, do not put an end to the matter; in other words, whether the revocation is expressed in the instrument or to be implied necessarily from its content, the question remains a question of intention. Nevertheless, where there are express words of this sort, there is a heavy burden resting on those who say that those words were not intended to be, as they appear to be, absolute, but only relative.

Among the cases which were cited to me was *Quinn* v. *Butler*,[2] where there was a codicil which was ineffective but which did not revive the terms of the will. In that case there was a power given to charge certain hereditaments with the payment of the sum of £7,000 as a provision for younger children, and the donee of the power charged the hereditaments by his will with the said sum of £7,000, part to a son and the rest to the three daughters. Then by a codicil he said: "I "hereby revoke and make void the bequest and appointment or "charge of the said sum of £7,000 so made by my said will," and in exercise of the power he appointed the money to his son. That exercise of the power failed. Lord Romilly said[3]: "In

[2] (1868) L.R. 6 Eq. 225.

[3] Ibid. 227.

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" this case I am of opinion that the codicil is a simple revocation " of the appointment made by the will, and nothing more. I " think the whole question depends on the intention of the " testator. If a will is simply revoked in order to make a gift " in favour of another person, and you can see that there is no " intention to revoke unless for that purpose, then the doctrine " of *Onions* v. *Tyrer*[4] applies." He then said that on the facts there could be no doubt that the intention was to revoke the will altogether, and that that must be the end of the matter. It is only a question again of intention.

Onions v. *Tyrer*[5] (the oldest reported case on this subject) is not very easy to follow, but it was apparently a case where the second instrument did not alter the beneficial uses or trusts but merely substituted different trustees, and the second failing, it was held, in spite of words of general revocation of the earlier instrument, that the failure of the second revived the first. It was not very difficult to come to that conclusion there, because it was only a matter of changing machinery, and the purpose of the testator remained the same.

When one considers the other case which is much relied on of *In re Bernard's Settlement*,[6] it is to be seen that having appointed certain funds by her will to her six daughters equally, the testatrix revoked that appointment by a codicil to her will in so far, but no further, as it gave one of them an absolute interest, and settled that particular interest. That settlement being bad for perpetuity, it was held that the original gift remained. Neville J. cited *Quinn* v. *Butler*[7] and another case of *Duguid* v. *Fraser*,[8] from which he cited this passage, which I again may cite from his judgment[9]: " ' There have " ' been cases where the intention to revoke in any event being " ' clear, as where the appointor began the invalid appointment " ' by saying " I revoke the former appointment to this extent," " ' and then proceeded to appoint—in which the courts have " ' been compelled by the language to give effect to the revoca- " ' tion, though not to the subsequent appointment. I do not " ' feel myself fettered by anything of that kind.' "

The judge, having discussed the old doctrine (which I need not go into) about the difference between invalidity in the terms of the gift and in the capacity of the taker, a distinction which now is exploded, said this[10]: " I think the question which the " court has to determine is, Did the testator intend by the " second appointment to revoke in any case the prior appoint- " ment, or did he really only intend to revoke it for the purpose " of carrying out the alteration made in his second appointment " and without having any intention of revoking the previous gift " except for the purpose of the altered appointment? " He came

[4] (1716) 1 P.Wms. 343.
[5] Ibid.
[6] [1916] 1 Ch. 552.
[7] L.R. 6 Eq. 225.
[8] (1886) 31 Ch.D. 449.
[9] [1916] 1 Ch. 552, 560.
[10] Ibid.

to the conclusion that there was no intention to revoke beyond the necessity of the matter as the testatrix saw it.

None of these cases bind me, in my judgment, any more than does the leading case in the House of Lords of *Ward* v. *Van der Loeff*.[11] I do not need to go through that case. There was much judicial wisdom expended upon it, but it all comes down, in the end, to this same question of intention.

It seems to me the strong point for the remaindermen is this, that this is not a question, on the face of it, of altering a gift but altering a condition attached to a gift. The settlement of the Coles Park Estate was left where it stood, but the proviso or provisos contained in the name and arms clauses are revised by the testator, and it may be said, therefore, that this is only a matter of altering machinery, and of seeking to bind the first taker and then his immediate successor, if he be tenant for life, or tenant in tail, by a different form of words, and this argument has weighed in my mind a good deal; but when one looks at the new form of words, they are not the same in scope as the old form. They do not seek to perpetuate the imposition. They do not say "take and use the name"; but "assume the "name." They do not contain a forfeiture clause for discontinuance; they merely express the testator's heartfelt wish that those who take his bounty will feel it is right to comply with his wishes.

It is, therefore, not merely a new piece of machinery which is being substituted for the old but rather a different scheme of things, and the question, as Lord Haldane put it in *Ward* v. *Van der Loeff*,[12] is "Was there an independent revocation?" Certainly there are words of independent revocation, and the new words are put in "in the place of those which I have hereby "revoked." I am asked to say, however, that if the testator had been told that the second form of words was void, he would have said at once: "Let the will stand." He might have said, alternatively, it seems to me: "No; I will try a third expedient."

The course he would have chosen is a matter of speculation and I must, therefore, bear in mind the words of the codicil, which say "which I have hereby revoked": the testator, for some reason or other, which I will not speculate upon, was dissatisfied with the earlier form of words and revoked them in order to replace them by the later form. It would, I think, be just a guess to conclude that it was his intention, or would have been his intention, if the second form of words did not pass through the eye of the needle which the Court of Appeal has now constituted as the test, to have said: "Let us fall back on the "first series of words," remembering always, particularly, that the first series of words is more stringent than the second. I think, as I say, for reasons which I need not speculate upon, that he had rejected the first expedient and adopted the second,

[11] [1924] A.C. 656; 40 T.L.R. 493.

[12] [1924] A.C. 656, 661.

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for all purposes; and the second having proved ineffective, it does not revive the first.

I am, therefore, of opinion that the doctrine of dependent relative revocation has no part to play in this will and codicil.

Declaration accordingly.

Solicitors: *Oswald Hickson, Collier & Co.; Crossman, Block & Co.; Rooper & Whately.*

[COURT OF APPEAL.]

C. A.

1956
April 27, 30;
May 1.

Denning, Birkett and Parker L.JJ.

*ROLEX WATCH CO. LTD. *v.* COMMISSIONERS OF CUSTOMS AND EXCISE.

Revenue — Customs and excise — Valuation of goods — "Uplift" — Branded goods imported by sole concessionaire—Duty assessable on value—Statute requiring value to be based on price in open market — No open market — Advertising expenses borne by sole concessionaire in England—Cost of advertising properly added to invoice price of goods to arrive at value—Customs and Excise Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 44), *s.* 258, *Sch.* 6, *paras.* 1, 2.

An English company, which was the sole concessionaire in this country for the import of and wholesale dealings in certain Swiss watches with well-known trade names, imported parcels of these goods through Swiss vendors with whom the English company had for many years been closely associated. The Swiss companies bore the cost of international advertising of the goods, that cost being reflected in their invoice prices. The English company bore the cost of advertising in this country. In assessing the ad valorem duty chargeable on the parcels in accordance with section 258 of the Customs and Excise Act, 1952, and the Sixth Schedule to that Act,[1] the Commissioners of Customs and Excise added to the invoice prices an increase (called an "uplift") incorporating the cost of the English advertising; and the arbitrator to whom the resultant

[1] Customs and Excise Act, 1952, s. 258: "(1) For the purposes of any "enactment for the time being in "force whereunder a duty of customs "is chargeable on goods by reference "to their value, the value of any "imported goods shall be taken to "be that laid down by the Sixth "Schedule to this Act, and duty shall "be paid on that value: . . ."

Sch. 6: "1. (1) The value of any "imported goods shall be taken to be "the normal price, that is to say the "price which they would fetch, at the "time when they are entered for "home use (or, if they are not so "entered, the time of importation), "on a sale in the open market "between buyer and seller indepen-"dent of each other. . . .

"2. A sale in the open market "between buyer and seller indepen-"dent of each other pre-supposes— "(*a*) that the price is the sole con-"sideration; and (*b*) that the price "made is not influenced by any com-"mercial, financial or other relation-"ship, whether by contract or other-"wise, between the seller or any per-"son associated in business with him "and the buyer or any person asso-"ciated in business with him (other "than the relationship created by the "sale of the goods in question); and "(*c*) that no part of the proceeds of "the subsequent re-sale, use or dis-"posal of the goods will accrue either "directly or indirectly to the seller or "any person associated in business "with him."

dispute was referred awarded that there should be an uplift of ten per cent. on that ground. On appeal by the company:—

Held, that since there could be no open market for goods bearing a trade name imported by a sole concessionaire who was commercially linked with the vendors, the true value had to be acertained indirectly on the material available and the invoice prices adjusted to accord so far as possible with the Sixth Schedule provisions generally; and that the arbitrator had properly applied the Schedule to the special facts of this case by including the cost of the English advertising in the value of goods bearing a trade name.

APPEAL from Sellers J. on an award in the form of a special case stated by an arbitrator (W. Craig Henderson Q.C.) under sections 255 and 260 of the Customs and Excise Act, 1952.

The complainants, the Rolex Watch Company Ltd., an English company, had since 1905 carried on business as importers and wholesale dealers in Swiss watches, known as Rolex and Tudor watches, supplied by two Swiss companies under the same control in Switzerland, the watches being made by another associated Swiss company; all the companies were closely connected, the shares being largely held by a Swiss charitable foundation—the Hans Wilsdorf Foundation. The complainants were the sole concessionaires for the goods imported into this country and were the registered owners of the trade marks of the name Rolex and of the name Tudor. The market in these watches in this country had been built up and maintained by advertising and publicity done (a) by the Swiss companies who advertised throughout the world on an international basis and (b) by the English complainants in England. All the advertising in England was paid for by the complainants, that being according to the usual practice of the trade. The goods came to this country as complete watches or as watch movements and on arrival in England were liable to a customs duty ad valorem of 33⅓ per cent., the value of the goods for the purposes of that duty falling to be ascertained in accordance with the provisions of section 258 of, and the Sixth Schedule to, the Customs and Excise Act, 1952.[1]

Between August 28 and October 10, 1953, a consignment consisting of 18 parcels arrived in London, accompanied by certificates made by the complainants' customs clerk, who declared therein that the importers were associated with the consignors "by reason of being partly under the same control." The value of the 18 parcels on the invoices therewith amounted in English currency to £20,105 13s. 9d. The customs authorities alleged that by reason of the relationship between the consignors and consignees the invoice values did not give the true value for ad valorem duty and that there must be added to the invoice value what was called an "uplift" of 12½ per cent. The complainants challenged the right of the customs authorities to charge that amount of, or any uplift at all; and the dispute

[1] For footnote, see previous page.

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ROLEX WATCH CO. LTD. v. COMMISSIONERS OF CUSTOMS AND EXCISE.

was submitted to the arbitrator. It was agreed between the parties that four parcels should be taken as selected instances, and that the values arrived at should apply to the rest of the consignment.

The arbitrator in stating the case set out certain parts of the evidence given before him during a five-day hearing, particularly relating to two matters: (1) whether the close relationship between the Swiss companies and the complainants had led to any concession in the prices charged by the Swiss companies which was reflected in their invoice prices, and (2) whether the fact that the cost of the extensive advertising in England of the goods of the Swiss companies had been borne by the complainants had made the invoice prices of the goods less than their real value in England. In paragraph 19 of the award the arbitrator found that notwithstanding the close association between the Swiss companies and the complainants, there was no evidence of any concession in prices made or given by the Swiss companies to the complainants and that the invoice prices on the consignment in question were "the real wholesale prices."

After stating that evidence and the contentions of the parties, the arbitrator found the following facts as to the trade in England in Rolex and Tudor watches. (1) The market for these Swiss watches and movements in England had been maintained by the advertising done by the Swiss companies and in England more particularly by the complainants; and the value of the watches had been established and enhanced thereby; (2) So much of that enhancement of value as resulted from the advertising in England by the Swiss companies and paid for by them was recovered as a factor in the cost of the goods in the invoice prices charged to their importers; but no part of the expenditure by the complainants on the extensive advertising, which had added to the enhancement in value of the goods in England, had been included in the invoice prices of the sales to the complainants; (3) The appointment by the Swiss companies of the complainants as sole concessionaires of the Rolex and Tudor companies for the sale of their goods in England worked for the benefit of both the vendor and the importers; (4) The burden undertaken by the complainants to bear the cost of advertising the vendors' goods in England was one well known in the trade in the case of sole concessionaires and had been accepted and borne by the complainants throughout their long association with the Swiss companies; (5) That burden, had it not been borne by the complainants, would of necessity have had to be borne by the Swiss companies to make the market in their goods in England, and would have added, to the extent of that additional expenditure, to the cost of these goods as exported by them. It was admitted by the Swiss companies that they had to and did recover the cost of their own advertising in the prices they charged for their goods. Their invoice values did not, therefore, cover the whole value of the goods as arrived in England; . . . (7) While

finding that a guarantee of continuity of supplies would assist the market in the goods, the arbitrator was of opinion that the value of the trade marks lay especially in the fact that the dealer in the article knew that the goods with the respective marks had a high reputation with the public and that they could pass on to the ultimate buyers the right to use these watches so marked; (8) On the difficult question of the measure of the increased value of the goods resulting from the advertising thereof by the complainants, the distinction made by the expert witness for the customs authorities between advertising which went to the making and maintenance of the market and that which merely related to selling the goods *in* the market was a valid one; but relatively very little in the advertisements could be held not to relate to the making and maintenance of the market in the goods.

The arbitrator awarded that in addition to the statutory duty ad valorem of 33⅓ per cent. on the value of the goods in question, the complainants must pay to the customs authorities an additional "uplift" of 10 per cent. on the invoice values of the goods. The question for the opinion of the court was whether the award was right in law as a proper application to the facts of the case of the provisions of the Sixth Schedule to the Act of 1952, or whether the arbitrator ought not to accept the claim of the Commissioners of Customs and Excise for an uplift in invoice prices, calculated on the basis of treating the complainants' expenditure on advertising the Swiss goods as part of the cost of the goods not included in the invoice prices of the Swiss companies, and measuring that increased cost as a percentage of the complainants' total expenditure on the goods.

The complainants appealed, and on January 26, 1956, Sellers J. dismissed their appeal. He stated that in some circumstances it might be quite erroneous, in assessing the value of goods, to have regard to the cost of advertising, but as was found in this case, the cost of advertising was sooner or later recouped from the selling price of the goods, and it became a factor of cost which influenced the price which the manufacturer or distributor asked. Therefore when one looked at the notional market, one could say that if there had been an expenditure on advertising, that would tend in normal circumstances to be reflected in the price which the seller would ask for his goods; and in the present circumstances it was a factor which could be regarded if one was trying to set up the notional sale which was the test applied by the Sixth Schedule to the Act of 1952.

The complainants appealed.

R. J. Parker for the complainants.

Roy Borneman Q.C. and *C. N. Beattie* for Commissioners of Customs and Excise.

DENNING L.J. stated the facts, and continued: The statutory provisions governing this duty are section 258 of the Customs and

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Excise Act, 1952, and the Sixth Schedule to that Act, which provides that the customs duty—in this case, it is 33⅓ per cent. on watches—is chargeable by reference to the value of the goods; and "The value of any imported goods shall be taken to be the "normal price, that is to say the price which they would fetch, "at the time when they are entered for home use . . . on a sale "in the open market between buyer and seller independent of "each other." By paragraph 2 of the Sixth Schedule, "A sale "in the open market between buyer and seller independent of "each other pre-supposes—(*a*) that the price is the sole con-"sideration; and (*b*) that the price made is not influenced by "any commercial, financial or other relationship, whether by "contract or otherwise, between the seller or any person "associated in business with him and the buyer or any person "associated in business with him." It is quite clear from later paragraphs in the schedule that the right to use the trade name and the get-up of the goods is to be taken into account in assessing the price.

There is in this case no open market, there are no comparable goods, and the value of these goods must be ascertained, as well as may be, from the materials available. It was argued before us by Mr. Parker that in this case all the pre-suppositions of paragraph 2 of the Sixth Schedule were complied with, and that, therefore, we ought to take the invoice price alone as the value of the goods. He said that the invoice price was the sole consideration here and was not influenced by the relationship of the parties. Reading the whole of the findings of the arbitrator, I cannot accept that view. It seems to me that the invoice price cannot be taken as the sole consideration. The transaction between these parties was a composite transaction, which cannot be split into parts. The truth is that the invoice price does not reflect all the pre-suppositions of paragraph 2. It is only one of the materials on which the arbitrator has to work and to make adjustments so as to ascertain the true value, and that is what he has done.

The most important thing to bear in mind, as it appears to me, is the trade name of the goods, "Rolex." The trade name adds to the value of the goods. The value in the trade name has been created by advertising—made and maintained by advertising—and the cost of that advertising must be reflected in the value, because of the increased value which is obtainable on a sale in the trade name. It seems to me that the invoice price, in so far as it reflects the international advertising, is reflecting the value of the goods. But the invoice price does not include the cost of the English advertising. It ought, I think, to be increased so as to reflect the cost of the English advertising. It is only as a result of the English advertising, coupled with the international advertising, that the Rolex watches have the value which they have. Therefore, in the value of the goods there should be included (as the arbitrator did) the appropriate sum to repay the

cost of the advertising spent in making and maintaining the market.

Mr. Parker next argued in this way: the sole concessionaire has benefits which a buyer in the open market would not have. He has a right to continuity of supplies and he has a monopoly of dealing in the goods in the English market. Mr. Parker argued that, assuming you take the cost of English advertising into account so as to increase the value, you ought to have a corresponding " down-fall " (as he put it) to reckon with those benefits which a sole concessionaire has over and above a person in the open market.

The answer to that argument seems to me to be this, that the sole concession (as the arbitrator found) is a mutual benefit to seller and buyer, but it does not in itself necessarily affect the price of the goods in any way. A buyer in the open market, buying goods with a trade name, could reasonably expect a continuity of supplies. He could assume that there would be a normal flow of those goods into the English market on a commercial scale. The seller, in his own business interest, would supply any willing buyer with whatever goods he needed so as to resell them in the English market. The monopoly, too, is a convenience but does not necessarily affect the price. So it seems to me that the arbitrator was entitled simply to take the invoice price and increase it by the appropriate amount on account of the cost of the English advertising.

Lastly, Mr. Parker said that this was a separate parcel, and should be treated as such; whereas the arbitrator treated it as one of a large bulk, which would have a higher value for wholesale purchasers accordingly. I do not think it can be treated as an odd lot. A purchaser in an open market buying goods with a trade name would be entitled to expect the seller to sell to him all the goods he could, and to regard this, therefore, simply as a precursor to further dealings.

So, for all those reasons, it seems to me that there is no error in point of law in what the arbitrator has done. The English company is a sole concessionaire, associated with Swiss sellers, and the sole concessionaire is doing the English advertising. In order to arrive at the real imported value of the goods, the arbitrator added to the invoice price a sum to represent the cost of the English advertising. I think that was quite a proper way of arriving at the value, that there is no error in law in what he did, and I would dismiss the appeal.

BIRKETT L.J. I am of the same opinion. [His Lordship stated the facts, and continued:] I want to emphasize that the decision is really a decision on the facts of this case, and Sellers J. was at pains to emphasize the same point.

[His Lordship read from the judgment of Sellers J. and from the case stated (supra), and continued:] The referee said that the question for the court was: " Am I right on the facts of this

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"case, as I find them and as I set them out, in saying that the "proper uplift on the facts of this case is 10 per cent., or ought "it to be something different?"; and the ground on which that is put is simply this matter of advertising. The figures are in some respects quite remarkable. The expenditure by the plaintiffs on advertising the goods of the Swiss companies from 1951 to 1953 was no less than £39,000, and the purchases were £212,000 odd. On that figure the cost of the advertising came to about 17½ per cent., which was the figure Her Majesty's Customs and Excise Commissioners decided at first to ask for in this case.

It is quite plain, despite the very able argument which Mr. Parker addressed to us, that the referee did keep his mind on the question which he had to determine, the value in accordance with the Sixth Schedule. It has been manifest throughout this argument that to apply the Sixth Schedule in a case like this is not too easy. An open market (as described in the schedule) in the case of a sole concessionaire such as the present one does not really exist, and when the schedule states: "The value of any "imported goods shall be taken to be the normal price, that is "to say the price which they would fetch, at the time when "they are entered for home use (or, if they are not so entered, "the time of importation), on a sale in the open market between "buyer and seller independent of each other . . ." and makes the pre-suppositions about what an open market means, one is confronted at once with the position that one cannot have it. If there is a sole concessionaire, ipso facto the free open market just vanishes, and one must do the best one can; one must take a notional open market and consider all the factors which bear on the question of price.

Arguments were put before the arbitrator with regard to the monopoly value and the continuity of supplies being in the price; but the main argument was that the cost of advertising in this country was not in the price. The findings of fact of the arbitrator are set out very carefully. [His Lordship read further from the case and continued:] The finding of fact by the arbitrator says in the plainest terms that if the Rolex Company in England had not expended this money on advertising, the Swiss companies would have had to do it in order to maintain and preserve their prestige in the markets in this country, and, had they done it, that cost would inevitably have been added to the price. Then the invoice price would contain that element which, admittedly, at the present moment it does not. The conclusion which the arbitrator came to was: "If I am asked "to do my best to assess in accordance with the Sixth Schedule "that particular matter, namely, the cost of advertising, it is "not in the price. The evidence indicated to me that it ought "to be in the price, and I think it fair and proper that it should "be added to the price. When I am asked to say that it should "be 17½ per cent., I do not agree. When I am told that for a "period of years it has been accepted and paid as 12½ per cent.,

"I still think it is too much. The conclusion to which I have "come, having considered all the facts and decided on the facts "of this case in accordance with the Sixth Schedule, is that the "additional uplift should be 10 per cent." I, too, can find no error made by the arbitrator; I agree with Sellers J.; and I agree that this appeal ought to be dismissed.

PARKER L.J. I also agree. Imported goods fall to be valued for the purposes of customs duty, in accordance with the Sixth Schedule of the Customs and Excise Act, 1952. According to that schedule, the value is to be arrived at on the basis of a hypothetical open market sale on certain assumptions and certain pre-suppositions. The only one which is to my mind material to this case is subparagraph (*b*) of paragraph 2, which reads: "A "sale in the open market between buyer and seller independent "of each other pre-supposes . . . (*b*) that the price made is not "influenced by any commercial, financial or other relationship, "whether by contract or otherwise . . ." between the parties.

In all cases of valuation by reference to hypothetical sales, I suppose the best evidence, if it is available, is comparable sales in the market in question. But one has only to consider the facts of this case to realize that there can be no open market in Rolex watches, and, accordingly, what I have referred to as the best evidence is not available. It is true that certain witnesses were called as to what they think they would have paid if there had been an open market. The arbitrator, quite rightly I think, paid very little or no regard to such evidence. It could be of very little weight. Accordingly, in those circumstances he was thrown back to the more indirect method of approach, namely, looking at the actual bargain made, the actual invoice price, and seeing whether, by reason of the assumptions and pre-suppositions in the schedule, some adjustments upward or downward ought to be made in that invoice price.

Now, quite clearly, the pre-suppositions in the paragraph which I have read, paragraph 2, subparagraph (*b*), were not fulfilled, in that, firstly, there was a financial connexion; both buyer and seller were under the same financial control; and, secondly, there was also a commercial relationship, namely, that between vendors and sole concessionaires. An adjustment accordingly fell to be made in the invoice price in so far as that financial connexion or that commercial relationship affected the price. The arbitrator found that so far as the financial connexion was concerned, it had not affected the price at all. On the other hand, he found—and it is not challenged, I think—that the appellants, the sole concessionaires, in accordance with the ordinary practice of people in that position, had expended large sums on advertising in this country. He went on to find that, on the hypothetical sale laid down in the schedule, a buyer who had no such relationship with the vendors would, on the facts

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of this case, have paid the invoice price, plus an uplift (as it is called) of ten per cent., plus the forwarding charges.

The sole question for this court is whether the arbitrator was wrong in law in holding that there should be an uplift by reason of such expenditure on advertising. No question of quantum arises. If there is to be an uplift, then whether it should be ten per cent. or any other figure is for the arbitrator and the arbitrator alone.

To my mind, it is not in every case (as indeed the judge said) that advertising expenditure of this sort will result in an uplift; still less that it will result in an uplift arrived at by a purely mathematical calculation, applying the full amount of the advertising expenditure to the full amount of the purchases. But so far as the facts of this case are concerned, I think the arbitrator was right in allowing an uplift on this ground. To start with, these were branded foreign goods. The margin, moreover, between the vendors' selling price and the retail price in this country was very considerable. It is also clear that if the vendors themselves had borne the cost of advertising in this country, they would have sought to recover at least those costs, as indeed they did with their international advertising, in the price, and, although there is no direct finding on the point, it seems to me, having regard to that very wide margin between sellers' price and retail price in this country, they would have recovered such expenses. But, quite apart from that, the hypothetical buyers would surely say to themselves "If the "appellants, as sole concessionaires, can afford to pay X by "way of invoice price and Y by way of advertising and still make "a profit, then surely I can afford to pay X plus Y." That may be oversimplifying the position, but I see, myself, no answer to it.

It has been forcibly urged that, since the expense in advertising was expressly linked (if I may put it that way) with the relationship of vendor and sole concessionaire, it ought, by reason of the Sixth Schedule, to be completely ignored in arriving at the open market price. Attractive as that argument is, I think it is fallacious, because what one is trying to ascertain is what the buyer would give in this hypothetical open market at the time of the import in question, which is at a time when all the advertising expenses have already been incurred. It is part of the conditions of the market that the expenditure has been incurred and the goods have had the benefit of that advertising.

It was also said—and great reliance was put upon it—that in paragraph 19 the arbitrator had in fact said that the invoice prices were "the real wholesale prices." Accordingly, it is said that the arbitrator, in his later paragraphs, must have been trying to ascertain one of two things, either the value of the goods to the particular importers, or what would have been their value if the vendors had done certain things, namely, undertaken the advertising themselves.

It is sufficient for me to say that, reading the award as a

whole, I do not think that paragraph 19 can be given any such meaning. In paragraph 19 the arbitrator is merely considering the financial control aspect of the matter, and finding that there is no adjustment to be made to the invoice price on that account, and, so far as the financial connexion is concerned, the invoice price is the real price and not one which falls for any adjustment.

Finally, it was urged, particularly in reply—and throughout it has always seemed to me the strongest way in which the appellants can put their case—in this way. It is said: "Be "it so. If, in severing the commercial relationship of vendor "and sole concessionaire in order to arrive at a price under the "Sixth Schedule, it is right to add on something for the adver- "tising expenditure, yet there is another effect of severance, "namely, that the person offering for the goods will not be in "such a good position. In particular, he will not have any "contractual right to supplies of the goods; nor will he have a "monopoly in them." I confess that at first sight it would appear that as a matter of general principle, when one does sever a relationship of this sort, one must, if one is going to add anything for the burdens of the relationship, deduct something for the benefits of the relationship. It is rather surprising at first sight to think (as must be the case if the arbitrator is right) that there was no benefit at all to the appellants in this relationship, and, if there was a benefit it was something which fell to be deducted. As I say, that, I think, is the strongest way in which the case can be put. But the facts here are very special, and I cannot say that the arbitrator did not have the point in mind. He undoubtedly considered the point that the hypothetical purchaser would not have any right to continuity of supplies, and he deals with it expressly in paragraph 32 subparagraph 7, where he says this: "While finding that a guarantee of con- "tinuity of supplies would assist the market in the goods, I "am of opinion that the value of these trade-marks lies "especially in the fact that the dealer in the article knows that "the goods with the respective marks have a high reputation "with the public and that they can pass on to the ultimate "buyers the right to use these watches so marked." It is clear from that that it is an element which the arbitrator took into consideration, and I think he must, as a result, have determined that there was nothing to come off on that account by way of deduction from the price.

Finally, it is said that the arbitrator was wrong in treating the hypothetical sale as a sale of 18 parcels of watches whereas he ought to have dealt with it as a sale of an isolated parcel. It is, I think, conceded by Mr. Borneman for the respondents that on a true view one must consider each parcel, the subject of each invoice. But, to my mind, the fact that the arbitrator may have treated it as a sale of 18 parcels does not really affect the matter, because, in this hypothetical open market one must surely be entitled to assume at least this, that the other 17 parcels

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are coming forward into that market, and, therefore, whether one looks at it as a sale of one parcel out of 18 or a sale of 18 parcels does not seem to me to affect the matter. For these reasons I cannot see that the arbitrator erred in law, and I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Barfield & Barfield; Solicitors, Commissioners of Customs and Excise.*

M. M. H.

[PROBATE, ETC., DIVISION.]

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May 14.
PRACTICE NOTE (LEGAL AID).

* PRACTICE NOTE (LEGAL AID).

Legal Aid — Practice — Inspection of civil aid certificate — Legal Aid (General) Regulations, 1950 (1950 *S.I. No.* 1359), *reg.* 15 (5) (6) (7).

Regulation 15 (7) of the Legal Aid (General) Regulations, 1950, provides that no document and no extract from a document filed or exhibited under paragraphs (5) and (6) of that regulation shall be disclosed save by leave of the court.

The effect of this regulation is that, except by leave of a judge or registrar, no civil aid certificate is open to inspection by anyone other than the party who filed the same, and its contents cannot be disclosed to any other party to the suit.

B. LONG,
Senior Registrar.

May 14, 1956.

[QUEEN'S BENCH DIVISION.]

1956
April 27.
Lord Goddard C.J., Cassels and Donovan JJ.

* REGINA *v.* CAMPBELL. *Ex parte* NOMIKOS.

Shipping—Safety and load line—Timber deck cargo—Loaded to a height in excess of the permitted maximum on fore deck and raised quarter deck—Whether one or two offences—Timber Cargo Regulations, 1932 (*S.R. & O.*, 1932, *No.* 110), *reg.* 5 (*b*)—*Merchant Shipping (Safety and Load Line Conventions) Act,* 1932 (22 *Geo.* 5, *c.* 9), *s.* 61 (4), (6).

Crown Practice — Certiorari — Jurisdiction of inferior tribunal — Two convictions — Only one offence — Plea of guilty to both charges — Jurisdiction of the magistrate—Certiorari a discretionary remedy.

The applicant, the master of a vessel, pleaded guilty to, and was convicted on, two charges of contravening regulation 5 (*b*) of

[Reported by D. TRAFFORD OWEN Esq., Barrister-at-Law.]

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the Timber Cargo Regulations, 1932,[1] in that he loaded the fore deck and the raised quarter deck of his vessel with timber to a height in excess of the permitted maximum. He applied for an order of certiorari to bring up and quash his conviction on the charge relating to the raised quarter deck, alleging that there was only one contravention of the regulations and not two, and that, therefore, the magistrate had no jurisdiction to convict on the second charge:—

Held, (1) that there was only one contravention of the Timber Cargo Regulations, the relevant provision of the regulations was so obscure that the only safe course was to construe it in favour of the defendant and say that, for the purposes of the regulations, there was only one deck and one cargo.

(2) That certiorari must be refused since it was a remedy which depended on jurisdiction, and in the present case the magistrate had jurisdiction to hear and determine the case. There was no case known to the court where a plea of guilty had been entered and certiorari granted. It would be wrong to issue certiorari in such a case. Certiorari was a discretionary remedy.

Per curiam. The objections raised on behalf of the applicant were such as should have been raised in the course of defence after entering a plea of not guilty. If then the magistrate had convicted the remedy would have been by way of appeal. It might be that the applicant could recover the £250 by an application for the bounty or mercy of the Crown.

Rex v. *Stafford Justices* [1940] 2 K.B. 33; 56 T.L.R. 623 approved.

APPLICATION for an order of certiorari.

The applicant, the master of the *S.S. Capetan Giannis*, was charged with two contraventions of the Timber Cargo Regulations, 1932, in that, when his vessel was inspected after docking in the Port of London, the height of that part of the timber deck cargo carried on the fore deck, and that part of the timber deck cargo carried on the raised quarter deck, was in excess of the maximum permitted height, both contraventions being contrary to regulation 5 (*b*) of the Timber Cargo Regulations, and to section 61 (4) and (6) of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932.

At the hearing at the Tower Bridge Magistrates Court, on December 17, 1955, the applicant pleaded guilty to both charges. He was convicted, and was fined £500 in respect of the charge relating to the fore deck, and £250 in respect of the charge relating to the raised quarter deck.

He applied to the divisional court of the Queen's Bench Division for an order of certiorari to remove and quash the second conviction, which related to the overloading of the raised quarter deck and for which he had been fined £250.

It was contended on his behalf that the maximum penalty prescribed by section 61 (4) of the Merchant Shipping Act, 1932,

[1] Timber Cargo Regulations, 1932, reg. 5 (*b*): "In the case of a ship 'within any of the areas set out in 'the first column of the Schedule 'hereto, during the periods set out 'respectively opposite to such areas "in the second column of the said "Schedule, the height of the timber "deck cargo above the freeboard deck "shall not exceed one-third of the "extreme breadth of the ship."

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for contravening any provision of the Timber Cargo Regulations was £500, and that in the premises the metropolitan magistrate, the respondent, was entitled to impose the penalty of £500, but that the further penalty of £250 was in excess of her jurisdiction. It was further contended that although the timber deck cargo was divided into two parts and placed for purposes of stowage on the fore deck and the raised quarter deck, there was in fact only one cargo and one deck for the purposes of the regulations, and thus only one contravention of the regulations.

On behalf of the respondent it was contended that she was neither invited nor afforded any opportunity to deliberate upon the proper construction of the operative words. A plea of guilty had been entered to each of the contraventions charged in the summons, which were the subject of separate informations. It had not been suggested at the hearing that the two parts of the cargo should be regarded as one cargo, or that only the maximum height of the deck cargo taken as a whole should be considered. No question had been raised as to her jurisdiction to deal with two contraventions and to impose a penalty for each. If the court was unable to impose more than a fine of £500 in such cases it would be powerless to remove the profit incentive for such admittedly illegal conduct. It was further contended on behalf of the respondent that there were in fact two offences, committed on different parts of the vessel.

Michael Summerskill for the applicant.

Rodger Winn for the magistrate and for the Ministry of Transport and Civil Aviation.

The following cases, in addition to that referred to in the judgment, were cited in argument: *Rex* v. *Nat Bell Liquors Ltd.*[2]; *Kreuger* v. *Blanck*[3]; *Reg.* v. *Richmond, Surrey, Justices*[4]; *O'Connor* v. *Issacs*[5]; *Reg.* v. *South Holland Drainage Committee*[6]; *Rex* v. *West Kent Quarter Sessions Appeals Committee*[7]; *Rex* v. *Willesden Justices*[8]; *Rex* v. *Cork Justices.*[9]

Lord Goddard C. J. stated the facts and continued: The first point that we have to decide is whether there was one offence or two offences, because if there were two offences as the informations allege, there being two informations, then it follows that there can be no ground for certiorari.

Therefore, we have first of all to consider the regulations. For the purposes of the Timber Cargo Regulations, 1932, the term "timber deck cargo" is defined by regulation 1 (2) as meaning "a cargo of timber carried on an uncovered part of a freeboard

[2] [1922] 2 A.C. 128; 38 T.L.R. 541.
[3] (1870) L.R. 5 Exch. 179.
[4] (1860) 24 J.P. 422.
[5] [1956] 2 W.L.R. 585; [1956] 1 All E.R. 513.
[6] (1838) 8 Ad. & El. 429.
[7] [1951] 2 T.L.R. 470; [1951] 2 All E.R. 728.
[8] [1918] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838.
[9] (1906) 40 Ir.L.T. 121.

"or superstructure deck, but does not include a cargo of wood "pulp or similar substance." The term "freeboard deck" has the same meaning as in the Load Line Rules. The term "super-"structure deck" means "the deck forming the top of a super-"structure as defined in the Load Line Rules." In those rules the term "superstructure" means "a decked structure on the "freeboard deck extending from side to side of the ship, and "includes a 'raised quarter deck'; and 'superstructure deck' "means the deck forming the top of a superstructure." The latter is reasonably intelligible. As regards "freeboard deck," I have no doubt that the definition of that term is intelligible to ships' masters, ship architects and ship builders, but it is a little difficult for a mere layman in these matters like myself to follow. I do not think that it matters, because Mr. Winn contends that the fore deck and the quarter deck of the ship were both superstructure decks.

The regulation which is alleged to have been infringed is regulation 5 (*b*), which provides as follows: "In the case of a "ship within any of the areas set out in the first column of the "Schedule hereto, during the periods set out respectively "opposite to such areas in the second column of the said "Schedule, the height of the timber deck cargo above the free-"board deck shall not exceed one-third of the extreme breadth "of the ship." The simple point is that part of this deck cargo was stowed on the fore deck of the ship and part on the quarter deck. It was a deck cargo. The question is whether or not there was more than one breach of the regulation, or whether it was only one offence to overload both the fore deck and the quarter deck.

We think that the matter is one of very great obscurity because of the way in which these regulations are drafted. I can see very good reasons from the safety point of view why the regulations should make it an offence to overload what I may call different decks, regarding the fore deck and the quarter deck as different decks, but I do not think that one can under these regulations regard them as different decks. I think that we must conclude that there is only one deck, although to get from one part to another one may have to go down a ladder and up another ladder. For my part I am not prepared to say here that there were two timber cargoes. I think that there was only one timber cargo, and I think that the timber cargo was stowed on a superstructure deck. The only safe thing, when one is construing such obscure regulations, is to construe them in favour of the applicant and to say that there was only one offence here and that only one information should have been laid, although I can see very good reasons for the authorities taking the view that there were two offences or that there ought to be two offences. It may be a matter which the President of the Board of Trade will take into account, and it may be that he will amend these regulations.

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Lord Goddard C.J.

There is another point. It is now suggested that the magistrate's decision is to be brought up and quashed on certiorari, on the ground that she ought not to have convicted on the second information. In one sense that is quite right, but what happened here was that, the parties being in front of Miss Campbell, the applicant pleaded guilty. What option had she but to proceed to convict? She convicted on both these informations. It is said that her decision must be quashed upon one of them, and the applicant selects the conviction on which a fine of £250 was imposed because the other one, in which a fine of £500 was imposed—and which included according to his case, and so we hold, the whole of the cargo—came first in point of time. That may be, but there is a great distinction, which is not always sufficiently borne in mind in connexion with the very special remedy of certiorari, between what a magistrate or a court does inside and what is done outside jurisdiction. If the matter is within the jurisdiction, the decision cannot be quashed on certiorari. If the decision is wrong, the remedy is appeal.

Now consider what happened here. If, instead of a plea of guilty being made, the applicant had pleaded not guilty, the magistrate would have heard the first case and, there being no doubt about it, she would have imposed a fine. The second case would then have been called on and the applicant would have been able to say: "I have got a defence to this. It is "not a question of jurisdiction. You, the magistrate, have "jurisdiction to hear and determine this case, but you must "determine it in my favour because I have a defence. My "defence is that these regulations apply only to one deck. "What are said to be two decks must be regarded as one deck. "What are said to be two cargoes are to be regarded as one "cargo. Therefore you must dismiss this case on the ground "that the second information does not disclose another offence "against me." It may be also that the applicant might have put in what is equivalent to—and what is sometimes in cases before courts of summary jurisdiction inaccurately called—a plea of autrefois convict. I believe that that ought strictly speaking to be confined to an indictment, but at any rate it is quite clear that a magistrate cannot convict twice for the same offence and that a perfectly good objection can be taken. Whether or not it is accurately called autrefois convict, does not matter. Those, as I say, were matters of defence.

If the position had been as I have tried to envisage, that is to say, pleas of not guilty entered and conviction on the first information, and the magistrate had then proceeded to convict on the second, the remedy would have been, in my opinion, an appeal; because until the magistrate had inquired into the facts and construed the regulation it would not have appeared whether or not an offence had been committed. Certiorari in these matters must depend upon jurisdiction. It is sometimes forgotten why it is that certiorari will lie for bias in a magistrate. Of course,

no question of bias arises here, but it is a very common ground for moving for certiorari that the magistrate has an interest in the matter and is, therefore, said to be biased. The reason why that is a ground for certiorari is that there is a well-known maxim that no man can be judge in his own cause. If a magistrate is biased, he is disqualified from sitting because he would be sitting on a matter in which he himself was interested. Therefore he has no jurisdiction to sit, and if he sits that is a fatal objection to a conviction. It seems to me that when a prosecution is launched before a magistrate for a breach of these regulations, which is a summary offence, it follows and is abundantly clear that the magistrate has jurisdiction to hear and determine that case. In this case there was a hearing and determination. It turns out that if the applicant had pleaded not guilty the determination would or ought to have been the other way: the information ought to have been dismissed. I cannot see by what process of reasoning we can say that the magistrate had not got jurisdiction to hear this case, although if this point had been taken before the magistrate—one assumes that she would have decided rightly—she would have dismissed the case.

Another ground for refusing certiorari in the present case is that I know of no case where a plea of guilty has been entered and certiorari has been granted. No one can suggest that the magistrate did anything wrong. She has filed an affidavit explaining exactly what happened. She was not asked to construe these regulations. As competent counsel was before her and entered a plea of guilty for his client, she naturally proceeded to record a conviction and to consider what penalty should be imposed. In my opinion it would be quite wrong to issue certiorari after that has been done, and also in my view the court has no power to order certiorari in this case. Certiorari is always, it should be remembered, a discretionary remedy. Although, in the history of that writ, the courts were inclined at one time rather to depart from the view that certiorari is a discretionary remedy, in *Rex* v. *Stafford Justices*,[1] to which Mr. Summerskill referred, the Court of Appeal were, if I may say so, on the right lines in getting certiorari back to a matter of discretion. It may very often be that the facts are such that the discretion can be exercised in only one way, that is to say, it would not be a judicial exercise of discretion if one decided the other way. In this case the whole difficulty was caused by the deliberate entering of a plea of guilty on the part of the applicant. It may be that there is still a hope of the applicant getting back part of his money, but that must be done by an application for the bounty or mercy of the Crown. If it is pointed out to the responsible advisers to Her Majesty that the court has decided that there was only one offence here and not two offences and a petition is made for the return of the one penalty, it may be that the Crown will be pleased to order a return. That is not a matter

[1] [1940] 2 K.B. 33; 56 T.L.R. 623.

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for us, and we do not express any opinion whether that would be right in this particular case or not. It is true that two penalties have been inflicted. It is also true that it was entirely owing to the action of the applicant that they were inflicted.

For these reasons the application for certiorari must be refused.

CASSELS J. I desire only to add a few words upon that part of the case which concerns the cargo which was carried on this ship, as disclosed in the facts before the court. By section 61 (1) of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932: "The Board of Trade shall make regulations . . . "as to the conditions on which timber may be carried as cargo "in any uncovered space on the deck of any load line ship." Those regulations have been made and duly published, and they are known as the Timber Cargo Regulations. It is said that there has been a contravention of regulation 5 (*b*) with regard to stowage. Part of that regulation reads: "the height of the "timber deck cargo above the freeboard deck shall not exceed "one-third of the extreme breadth of the ship." It does seem to me that really the foundation for the datum line to be taken is the line of the freeboard deck, and it is the height above that line, if exceeded, which will constitute the offence which is committed if there is a breach of these regulations. Further, I am of the opinion that one cannot hold a yardstick upright alongside this cargo and say: "There you are 4 feet above the "datum line. There you are 10 feet above the datum line. "There you are 15 feet above the datum line. That will be "three summonses." I think that that would be wrong and not in accordance with the strict interpretation of these regulations.

I, therefore, go a little further and find that section 61 (4) of the Act reads thus: "If any provision of the timber cargo "regulations is contravened in the case of any British load line "ship registered in the United Kingdom, the master of the ship "shall be liable to a fine not exceeding five hundred pounds." That, by subsection (6) of the same section, is made to apply to any foreign load line ship which is found to be in breach of these regulations in British ports.

There is a further thing to be observed with regard to these regulations. It is not only the height of the cargo of timber which may bring the master of a ship into trouble. He is also expected to have due regard to the safety of his crew, and he must arrange for avenues through the cargo and protecting rails to be erected. All that comes under the safety regulations, and I should find it difficult to understand, if in one place one found that the height for the purpose of these avenues was greater than in another and further away or further above what I venture to call the datum line, that for every position in which one found that the height had been exceeded there could be a separate information. None the less, the situation which has arisen is entirely the applicant's fault, because when appearing before

the metropolitan magistrate he pleaded guilty in respect of both informations, listened to the imposition of a fine of £500 plus one of £250 which (whatever his nationality may be) he was able to add together and make £750, and now comes to this court in order to seek the remedy of certiorari.

I agree that he is not entitled so to do and that this application must be refused.

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DONOVAN J. I have nothing to add upon the question of whether certiorari should issue, upon which matter I entirely agree with what has been said by the Lord Chief Justice and by Cassels J.

On the main issue, the question is, as I see it, basically one of the true construction of the term "timber deck cargo" appearing in the Timber Cargo Regulations, 1932. It is there defined as meaning: "a cargo of timber carried on an uncovered "part of a freeboard or superstructure deck, but does not include "a cargo of wood pulp or similar substance." Even assuming here in favour of the prosecutor that there were two superstructure decks, the question becomes this: when part of that cargo is carried on one superstructure deck and another part on another superstructure deck on the same ship at the same time, is that one cargo or two cargoes within the meaning of the definition? If it is two cargoes, then there are two offences each carrying a maximum fine of £500. If it is one cargo, it is one offence only. There is obviously a good deal to be said for each interpretation, but in a case where a heavy fine can be inflicted for each offence, I think that any such ambiguity ought to be resolved in favour of the subject, because it is quite easy for the authorities to put the matter beyond doubt, and make it clear which interpretation is right if they wish to do so.

Application dismissed. Applicant to pay half the costs of the respondents.

Solicitors: *Richards, Butler & Co.; The Treasury Solicitor.*

[COURT OF APPEAL.]

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DENNING, BIRKETT and PARKER L.JJ.

Shipping—Bill of lading—Clause paramount—Incorporation of United States Carriage of Goods by Sea Act, 1936, *"with respect to shipments from a port in the United States"—Whether port in Panama Canal Zone "a port in the United States"—Statute*

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defining "United States" held to apply—United States Carriage of Goods by Sea Act, 1936, *s.* 13.

Section 13 of the United States Carriage of Goods by Sea Act, 1936, provides: "This Act shall apply to all contracts for carriage "of goods by sea to or from ports of the United States in foreign "trade. As used in this Act the term 'United States' includes "its districts, territories, and possessions."

A clause paramount in the Royal Mail Lines Ltd. (North Pacific Coast Service) bill of lading provided that all the terms and provisions of the United States Carriage of Goods by Sea Act, 1936, should apply "with respect to shipments from a port in the "United States." On a preliminary issue arising on a claim concerning the shipment of goods from the port of Cristobal in the Panama Canal Zone to London:—

Held, that Cristobal was "a port in the United States" within the meaning of the clause paramount, and the provisions of the Act of 1936 must therefore be read into the contract contained in the bill of lading. The clause paramount had to be construed on the assumption that the shipowners inserted it in order to comply with the local law of the port of shipment, and on the evidence that local law was the law of the United States, for the Panama Canal Zone was, for the purposes of the Act of 1936, a "possession" of the United States and so within the definition of "United "States" in section 13.

Luckenbach S.S. Co. v. *United States* (1930) 280 U.S. 173 distinguished.

Decision of Sellers J. affirmed.

APPEAL from Sellers J. on a preliminary issue, which the parties agreed would be determinative of the whole case.

In February, 1952, shippers in Corinto, on the west coast of Nicaragua in Central America, shipped ten boxes of ipecacuanha roots for transport to London, England, on a bill of lading issued by the Grace Line. The goods were carried from Corinto down the west coast to the Panama Canal, and then through the Canal to Cristobal, a port in the Canal Zone, on the east coast. At Cristobal they were transhipped into a steamer, the "Samanco," for transport to London, that steamer being owned by the defendants, the Pacific Steam Navigation Company. In the course of transit from Cristobal to London, the goods were damaged, and for the purposes of the trial of this preliminary issue it was assumed that they were damaged by the negligence of the shipping company. The plaintiffs, Stafford Allen & Sons, Ltd., the owners of the goods, claimed damages against the shipping company for the negligence. The shipping company set up an exception claiming that they were not liable for any negligence.

The transit from Cristobal to London was on the terms of the regular bill of lading used by the shipping company, which in that particular service at that time was that of the Royal Mail Lines Ltd. (North Pacific Coast Service), which was expressly governed by English law. There was an exemption clause in that bill of lading, which, prima facie, would be wide enough to exempt the company from liability for negligence;

but there was also a clause paramount, clause 29, which provided as follows: "29a. With respect to shipments . . . from a "port in Canada, all the terms, provisions and conditions of "the Canadian Water Carriage of Goods Act, 1936, and the "Schedule thereto are to apply to the contract contained in this "bill of lading. . . . 29b: U.S.A.: With respect to shipments "(other than live animals and deck cargo) from a port in the "United States, all the terms and provisions of the Carriage of "Goods by Sea Act, 1936,[1] of the United States are to apply "to the contract contained in this bill of lading."

An agreed statement of facts stated that Cristobal was a port on the eastern shore of Limon Bay near the entrance to the Panama Canal from the Caribbean Sea; and the Zone was a stretch of land in the Isthmus of Panama extending generally five miles on each side of the centre line of the Panama Canal. The rights of the United States of America in and over the Zone derived from the Hay-Bunan-Varilla Treaty of 1903, article 3 of which provided that "the Republic of Panama grants to the "United States all rights, power and authority within the Zone ". . . which the United States would possess and exercise if it "were the sovereign of the territory . . . to the entire exclusion "of the exercise by the Republic of Panama of any such "sovereign rights, power or authority."

Before Sellers J. the question for determination as a preliminary issue was the meaning of the words in the clause paramount—"port in the United States"—and whether the port of Cristobal in the Panama Canal Zone was for the purposes of the contract between these parties a port in the United States, since it was conceded by the defendants that if the provisions of the United States Carriage of Goods by Sea Act, 1936, were to be read into the bill of lading the exceptions clause was so inconsistent with them that it could not stand and the plaintiffs must succeed.

Sellers J. suggested that the parties should communicate with the United States Embassy to determine that issue, and the hearing was adjourned for inquiry to be made. Two questions were submitted to the United States authorities: (*a*) whether Cristobal was regarded generally as a port in the United States, and (*b*) whether the Canal Zone was, within the definition of the United States Carriage of Goods by Sea Act, 1936, a district, territory, or possession of the United States in section 13 of that Act.[1] No reply was received to (*a*); and on (*b*) an opinion was given by Mr. Penifer, Counsel of the American

[1] S. 13: "This Act shall apply "to all contracts for carriage of "goods by sea to or from ports of "the United States in foreign trade. "As used in this Act the term "'United States' includes its dis- "tricts, territories, and possessions. ". . . *Provided further*, That every "bill of lading or similar document "of title which is evidence of a con- "tract for the carriage of goods by "sea from ports of the United States, "in foreign trade, shall contain a "statement that it shall have effect "subject to the provisions of this "Act."

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Department, that the Canal Zone was within that definition. The British Foreign Office was also asked to pronounce on (*a*), but declined to do so, stating that it was not a question of fact, but of the construction of a commercial document, which was the task of the court.

Sellers J. at the resumed hearing held that he was entitled to look at the United States Act of 1936 for assistance in determining whether Cristobal was a port in the United States, and having found the definition in section 13 of that Act: "As used "in this Act the term 'United States' includes its districts, "territories, and possessions," and having looked at the United States authorities, held that Cristobal was a "port in the United "States" such that the provisions of the Act of 1936 had to be read into the bill of lading and the plaintiffs must accordingly succeed.

The shipping company appealed.

G. G. Honeyman Q.C. and *J. S. Wordie* for the shipping company.

H. V. Brandon for the plaintiffs.

The following cases were cited in the argument: *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham Steamship Co. Ltd.*[2]; *Foster* v. *Globe Venture Syndicate Ltd.*[3]; *Luckenbach Steamship Co.* v. *United States*[4]; *Macomber & Whyte Rope Co.* v. *United Fruit Co.*[5]; *G. E. Dobell & Co.* v. *S.S. Rossmore Co. Ltd.*[6]; *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*[7]; *The Glendarroch.*[8]

Denning L.J. stated the relevant facts, read the paramount clause, which he said had plainly been inserted by the shipping company in order to comply with the local law about shipments from the coast of the American continent, and continued: If that clause paramount applies to this shipment from Cristobal to London, it means that the shipping company are not entitled to avail themselves of the exception, because the United States Carriage of Goods by Sea Act, 1936, by section 3 (8), makes such an exemption clause null and void and of no effect.

Thus the sole question, as it turns out, is whether this shipment from Cristobal in the Panama Canal Zone was a shipment from "a port in the United States" within the meaning of that clause paramount. In ordinary use, the term "United States" means the continental area of the United States of America, and does not include outlying possessions such as the Panama Canal Zone. But in construing this clause we must have regard to the law of the port of shipment. We must, I think, attribute to the

[2] [1939] 2 K.B. 544; 55 T.L.R. 503; [1939] 1 All E.R. 819.
[3] [1900] 1 Ch. 811.
[4] (1930) 280 U.S. 173.
[5] (1922) Vol. 225 Illinois Appellate Court Reps. 286.
[6] [1895] 2 Q.B. 408; 11 T.L.R. 501.
[7] [1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513.
[8] [1894] P. 226; 10 T.L.R. 269.

ship-owning company an intention to do what is lawful by the local law. If the law of the Panama Canal Zone requires a shipowner to insert a clause paramount so as to deprive the shipowner himself of the benefit of the exempting clause, we should construe the bill of lading to comply with that law rather than to ignore it.

What, then, is the law of the Panama Canal Zone on this matter? It is said to be contained in the United States Carriage of Goods by Sea Act, 1936, which provides, by section 13, that: "This Act shall apply to all contracts for carriage of goods by "sea to or from ports of the United States in foreign trade." Then there are these important words: "As used in this Act the "term 'United States' includes its districts, territories, and "possessions." Later on the section provides for a clause to be inserted in every bill of lading: "*Provided further*, That every "bill of lading or similar document of title which is evidence of "a contract for the carriage of goods by sea from ports of the "United States, in foreign trade, shall contain a statement that "it shall have effect subject to the provisions of this Act."

The crucial words of the Act for present purposes are these: "the term 'United States' includes its districts, territories and "possessions." The Panama Canal Zone is not a "district" of the United States like the District of Columbia. It is not, I imagine, a "territory," if we accept the ruling to that effect of the Appellate Court of Illinois in *Macomber & Whyte Rope Co.* v. *United Fruit Co.*[1] The question is whether the Canal Zone is a "possession" of the United States. We have been supplied on this point with an agreed statement of facts relating to Cristobal and the Canal Zone, and we have been referred to all the relevant authorities in the United States on the subject.

Cristobal is a port on the eastern shore of Limon Bay near the entrance to the Panama Canal from the Caribbean Sea; and the Zone is a stretch of land in the Isthmus of Panama extending generally five miles on each side of the centre line of the Panama Canal. The rights of the United States of America in and over the Zone derive from the Hay-Bunan-Varilla Treaty of 1903, article 3 of which says that the "Republic of Panama grants to "the United States all rights, power and authority within the "Zone . . . which the United States would possess and exercise "if it were the sovereign of the territory . . . to the entire "exclusion of the exercise by the Republic of Panama of any "such sovereign rights, power or authority."

The United States Supreme Court in *Luckenbach S.S. Co.* v. *United States*[2] held that a port in the Panama Canal Zone was a "foreign port." That was a special decision on a special statute. It arose out of the fact that there was a subsidy in respect of the carriage of mails from certain ports within the United States to foreign ports. If there was carriage to the ports

[1] (1922) 225 Illinois Appellate Court Reps. 286.

[2] (1930) 280 U.S. 173.

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of Panama or to Colon which are not in the Canal Zone but in the Republic of Panama, the shipowners would get the subsidy. It was argued that if the mails went to Balboa or Cristobal, which are in the Canal Zone next door to those ports, the subsidy would not be payable. That would be contrary to a long current of practice, and the Supreme Court held that the subsidy was payable to the shipowners whether the mails were carried to Panama or Colon in the Republic of Panama, or to Balboa or Cristobal in the Canal Zone. The case is not of general application.

Relieved of that case, it seems to me that, if we give the word "possession" in this Act its ordinary meaning, then the Canal Zone is a possession of the United States. In a book on the American Law of Ocean Bills of Lading, Mr. Arnould W. Knauth, dealing with this definition in the Act of 1936, at p. 149 says: "The term 'United States' includes the Canal Zone at "Panama, Alaska, Hawaii, Midway, and Guam," and other places. In The Canal Zone Code, which is a publication embodying all the laws applicable to the Canal Zone, in the Cumulative Supplement No. 2 (at p. 124), the compiler states in regard to this Act of 1936: "It would seem that this Act is "applicable to contracts for the carriage of goods by sea to or "from the ports of the Canal Zone, in foreign trade." In the course of the case, inquiry was made of the United States authorities on behalf of the parties on the matter, and a report by them tells us that the Panama Canal Company has successfully maintained the applicability of the Act to the Canal Zone in two or three law suits in the United States District Court for the District of the Canal Zone. The decisions are unreported, the cases being decided on demurrer or in similar ways.

On the material which has been put before this court, it seems to me that the term "United States" in the Act of 1936 includes the Panama Canal Zone. If this conclusion is right, it means that the local law affecting shipments from Cristobal requires the shipowners to insert in the bill of lading a paramount clause bringing into operation the United States Carriage of Goods by Sea Act, 1936. That is a most material circumstance which we must bear in mind when construing this paramount clause.

So construed, it seems to me that a "port in the United "States" in the clause means a port in the United States, its districts, territories or possessions. Cristobal is such a port. The paramount clause, therefore, brings into operation the terms and provisions of the United States Carriage of Goods by Sea Act, 1936, and by those provisions the exempting clause is rendered null and void.

For these reasons, it seems to me that the shipowners cannot rely on the exempting clause. The paramount clause is not an exception upon an exception. It is paramount. I think, therefore, the appeal should be dismissed.

BIRKETT L.J. I agree. The simple question is: Does the Carriage of Goods by Sea Act, 1936, of the United States apply in this case? The immunity clause in the bill of lading is really a work of art. One begins to wonder how on earth any cargo can get from one port to another without coming within that clause, because heat of holds, snow, rain, fresh water, and sea water, and every conceivable thing that the wit of man can imagine are included in the clause. If that immunity clause remained in full force and virtue, it is a very fine weapon of defence. The importance of the point about whether it can apply is that, if the Act does apply, all these wonderful exceptions go by the board. Therefore, it does become of very great importance in this case.

If the Act does apply, then another question immediately arises, and that is the meaning of clause 29, the clause paramount. What are the words of that clause? [His Lordship read the clause paramount relating to the U.S.A., and continued:] At first sight it would seem difficult to assert that Cristobal in the Panama Canal Zone was "a port in the United States." The United States, as people have been wont to consider them, are the 48 States which have been federated together to form the United States. But the moment one begins to examine that apparently simple question, very great difficulties immediately arise. In the Act of Congress of 1936,—the Carriage of Goods by Sea Act—section 13 appears to deal with this point: "This Act "shall apply to all contracts for carriage of goods by sea to or "from ports of the United States in foreign trade. As used in "this Act the term 'United States' includes its districts, terri- "tories and possessions." So, immediately, the term "United "States" is enlarged from the conception of the 48 States, as we normally think of them, to the United States plus any of its territories, any of its districts, or any of its possessions.

To show how complicated this matter was we had cited to us *Luckenbach Steamship Co.* v. *United States*[3] in the Supreme Court, a judgment of Taft C.J., who took that position after holding the high office of the President of the United States. The question there for determination dealt with kindred matters, and it was there held that ports in the Canal Zone are to be regarded as foreign ports within the meaning of the particular statute with which the court was there concerned.

I think that one of the governing considerations in that decision of the Supreme Court was that they had before them a decision to which they attached very great weight, namely, *United States* v. *Alabama Great Southern Railroad Co.*,[4] where a construction had been given by the Executive Department of the Government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the Act.

[3] 280 U.S. 173.

[4] (1892) 142 U.S. 615.

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certainly consorted with the equities of the case, and which they regarded as decisive. They were confronted with that statement from that case, and they followed it. I think the principle of that decision was that traders having traded in the faith that these should be regarded as foreign ports for the purposes of carrying mails, the Supreme Court held, for this specific purpose under this particular statute with regard to the carriage of mails, that the ports of the Panama Zone were foreign ports, and that they were going to keep faith with traders who had carried goods on that footing.

This case is not to be decided by merely saying that they held that the "United States" meant this or that, or that "the "Panama Zone ports" means this or that in any particular case within the meaning of the statute. We have to look at the particular document with which we are concerned, and to construe it accordingly.

We had before us the opinion of Mr. Penifer, counsel of the American Department, and Sellers J. paid very great attention to that opinion. It was a pretty extensive review of the question in this case. It arose because, as I understand, Sellers J. felt that it would be helpful to the court to have an authoritative view expressed. This opinion given on November 15, 1955, stated: "Reference is made to the memorandum of November 1 "from the office of the legal adviser of the Department of State "to you requesting an opinion as to the applicability of section 13 "of the United States Carriage of Goods by Sea Act, 1936, to a "shipment in foreign trade from Cristobal under a bill of lading "providing," the provision is then set out as in the clause paramount. Then comes this other passage: "According to Clyde "& Co., the solicitors who made the request to the London "Embassy, the two issues are whether Cristobal was to be "regarded as a port in the United States, and whether the Canal "Zone is a district, possession or territory of the United States "within the meaning of section 13 of the United States Carriage "of Goods by Sea Act, 1936."

The following pages, which I do not propose to quote, deal with the matter in great detail, setting out the relevant decisions which have been made and which might be of assistance, concluding: "The position of the Panama Canal Company that "the Carriage of Goods by Sea Act is applicable to the Canal "Zone and is part of the Canal Zone Code is consonant with the "ruling of the Supreme Court of the United States in *Panama* "*Railroad Co.* v. *Johnson*,[5] which is cited in respect to the "requirements of the constitution of uniformity of maritime law "throughout the territorial limits of the United States Govern-"ment." Sellers J., in his judgment, expressly said that he accepted the opinions which had been given with such care on the precise questions which had been addressed to him and which were the issues and questions raised in the case.

[5] (1924) 264 U.S. 375.

The second matter is that there was an opinion given by a New York lawyer, Mr. Arnould W. Knauth, of the New York Bar. The editor of the 1952 edition of Carver on Carriage of Goods by Sea in the preface goes out of his way to thank Mr. Arnould W. Knauth of the New York Bar for his valuable help "in "regard to United States law." The opinion of Mr. Knauth was before the judge, and I take it that the real author of that opinion to which acknowledgment is made in the preface by the editor of Carver is this New York lawyer, because when he cites section 13—"the term 'United States' includes its districts, "territories and possessions"—the learned author expressly adds this: "'The United States' here"—that is in section 13 of the Carriage of Goods by Sea Act, 1936—"includes the Canal "Zone of Panama, Alaska, Guam" and various other places. Sellers J. was also influenced by that matter. I see no difficulty in this case, having regard to the evidence which was set out in the agreed statement of facts, in holding that Cristobal was indeed a port in one of the possessions of the United States of America, although, as my Lord quoted from the agreed statement of facts, its precise position is as there set out.

If that be right, it would follow, I think, that the provisions of the Carriage of Goods by Sea Act, 1936, apply in this case, and I am of opinion that they do. In those circumstances, it seems to me that the view which was formed by Sellers J. and expressed by him was right, and that this appeal ought to be dismissed.

PARKER L.J. I agree, and I would only add a few words in deference to Mr. Honeyman's argument. He contended, in the first instance (and, I think, rightly), that the application of the Carriage of Goods by Sea Act, 1936, of the United States is a conditional application. Accordingly, the first question is as to the construction of that condition. His argument goes on: If that construction is clear, then it is unnecessary to look at anything further and, indeed, it would be wrong to go on and construe as contractual terms the terms of the Act of the United States. Only if the condition is ambiguous, so runs the argument, would it be relevant to consider that Act. It is at that point that I part company with Mr. Honeyman.

The object, of course, in any question of construction is to ascertain what the parties intended by the words they used. When one is construing a contract or other written document, I think in every case it is for the court to bear in mind the context in which the words are used, including the position of the parties, the nature of the transaction, the object of the venture. In this case the plaintiffs are the owners of goods on a steamship owned by the defendant shipowners. The contract in question is a bill of lading evidencing a contract for the carriage of those goods. It is well known that both the United States and this country have adopted the Hague Rules.

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Accordingly, when one comes across a clause paramount dealing with shipments from ports of Canada and ports in the United States, it is perfectly obvious to anybody in trade why the paramount clause has been inserted by the shipowners. It is an insertion very much against their interest, because it in effect cuts out the elaborate exception clause on which otherwise they might rely. They have done it in order to comply with the local law, the law of Canada and the law of the United States. Accordingly, unless there are clear words to the contrary, one must presume, I think, that the application of the clause is co-extensive with the application of the Act.

At that point it becomes, therefore, necessary to consider what is the ambit of the Act of the United States. My Lords have dealt with that fully. It is sufficient for me to say that there was evidence here—and in these courts, of course, foreign law is a matter of fact—true, not cross-examined to, and perhaps not made as clear as one might have hoped—that, for the purposes of the Act of 1936, Cristobal in the Canal Zone is a possession of the United States within the definition in that Act. It seems to me clear, on the opinion of Mr. Penifer, that at any rate in the courts of the Canal Zone it would be held that Cristobal was a possession of the United States. Indeed, he referred to the fact that there have been two, or possibly three, cases—true, unreported—in the Canal Zone courts where the courts have so held. I would dismiss this appeal.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Hill, Dickinson & Co.; Clyde & Co.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1956
April 30.
Lord Goddard C.J., Jones and McNair JJ.

* REGINA *v.* REIGATE JUSTICES. *Ex parte* HOLLAND.

Road Traffic — Licence — Licensing authority — Power of prosecution — General trade licence — Unauthorized use — Powers of county councils to prosecute in respect of offences in their areas — Vehicles (Excise) Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 89), *s.* 8 (1) (2) — *Road Vehicles (Registration and Licensing) Regulations*, 1953 (*S.I.* 1953, *No.* 231), *reg.* 35.

The applicant, an officer of the Surrey County Council, on the authority of the council, laid two informations against the driver

[Reported by D. TRAFFORD OWEN, Esq., Barrister-at-Law.]

of a vehicle which was carrying (in Surrey) trade plates issued by the Hampshire County Council, alleging contraventions of the Vehicles (Excise) Act, 1949, and the regulations made thereunder. The justices dismissed the informations on the ground that the applicant was not competent to lay the informations and that the only competent authority was the county council which had issued the licence:—

Held, (1) that section 8 (2) of the Vehicles (Excise) Act, 1949, had transferred to county councils all the powers which the Commissioners of Customs and Excise had with regard to vehicle licences, both as regards the levying and collection of duties, and also the prosecution of offenders for breaches of the regulations relating to those duties.

(2) That there was no limitation on the right of a county council to prosecute in respect of an offence committed within the county. Accordingly, an order of mandamus should issue.

Quaere, whether the county council could prosecute if the offence had been committed in another county.

APPLICATION for order of mandamus.

The applicant, Cecil Ernest Holland, an officer of the Surrey County Council, was authorized by the council, pursuant to section 277 of the Local Government Act, 1933, to institute and to appear and conduct proceedings before any court of summary jurisdiction instituted by the council in respect of offences under, inter alia, the Vehicles (Excise) Act, 1949, and the regulations made thereunder.

In March, 1955, the Surrey constabulary reported to the council facts which, in the opinion of the applicant, provided a prima facie case that one Richard Latham Hampton had used a general trade licence, issued by the Hampshire County Council in respect of general trade plate 343 HO, on a mechanically propelled vehicle, an unregistered goods vehicle, for a purpose contrary to regulation 29 D (3) of the Road Vehicles (Registration and Licensing) Regulations, 1955, and section 25 of the Vehicles (Excise) Act, 1949; and that he had also unlawfully used an unregistered goods vehicle, for which a licence was not in force, on a public road, contrary to the Vehicles (Excise) Act, 1949, s. 15 (1).

The applicant, in pursuance of the authority vested in him, laid informations in respect of the aforementioned offences before the Reigate justices. At the hearing counsel for the defendant asked the justices to dismiss the charges on the ground that being an officer of the Surrey County Council the applicant was not competent to lay the informations in respect of the alleged offences, and that the only competent authority was the county council which had issued the general trade licence, namely, the Hampshire County Council. After hearing argument on this submission the justices upheld it and dismissed the informations.

The applicant moved for an order of mandamus to be directed to the justices requiring them to hear and determine the informations. At the hearing of the application it was further

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argued that the Commissioners of Customs and Excise could alone prosecute in cases relating to offences under the Act of 1949.

F. H. Lawton for the applicant.
P. W. Medd for the justices.

The following case was referred to in argument: *Brown* v. *Allweather Mechanical Grouting Co. Ltd.*[1]

Lord Goddard C.J. stated the facts and continued: We are differing from the justices and think that this is a case in which mandamus must go; but it is no reflection on the justices to say that they came to a wrong decision in this case, because it is not easy for people to find their way about numbers of Acts of Parliament and regulations, but having carefully considered the matter with the assistance of counsel on either side, I do not think that there is any particular difficulty about this matter.

The Vehicles (Excise) Act, 1949, placed the levying of duties under the Act in the hands of county councils. Section 8 of the Act of 1949 provides: "(1) The duties chargeable under this Act "shall be levied by county councils in accordance with provisions "to be made for the purpose by Order in Council. (2) Subject "to the provisions of this Act and of any Order in Council made "under this section, every county council and their officers shall "have within their county for the purpose of levying the duties "aforesaid the same powers, duties and liabilities as the Com-"missioners of Customs and Excise and their officers have with "respect to duties of excise, and to the issue and cancellation "of licences on which duties of excise are imposed, and other "matters under the Acts relating to duties of excise and excise "licences, and all enactments relating to those duties and to "punishments and penalties in connexion therewith shall "apply accordingly." That section means that all the powers which the Commissioners of Customs and Excise had with regard to vehicle licences are to be exercised by the county councils, and that applies, not only to the levying and collection of duties but to the enforcement of the law relating to those duties, and seeing that persons who break the law with regard to those duties are prosecuted and punished.

The other section of the Act to which I think I need to refer is section 23, which provides: "All penalties and forfeitures "recovered under or in pursuance of this Act, whether by a "county council or by any other person, shall be paid into the "Exchequer in such manner and in accordance with such "directions as may be contained in any Order in Council made "under this Act."

By the Road Vehicles (Registration and Licensing) Regulations,

[1] [1954] 2 Q.B. 443; [1953] 2 W.L.R. 402; [1953] 1 All E.R. 474.

1953, made under the Act of 1949, which are a set of regulations which, inter alia, make provisions relating to general trade licences, it is provided by regulation 29 D: "(1) A general "trade licence shall not be used upon any vehicle other than a "mechanically propelled vehicle which is in the possession of the "holder of such licence in the course of his business as a "manufacturer or repairer of or dealer in mechanically propelled "vehicles or is a mechanically propelled vehicle which is for "the time being laid up by its owner. . . . (3) No vehicle shall be "used upon a public road under a General Trade licence for any "purpose other than a purpose for which such vehicle is "authorized by this article to be used under such licence." That is the regulation under which the prosecution was brought.

Section 15 (1) of the Act of 1949 provides: "If any "person uses on a public road any mechanically propelled "vehicle for which a licence under this Act is not in force, not "being a vehicle exempted from duty under section seven of "this Act, or if any person who is the holder of a trade licence "or trade licences issued under this Act uses on a public road "at any one time a greater number of vehicles than he is "authorized to use by virtue of that licence or those licences, "he shall be liable to whichever is the greater of the following "penalties, namely (*a*) an excise penalty of £20; or (*b*) an excise "penalty equal to three times the amount of the duty chargeable "in respect of the vehicle or vehicles."

By regulation 35 of the Regulations of 1953 it is provided: "The clerk of the council and any other officer authorized by the "council are respectively empowered to perform any duty or "exercise any power of the council for the purpose of carrying "these regulations into effect"; so that the clerk to the county council or one of his officers can be authorized, and there is no point made here that Mr. Holland is not one of those persons.

It seems to me that the result of this is that the county council are given the duties under section 8, not only of levying excise duties, but also in relation to what I may call the enforcement clauses, that is to say, the clauses which, among others, deal with the prosecution of offenders for breaches of the regulations. It is said that a county council within its county may do these acts; therefore, if an officer of the county council finds a vehicle within his county which he believes to be offending against these regulations, he has not only the right but the duty to prosecute. It may be said it is unreasonable to put the duty on the clerk to one county to prosecute in respect of a vehicle which is kept in another county, but it has to be remembered that the offence is being committed in the county where the vehicle is stopped and probably has been committed in several other counties. For instance, if a vehicle is being driven by night unregistered or under trade plates when it ought not to be driven, it is committing an offence in every county through which it goes, but it may not be till it is light in the

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morning that somebody finds it out. As a general rule, any person in England can prosecute for any offence which he thinks is being committed, but Parliament has limited the right to prosecute for this offence and taken it away from private individuals and given it to the Commissioners of Customs and Excise, and it then has put the enforcement into the hands of county councils. I can find no limitation on the right of the county council to prosecute, provided they can show that the offence was being committed within their county. I dare say the Surrey County Council officer would be able to prosecute if he could only show that the offence had been committed in another county, but here the offence was being committed at Reigate in Surrey because the car was found there.

In these circumstances, I think the matter was covered by section 8, and therefore the justices were wrong in saying that they had no jurisdiction to hear and determine the informations.

JONES J. I agree, and have nothing to add.

MCNAIR J. I agree.

Order of mandamus.

Solicitors: *Wyatt & Co.; Neish, Howell & Haldane.*

[COURT OF APPEAL.]

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May 8.

Singleton, Morris and Romer L.JJ.

* SIMONS *v.* W. H. RHODES & SON LTD. AND ANOTHER.

[1955 S. No. 1139.]

Dock—Regulations—Lighting—Unloading of vessel—Breach by shipowners of statutory duty—Liability of stevedores to remedy breach —"Shortest time reasonably practicable" — Docks Regulations, 1934 (*S.R. & O.*, 1934, *No.* 279), *regs.* 12, 50.

By regulation 12 (*c*) of the Docks Regulations, 1934, made under section 79 of the Factories & Workshops Act, 1901, when a vessel is being unloaded in dock the shipowner is under a statutory duty efficiently to light every part of the ship to which persons employed may be required to proceed in the course of their employment.

By regulation 50, if the persons whose duty it is to comply with regulation 12 fail so to do, then it shall be the duty of the employers of the persons employed for whose use the lighting is required to comply with the said regulation "within the shortest "time reasonably practicable after such failure."

The plaintiff, a dock labourer in the employment of the first defendants, a firm of stevedores, who were engaged when it was dark in unloading cargo from a ship lying in a Liverpool dock and owned by the second defendants, sustained injury by tripping over a cleat on the vessel's deck.

The trial judge found on the evidence of the men, including the plaintiff, who had been working for five days on the vessel that

the lighting was inefficient and that it had been in the same condition throughout the time that they were working there. He found that the shipowners were in breach of regulation 12, but that it had not been proved that the stevedores were in breach of regulation 50:—

Held, that the shipowners having failed to provide efficient lights, it was the duty of the stevedores within the shortest time reasonably practicable to remedy the position provided they knew or ought to have known that there was a breach of duty by the shipowners. In the present case the stevedores had just as much opportunity as the shipowners of knowing of the state of the lighting and, accordingly, in failing to remedy it they were in breach of regulation 50 and equally liable with the shipowners to the plaintiff.

APPEAL from Ashworth J. at Liverpool Assizes.

The plaintiff, Simons, was a dock labourer in the employment of the first defendants, W. H. Rhodes & Son Ltd., a firm of stevedores, who at the time of the accident, in respect of which the action was brought, were engaged in unloading cargo from the steamship *Colonial*, owned by the second defendants, T. & J. Harrison Ltd., and then lying in the Huskisson Dock, Liverpool. At about 5 p.m. on December 21, 1951, the plaintiff was one of a gang of men in the ship's No. 2 hold. It was dark at the time and the lighting consisted of masthead lights and two clusters of lights for illuminating the inside of the hold. When the time came for knocking off work, the plaintiff, with the other members of the gang, left the hold by way of a ladder and the plaintiff, stepping on to the ship's deck, tripped over a ring bolt or cleat and fell, sustaining injury. He commenced proceedings in April, 1954, against the first defendants for damages, alleging breach of statutory duty under the Docks Regulations, 1934, and negligence, in failing efficiently to light the ship's deck. The first defendants by their defence put the blame for the alleged deficient lighting on the shipowners, who by regulation 12 [1] of the Dock Regulations are required efficiently to light all parts of a ship to which persons employed might be required to proceed in the course of their employment. The plaintiff then obtained leave to join the shipowners as second defendants, breach of statutory duty and negligence being alleged against them. On November 18, 1955, Ashworth J. dismissed the stevedores from the action. He found that the lighting was not efficient, that the shipowners were in breach of statutory duty, and he assessed

[1] Docks Regulations, 1934, reg. 12 (*c*): "all parts of the ship to "which *persons employed* may be "required to proceed in the course of "their employment, shall be efficiently "lighted, due regard being had to "the safety of the ship and cargo, of "all *persons employed* and of the "navigation of other vessels and to "the duly approved bye-laws or "regulations of any authority having "power by statute to make bye-laws "or regulations subject to approval "by some other authority."

Reg. 50: "If the persons whose "duty it is to comply with regulations . . . 12 fail so to do, then "it shall also be the duty of the "employers of the *persons employed* "for whose use the . . . lights are "required, to comply with the said "regulations within the shortest "time reasonably practicable after "such failure."

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the damages at £301, less one-third in respect of the plaintiff's own negligence.

The shipowners now appealed, asking that judgment should be entered for the plaintiff against both defendants and that their liability be apportioned.

D. J. Brabin Q.C. and *J. M. Davies* for the shipowners.
H. I. Nelson Q.C. and *G. B. Currie* for the stevedores.
Edward Wooll Q.C. and *A. D. Pappworth* for plaintiff.

Cases cited: *Hayward* v. *Glen Line*[2] and *Hanson* v. *Wearmouth Colliery*.[3]

SINGLETON L.J. stated the facts and continued: The case came on for trial before the judge in November, 1955. There were three witnesses called on behalf of the plaintiff (including the plaintiff himself) who were stevedores' men who had been working on the ship helping to discharge goods from No. 2 hatch at the time that the accident happened. They all gave evidence in regard to the lighting of the ship in the neighbourhood of the hatch. The plaintiff himself said that the light was not good. He said, indeed, that, when they came up from working below deck, a cluster of lights was brought up from below to give them more light to put the covers on. It would appear, if that answer is correct, that the lighting in the neighbourhood of No. 2 hatch was not very good, apart from the clusters which were brought up when the men had to put the hatch covers on.

The plaintiff was asked in cross-examination: "(Q.) You "made no complaint about that?"—that is, the lighting round the top of the hatch; the lighting from the masthead lights. He answered: "We made no complaint about that because, as "I explained, to put the hatch covers on we took the cluster up "and gave ourselves more sufficient light." Again he was asked: "When the masthead light was working properly, did "it throw a fairly good light?", and he answered: "I never "saw it working properly." He said that unloading had been going on for five days before, and the lighting, when it was used, was poor or inefficient all the time. There was another witness named McGill, who said that after the accident to the plaintiff he had looked to see what he had tripped over and he could not see anything until he struck a match, and then he saw the thing over which the plaintiff had tripped. If that is right, there cannot have been much light on that part of the deck from the masthead lights. McGill was asked: "On this occasion, when "you came up, did you find the light at the top of the hatch the "same as usual, or was it duller than usual?", and he said (as the other witness for the plaintiff said) that it was much or just as usual.

[2] [1955] 2 Lloyd's Rep. 142, 145. [3] 55 T.L.R. 747; [1939] 3 All E.R. 47.

On the other side, evidence on behalf of the first defendants was given by Mr. George Francis Land, who bore the title of "ship's foreman" for the stevedores. He was in charge (as he described it) "at the steamship *Colonial.*" I take it that he was in charge of the work of discharging the ship, that is, in charge of the stevedores' men who were working upon the ship. He said that the usual practice when work of that kind is going on is that there are two clusters of lights down below and the masthead lights, which were supplied in this case by the shipowners, as is the ordinary practice. He said that he had had no trouble upon this ship. He was asked if he had noticed any variation in the power of the lights on that day from other days, and he could not say that there was. He said: "To my mind, "they were the usual. We only have the same any time on "any ship." He had not noticed that there was anything wrong with the lighting provided by the masthead lights. The officer of the ship, the first mate, who was called, said the same thing, that is, that the lighting from the masthead lights was in order; there was nothing wrong with it and that it was as usual.

The judge was satisfied that the three witnesses for the plaintiff were all honest men and that they were all giving him the best information they could as to what had happened. He took the same view of all the witnesses in the case. He came to the conclusion that the lighting was inefficient. He said in the course of his judgment: "The two lights that were intended "to illuminate the hatch where the plaintiff was working, were "deflected downwards over the deck, and I think it is probably "true to say that so far as the broad area round the deck is "concerned they afforded reasonably sufficient light; but I am "quite satisfied that that lighting was not sufficient to enable "the men in the gang to put the hatch covers on with safety, "nor was it sufficient to illuminate the particular part of the "deck on to which the gang had to clamber, when they came "up out of the hold, and I can understand the situation quite "easily." Ashworth J. was satisfied that the lighting on that part of the deck was not sufficient to enable the men in the gang to put the hatch covers on with safety. That is a finding of fact.

Later in his judgment the judge said: "It was a striking "piece of evidence to find that after Mr. Simons had fallen over "and hurt himself, his mate, McGill, was unable to see what "had caused Simons to fall, and had to strike a match, and "there he found that Simons had tripped over a cleat, which "was welded into the deck, in between the two winches on the "forward side of this hatch. I accept that evidence called for "the plaintiff to the effect that they could not see this cleat "when they came out of the hatch. Because I accept that "evidence and made that finding of fact, I am constrained to "hold that the second defendants, the shipowners, were in

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"breach of the duty imposed on them by regulation 12 of the "Dock Regulations."

The judge went on to point out that it was not until eleven months after the accident happened that the shipowners knew anything about a claim against them. He then proceeded to consider regulation 50, and said: "It turns out that in the early "stages of unloading this hatch, the aft ladder was used, and "it may very well be that the lighting from the foremast was "sufficient to throw light on to the area immediately at the top "of that aft ladder. It would be further away from the mast. "Unfortunately, in the course of unloading, that ladder became "displaced or damaged, and it became necessary to use the "forward ladder. Although the evidence was not entirely certain "about it, I think it right to conclude that this forward ladder "had not been used in times of darkness for more than, at most, "two days before the accident." The judge added: "It seems "to me that the absence of any complaint, which indeed is "conceded by the gang, to their own employers regarding the "absence of lighting at the top of this forward ladder, was "sufficient to allow them"—that is, the stevedores—"to say "that they had not appreciated that the situation had arisen "which called for their intervention, under regulation 50. Nor "was it reasonably practicable for them to comply with it after "the shipowners were shown to have been at fault."

In regard to the claim against the stevedores, the judge said: "I feel, myself, that the employers were, at that stage at any "rate when the accident happened, entitled to assume that the "shipowners would carry out the statutory duty which was "imposed on them, and no complaint directed to the point now "before me had been brought to the notice of the employers. I "would have said that it is not proved that the employers were "in breach of any duty. The burden is on the plaintiff to "establish his case, and in my judgment he has not discharged "that burden, and I acquit the employers of all liability." It is upon that ground that Mr. Brabin bases the appeal of the shipowners, claiming, as he does, that it cannot be said upon the facts found by the judge that the stevedores are entitled to be discharged from the action altogether.

I have read certain passages from the judgment, before dealing with the regulations, for this reason. It is better, if one can, to have a full appreciation of the facts of the case before seeking to apply the regulations. The judgment of Ashworth J. appears to me to show, first, that the lighting provided by the masthead lights was not sufficient. Indeed, he found that it was inefficient. So the shipowners were at fault. Then it is said, as I shall show when I refer to the regulations, that, if that were so, there arose upon the stevedores a duty of protecting their men under another of the Dock Regulations, 1934, and also at common law. It is claimed by Mr. Brabin that the stevedores failed to do anything, and that, if there is a finding that the

lighting provided by the ship was inefficient, and if that position had been the same for five or six days, there was a duty upon the stevedores to take some action, and, as they took none, they must be held responsible under the judge's finding of fact. I have read other passages to show how the judge dealt with that in his judgment.

I suppose there would not be so many law suits, or so many appeals, if regulations were always clear. But they are not. And there is some little difficulty in applying regulation 50 to the facts of this case. Regulation 12 is in Part II, and it is the duty of shipowners to comply with the duties laid down in Part II of the regulations. [His Lordship read regulation 12 and continued:] Regulation 12 is one which is made, in part at least, for the safety of persons employed. It says that all places on the deck where work is being carried on and all parts of the ship to which persons employed may be required to proceed in the course of their employment, shall be efficiently lighted. The part of the deck on which the plaintiff fell was a place or a part of the ship at which he had to work or to which he might be required to go. On the finding of the judge that the place at which this accident happened was not efficiently lighted, it is clear that the shipowners are in breach of regulation 12, and that, on the judge's finding, is a cause of the accident which happened to the plaintiff.

It is upon regulation 50 that the appeal turns. [His Lordship read it and continued:] Regulations 9 and 10 deal with the means of access and gangways and the like. Regulation 12, which I have just read, provides that the places mentioned should be efficiently lighted by the shipowners. If they, that is, the shipowners, whose duty it is to comply with regulation 12, fail to do so, then it shall be the duty of the employers of the persons employed, the stevedores, for whose use the means of access and lights are required, to comply with the regulations within the shortest time reasonably practicable. In other words, if the shipowner does not comply with regulation 12, the stevedores, whose men require proper lighting, are under a duty to comply with regulation 12, and to do that within the shortest time reasonably practicable after the failure of the shipowners to do their duty under regulation 12.

Ashworth J. said: "It seems to me, that the absence of any "complaint, which indeed is conceded by the gang, to their "own employers regarding the absence of lighting at the top of "this forward ladder, was sufficient to allow them"—that is, the stevedores—"to say that they had not appreciated that the "situation had arisen which called for their intervention under "regulation 50. Nor was it reasonably practicable for them to "comply with it after the shipowners were shown to have been "at fault."

As far as I know, regulation 50 has only been considered once before in court, and that was in a judgment of Finnemore J. in

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Hayward v. *Glen Line, Ltd.*,[1] where he said: "I am told that "there has been no decision on the meaning of those words yet. "I would think that the meaning of those words is the one "suggested by Mr. Donaldson, that it means as soon as possible "after the employer knew, or ought to have known, that there "was a breach of statutory duty by the person responsible. I "find it difficult to see what other reading can really be given "to the words. If one gave some other meaning it must mean "that the employer has got to go regularly to see whether the "safe means of access is there. It is a statutory duty on the "employer to see that the regulation is carried out, but the "statutory duty here is not on the employer but on the occupier "of the ship, and the duty placed by statute on the shoulders of "the employer becomes effective only after the other person has "failed to carry his out."

Undoubtedly regard must be had to the last line of the regulation, "within the shortest time reasonably practicable after "such failure." To take the question of lighting, if the shipowner does not provide efficient lights, in the ordinary course it should come to the notice of the stevedores working on the ship that that state of things exists, and it would be their duty within the shortest time reasonably practicable to bring about an alteration either by some arrangement with the ship or by doing something themselves as employers. That is the duty cast upon them by the regulation. Of course, it would be difficult to do anything unless they either knew or had the opportunity of knowing of the breach. But in a case such as this the stevedores had just as much opportunity as the shipowners had of knowing what the state of lighting on the deck of the ship was.

Ashworth J. was satisfied that the lighting was not satisfactory. He was satisfied that there was by the ship a breach of regulation 12, in that the places at which the stevedores' men had to work were not efficiently lighted. If it be right to say—and no one disputes it—that the same condition had existed for five or six days, and that work (except upon Saturday and Sunday) was done in the dark on each of those days, it ought to have been obvious to the stevedores' man, who described himself as the ship's foreman, that that state of things existed, and he had an opportunity on behalf of his employers of complying with regulation 50.

The finding of the judge that the lighting was inefficient is coupled with the fact that the evidence on which the judge found the lighting to be inefficient is the evidence of the stevedores' men. If their men who were called as witnesses knew that the lighting was inefficient, so ought the higher management of the stevedoring company, and thus something ought to have been done in order to bring about compliance with regulation 50. Once you have the findings (a) that the lighting was inefficient, (b) that it had been in the same condition throughout the time

[1] (1955) 2 Lloyd's Rep. 142, 145.

the stevedores' men were working there, and (c) that the finding of the judge was based on the evidence of the stevedores' men, I find it difficult to see that it can be said that the stevedores did not know and had no opportunity of knowing that the lighting was inefficient. Of course, there were difficulties. The contention on behalf of the plaintiff's employers, and on the part of the ship, was: "The lights are the ordinary, usual lights for this "class of thing." But, unfortunately for them, the judge found otherwise. I do not see, in the circumstances of his findings, that he could say that the stevedores were not to blame. They had an opportunity of complying with regulation 50 of the regulations, but, unfortunately for them, they did not take it. The view which the judge took that the lighting was inefficient, the finding of the judge upon that ground and for the reasons which he gave seems to me to be a finding against both the shipowners and the stevedores, having regard to the length of time which had elapsed while the lighting was in the same condition.

For those reasons it appears to me that the appeal ought to be allowed to the extent that there ought to be judgment for the plaintiff against both defendants. Once that position is reached there comes the question as to how the damages should be apportioned between the defendants. We are asked to deal with that. One might have thought that the duty primarily was upon the shipowners. Under regulation 12 the duty of lighting is first put upon them, and the judge held that they did not perform their duty. Against that the stevedores took no steps. It may be that to some extent the position was a little more important than it otherwise would have been, for they, at some time before this accident—a few days before—had broken one of the ladders down into the hold at No. 2 hatch so that it could not be used. It was the aft ladder. If the men had been using it on the day of this accident, it is quite possible that the plaintiff would not have been in the same danger that he encountered when the aft ladder was out of order. The men used the forward ladder, and the top of that ladder was not lighted to the same extent as was the case with the other ladder. From the forward ladder the plaintiff stepped almost at once into the cleat which brought about the accident.

Upon the whole, I do not see that much distinction is to be drawn between the position of the two defendants, and I would think that it would be fair to both if the damages, which are not large, were borne equally between them.

MORRIS L.J. I am entirely of the same opinion. The finding of the judge was very clear to the effect that on parts of the ship the lighting was inefficient. That finding has not been challenged in this appeal. The judge held that there was not efficient lighting on the deck where the plaintiff was working. He further found that the lighting was not efficient of the parts of the ship to which the plaintiff might be required to proceed in the course

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of his employment. From those findings it seems to me to follow that the opening words of regulation 50 are satisfied—the words: "If the persons whose duty it is to comply with regula- "tions 9, 10 and 12 fail so to do, then it shall also be the duty "of the employers of the persons employed" to do what is laid down in regulation 50. There being a breach of regulation 12, then there was in this case a duty on the stevedores.

The regulation says that it is the duty of the employers of the persons employed "to comply with the [said] regulations within "the shortest time reasonably practicable after such failure." That might be regarded, first, as denoting that there is a duty, and, secondly, as denoting the time within which the duty has to be performed. But that, I think, is merely a matter of words. There is a duty to comply with the regulation within the shortest time reasonably practicable after such failure. The words "within the shortest time reasonably practicable" call for some test, and it seems to me that those words necessitate compliance by the employers with the regulation as soon as reasonably practicable after they know, or ought to know, of the breach of regulation 12. It is right, I think, to introduce that test and to judge as to what is the "shortest time reasonably practicable" in that way.

Mr. Nelson, I think, does not really submit that the regulation should be construed differently. What he has submitted is that, in effect, the finding of the judge is that there was in this case no evidence that the stevedores ought to have known that there was a breach of regulation 12. I do not find myself able to accept that submission. In the first place the judge does not state his finding in those terms. He states it in quite different terms. But, apart from that, it does not seem to me that it is possible to sustain that submission. The judge held in his judgment that the evidence of the plaintiff, of McGill and of Williams was the evidence of credible witnesses. He said in his judgment: "I accept the evidence of these very credible witnesses, Simons "and McGill and Williams, who gave their evidence extremely "well, that, when they came out of this hatch, the area of the "deck onto which they had to clamber was hardly lighted, if at "all." There was abundant evidence that the state of affairs there referred to by the learned judge had obtained for some days. Conditions had been the same for the previous few days before the Monday, when the accident happened. The condition of affairs was constant. In those circumstances it does not seem to me to be possible to say that there was not evidence that the stevedores ought to have known that there was on the part of the shipowners a breach of regulation 12.

It seems to me, therefore, to follow that the stevedores failed in the duty laid down by regulation 50, because, after they knew, or ought to have known, of the breach of regulation 12, and after time had elapsed to make it reasonably practicable for them to take steps, they then failed to comply with regulation 12. It

follows, therefore, that they were also in breach of the regulations and the result is, in my judgment, that the plaintiff was entitled to succeed against both defendants.

With regard to the apportionment of responsibility between the two I see no reason to distinguish between them, and I agree that it should be equally shared.

ROMER L.J. I agree and have only a very little to add. I think it is very likely true, as Mr. Nelson suggested, that nobody on the ship who took part in this operation of discharging the cargo thought that there was anything to complain about in the deck lighting until the accident happened. But, unfortunately for both the defendants, the judge found the contrary and held that there was inefficient lighting, so far, at all events, as the part of the deck where the accident took place was concerned. And the evidence is undisputed that the lighting as it existed at the time of the accident had been the same, no more and no less, as had prevailed since the commencement of the operation. As my Lord has pointed out, the judge arrived at his finding as to the inefficiency of the lighting on the evidence of the stevedores themselves, and it appears to me that it inescapably and logically must follow that the stevedores must be taken either to have known or to have had the opportunity of knowing of the default by the shipowners of their obligations under regulation 12. Accordingly, whatever in certain circumstances may be the true interpretation of regulation 50 and its application to any particular facts, I feel myself no doubt that on its application to the facts of this case, as found by the learned judge, the stevedores were in default of the obligation which regulation 50 placed upon them, and that the plaintiff ought to have succeeded in the action against them.

From that it follows that we ought to hold that liability of the stevedores was established, and I agree with my brethren in allocating the blame between the two defendants at 50 per cent. each.

Appeal allowed.
Judgment for plaintiff against both defendants.

Solicitors: *Botterell & Roche for Weightman, Pedder & Co., Liverpool; Guy Williams & Co., Liverpool; Silverman & Livermore, Liverpool.*

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Singleton, Morris and Romer L.JJ.

[COURT OF APPEAL.]

* QUINN *v.* HORSFALL & BICKHAM LTD.

[1954 Q. No. 2394.]

Factory—Dangerous machinery—Fencing—Horizontal milling machine—Machine used on process exempt from duty to fence under regulations—Whether exemption under regulations supersedes statutory duty to fence—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1)—*Horizontal Milling Machines Regulations*, 1928 (*S.R. & O.*, 1928, *No.* 548), *reg.* 3, *exemptions, proviso.*

Factory—Common law duty—Relevance of regulations.

The plaintiff, a highly skilled miller, was working on a metal milling machine which consisted of an unguarded cutting wheel revolving rapidly in a vertical plane and bearing upon the metal bar to be machined which was fixed by a clamp at each end, the clamps being mounted upon a turn-table underneath the cutter. The machine was set so that the cutter automatically rose and fell as it cut while traversing across the bar, a process called profiling. When the plaintiff had in this way automatically profiled a metal bar at one end he swivelled the turn-table preparatory to carrying out the same process upon the other end, and found it necessary to readjust the bar in the clamps. He pressed the button to stop the cutting wheel, but unknown to him he failed to push it in far enough to operate the switch, and the very little noise made by the still revolving cutter was inaudible to him because of the noise from the other machinery. The plaintiff moved to a position opposite the centre of the turn-table and as he did so he looked towards another man working another machine and to whom he wanted to give a message. While still looking at the other man, he put both hands over the bar with the result that two fingers of his left hand were injured by the unguarded revolving cutter:—

Held, that although the Horizontal Milling Machines Regulations, 1928,[1] exempted horizontal milling machines, when used for the process of automatic profiling, from the duty of fencing the cutters imposed by regulation 3, the proviso to the exemptions provided that those exemptions should not prejudice the application of section 10 of the Factory and Workshop Act, 1901 (now section 14 of the Factories Act, 1937[2]), in regard to the fencing of the dangerous parts of such machines. Therefore the defendants, having failed to fence what was admittedly dangerous machinery, were in breach of their statutory duty under section 14.

[1] Horizontal Milling Machines Regulations, 1928, reg. 3: "The "cutter or cutters of every horizontal "milling machine shall be fenced by "a strong guard, properly adjusted "to the work, which shall enclose the "whole cutting surface except such "part as is necessarily exposed for "the milling operations . . ."

"*Exemptions.*" "Nothing in *Regulation* 3 shall apply to any milling "cutter used on . . . (vii) automatic "profiling. . . . Provided that these "exemptions shall not prejudice the "application of s. 10 of the Factory "and Workshop Act, 1901" [now s. 14 of the Factories Act, 1937] "in "regard to fencing of such "machinery."

[2] Factories Act, 1937, s. 14: "(1) Every dangerous part of any "machinery, other than prime movers "and transmission machinery, shall "be securely fenced unless it is in "such a position or of such construc-"tion as to be as safe to every person "employed or working on the pre-"mises as it would be if securely "fenced."

Dictum of Somervell L.J. in *Franklin* v. *Gramophone Co. Ltd.* [1948] 1 K.B. 542, 557; 64 T.L.R. 186; [1948] 1 All E.R. 353 and of Somervell and Denning L.JJ. in *Benn* v. *Kamm & Co. Ltd.* [1952] 2 Q.B. 127, 131, 132; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833 considered.

Quaere. Whether the Secretary of State would have power by regulation to take out of the operation of section 14 machinery which was admittedly dangerous.

Held, further, that the defendants were in breach of their common law duty to take reasonable care to protect their employees from unnecessary risk.

Decision of Glyn-Jones J. [1956] 1 W.L.R. 264; [1956] 1 All E.R. 777 reversed.

APPEAL from Glyn-Jones J. at Manchester Assizes.[3]

On May 23, 1952, the plaintiff, who was employed by the defendant company as a fitter and miller at their factory, was working at a metal milling machine, reconditioning carding flats or bars used in the cotton spinning industry, when he was injured.

The machine had a cutter which revolved at a fast speed in a vertical plane and was mounted at the end of a horizontal spindle. The bar to be trued was held at each end in a clamp set upon a turn-table and each clamp had an adjustable jaw, controlled by a screw. The bar was placed upon the clamps and the clamps and the position of the bar upon them were so adjusted as to bring the surface to be milled precisely under the cutter, and when the work upon one end of the bar was done the turn-table was revolved so as to bring the other end of the bar under the cutter.

The movements of the cutter were controlled by two press buttons which were in a switch-box let into the front of the machine, and also by a knob in front of the machine above the switch-box.

The plaintiff had milled the surface at one end of a bar and when he swung the turn-table to bring the other end of the bar into position the bar did not swing into proper place and needed re-setting. He pressed the right hand button, intending to stop the cutter revolving, and moved to a position opposite the centre of the turn-table. As he did so he looked towards another man working another machine, and to whom he wanted to give a message. While he was still looking at the other man, the plaintiff put both hands over the bar. Unknown to him, the cutter was still revolving for he had not pushed the press button far enough in to operate the switch, and in reaching towards the screw with his left hand he put his fingers in the cutter. As a result the little and ring fingers of his left hand were so severely injured that the two end joints of each finger had to be amputated.

The plaintiff brought this action against the defendant company claiming damages for breach of statutory duty and at common law.

Glyn-Jones J. held that the machine in question being a horizontal milling machine used for the process of automatic

[3] [1956] 1 W.L.R. 264; [1956] 1 All E.R. 777.

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profiling was exempt from the duty of fencing the cutters imposed by regulation 3 of the Horizontal Milling Machines Regulations, 1928, and that the proviso to the exemptions only ensured that the provisions of section 14 of the Factories Act, 1937, were applied to any dangerous part of the machine other than the cutter; and that, accordingly, the defendants were relieved from their statutory duty to fence the cutter. He also absolved the defendants of common law negligence, but stated that if he had found the defendants liable he would have assessed the damages at £800 but would have held the plaintiff 50 per cent. to blame.

The plaintiff appealed.

John Thompson Q.C. and *Robert Lambert* for the plaintiff.
J. D. Cantley Q.C. and *W. D. T. Hodgson* for the defendants.

Cases cited are referred to in the judgments.

SINGLETON L.J. stated the facts and continued: There was a guard provided by those who made and supplied the machine. It was not used at the time that work was being done on the day of the accident for some reason or other. It was said in the course of the evidence (and, I think, it was found by the judge) that if the guard had been used it was much less likely that an accident of this kind would have taken place. At the same time it was not a complete guard. It was not a compliance with the requirements of section 14 of the Factories Act, 1937, if that section applies to the facts of this case.

Still, there was a guard which, had it been thought necessary to use it, might have been used for this operation and which, as far as I can see, might have been extended to have made it a better guard than it was. Mr. Cantley told the court that one reason why it was not used was that if it was in position it was not very easy for the man working the machine to see the cutter working. He would have had to stoop down and look under to some extent, to see the cutter; he could have done it. Whether that was a good reason for not using any sort of guard for this work I leave it for someone else to say. It is a fact which ought not to be taken against the defendants, but since the accident happened they have provided some other form of guard with unbreakable glass in front of it, so that the workmen can see the cutters and can have a guard to prevent injury such as occurred in this case.

The action was based on a breach of the Horizontal Milling Machines Regulations of 1928, or on a breach of section 14 of the Factories Act, 1937, or upon a breach of the duty which the defendants owed to their employees at common law.

The Horizontal Milling Machines Regulations, 1928, were made under the Factory and Workshop Act, 1901, section 79 of which provided that the Secretary of State, if satisfied that "any "manufacture, machinery, plant, process or description of

"manual labour, used in factories or workshops, is dangerous or "injurious to health or dangerous to life or limb, either generally "or in the case of women, children or any other class of persons ". . . may certify that manufacture, machinery, plant, process or "description of manual labour to be dangerous; and thereupon the "Secretary of State may, subject to the provisions of this Act, "make such regulations as appear to him to be reasonably prac-"ticable and to meet the necessity of the case."

A good many regulations have been made under the provisions of section 79, and they remain in force under the Factories Act, 1937, by section 159. The Act of 1937, by section 60, gave power to make regulations in somewhat wider terms. I need not go into the difference for this purpose. The regulations of 1928 were made, and have been considered once or twice in different cases, and no one suggests that they are ultra vires or regulations which could not properly be made.

Under the heading "Duties" it is provided: "It shall be "the duty of the occupier to observe Part I of these regulations. "It shall be the duty of every person employed to observe Part II "of these regulations." Under the heading "Exemptions" it provides: "Nothing in regulation 3 shall apply to any milling "cutter used on"—eight different processes, which are described, one of which is automatic profiling. The work on which the plaintiff was engaged at the time of his accident was automatic profiling. That part of the regulation ends in this way: "Provided that these exemptions shall not prejudice the applica-"tion of section 10 of the Factory and Workshop Act, 1901, in "regard to fencing of such machinery."

Part I of the regulations sets out the duties of occupiers. Our attention has only been directed to two of them, regulations 3 and 6. Regulation 3 provides: "(i) The cutter or cutters of "every horizontal milling machine shall be fenced by a strong "guard, properly adjusted to the work, which shall enclose the "whole cutting surface except such part as is necessarily exposed "for the milling operations. (ii) The guard shall either:—(*a*) be "provided with adequate side flanges; or (*b*) extend on each side "of the cutter or cutters to the end of the arbor, or to the "arbor support, or to a distance of not less than half the "diameter of the cutter. Provided that paragraph (ii) of this "regulation shall not apply to cutters used for face milling."

There you have, by regulation 3, a provision made by the Secretary of State as to how the cutter or cutters of every horizontal milling machine should be fenced. Prima facie, if that covers the whole of the dangerous part of the machine, it would take that part of the machine out of section 10 of the Factories Act, 1901.

That was held in *Benn* v. *Kamm & Co. Ltd.*,[1] in which

[1] [1952] 2 Q.B. 127, 132, 134; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833.

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Somervell L.J., in dealing with this kind of question, said: "It "must, in the first resort, be a question of the construction "of the regulations. If, on the face of them, they exhaustively "cover the subject matter, then there will be no statutory "liability. The learned judge adopted the wider construction, "but in that respect I have come to a different conclusion, which "I have stated." Denning L.J. said: "It seems to me that "when the regulations say that a particular dangerous part is to "be guarded in a particular way, then the occupier satisfies his "statutory obligations in regard to that part by guarding it in "that way; but the occupier remains under his ordinary statutory "obligations in regard to other dangerous parts." Romer L.J. said: "It is plain that a set of regulations may be so compre-"hensive as to prescribe a safeguard for all known dangers and, "if so, they would amount to a complete code which, on the "authorities to which my Lord has referred, would supersede "section 14 or such other section as might be relevant."

It was said that the regulation which I have read took the place of section 10 of the Act of 1901 and now takes the place of section 14 of the Factories Act, 1937, and that, consequently, the obligation of section 14 does not apply to this machine, though everyone agrees that at the place at which this accident happened there was a dangerous part of machinery. Section 14 (1) of the Act provides: "Every dangerous part of any machinery, other "than prime movers and transmission machinery, shall be "securely fenced unless it is in such a position or of such "construction as to be as safe to every person employed or "working on the premises as it would be if securely fenced." The defendants claim that section 10 has gone in regard to the cutters of the horizontal milling machine covered by the 1928 regulations, and consequently, that section 14 of the 1937 Act has no application in this case.

I will assume for the moment that that is right. The defendants add that an exemption applies, for the plaintiff was using a milling cutter of the kind mentioned in the regulations and he was engaged upon automatic profiling, so that that which he was doing, being one of the kinds of work mentioned within the exemption upon cutters there included, was exempted from regulation 3. Their case before the judge was that for this kind of work, automatic profiling, they need not have a guard of any kind whatever over the cutters either by reason of section 14 of the Act of 1937 or under the regulations. The result of that, assuming it to be right, is that by the regulations of 1928 the Secretary of State took out of the operation of the old section 10 this dangerous part of machinery; and everyone agrees it is a dangerous part. It may be doubted whether he had power to do that under section 79 of the Act of 1901, but I pass that by and wonder again how far the power of the Secretary of State goes under section 60 of the Act of 1937. There he is given a power to modify certain statutory provisions. The defendants contend

that he said that something which is a dangerous part of machinery need not be fenced.

If that is right, it is giving to the Secretary of State the power which had been exercised by Parliament in this kind of case as a rule; I am not saying it is beyond the powers of the Secretary of State under section 60. Someone may have to consider that another day. It occurs to me that if the Secretary of State did that it would be a most odd thing for him to do without providing any other form of guard or fence. Where regulations are made to enable some process to be carried on which could not be carried on if the case had to be dealt with under section 14 of the Act of Parliament in the normal case, the Secretary of State usually makes regulations which provide some other form of guard, as, indeed, was provided by regulation 3 in this case. But if some operations are exempted from regulation 3 and it is said by the defendants that there is no need for any guard whatever, can that possibly be right?

A question somewhat like this, though not wholly in line, arose in *Franklin* v. *Gramophone Co. Ltd.*,[2] one of the dust cases, in which the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, were the regulations under consideration. Somervell L.J. said: "There remains the question whether these "regulations do 'modify' the obligations imposed by section 47 "[of the Factories Act, 1937] in the manner suggested, or "whether that section still applies to inhalation of dust within "the words of section 47, though the grinder from which the dust "comes is one which, under the regulations, is expressly not "required to have appliances fitted to it. This depends on the "wording of the regulations. It would be possible so to word a "regulation as to make it quite clear one way or the other. "Sir David Maxwell Fyfe relied on the fact that in the "Horizontal Milling Machines Regulations, 1928, the exemptions "have a proviso which reads as follows: 'Provided that these "'exemptions shall not prejudice the application of section 10 "'of the Factory and Workshop Act, 1901, in regard to fencing "'of such machinery.'" The reference by the Lord Justice to the argument of Sir David Maxwell Fyfe is prefaced by the words "It would be possible so to word a regulation as to make "it quite clear one way or the other."

The regulations of 1928 having said that nothing in regulation 3 shall apply to any milling cutter used in the processes there described, adds: "Provided that these exemptions shall not "prejudice the application of section 10 of the Factory and "Workshop Act, 1901, in regard to fencing of such machinery." I regard that as precisely within what Somervell L.J. meant in the case which I have just cited. It appears to me, apart from that, that if one looks at the scope of the regulations one finds that regulation 3 provided that the cutters should be guarded in a particular way. When you read that with the proviso a little

[2] [1948] 1 K.B. 542, 557; 64 T.L.R. 186; [1948] 1 All E.R. 353.

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earlier, you find that, if certain processes are being carried through, regulation 3 shall not apply. But there is the proviso that these exemptions shall not prejudice the application of section 10 of the Factory and Workshop Act, 1901, in regard to the fencing of such machinery, from which it follows that section 14 of the Act of 1937 applies to these processes on milling cutters if they are not covered by the regulation—in other words, if they are exempt from the provision of regulation 3. That is how I read it. It appears to me that that is the only sensible way to read it when one remembers over the years the attempts made by the Legislature to provide additional protection for workmen. The tendency has been, on the whole, to give additional safeguards against accidents to workmen in the last 50 years at least, and I am glad to think that it should be so. If in wartime, or in the case of national emergency, it is found that something must be done to get additional tools of one kind or another, one may sometimes have liberty given to use certain machines; but that does not arise in this case.

To my mind, there is no question about it but that the proviso in the regulation shows that the provision as to fencing contained in the Act survived, so that one has to look back at section 14 of the Act of 1937, which provides that "Every dangerous part of "any machinery . . . shall be securely fenced unless it is in such "a position or of such construction as to be as safe to every "person employed or working on the premises as it would be if "securely fenced." That applies to this case. It was said by counsel on behalf of the defendants that that would make it impossible to do some of the processes exempted in the regulation. I do not think that that arises. When the evidence given in the case is examined it appears that the expert witness called on behalf of the plaintiff said that guards could be provided for each of them. No evidence was called by the defendants; not a witness to explain why they did not use the guard, or no expert witness to show (if it be material) that some of the processes could not be carried on. The processes mentioned are a little wide and, it was said in argument, a little odd. It would seem difficult to carry through some of them with a guard such as is required by section 14, but those things are not beyond the wit of man these days, perhaps. On the other hand, when you come to one of the processes mentioned, internal milling, it may be that a guard would not be needed for that as it might not be a dangerous part of machinery. That may be the very reason for drawing attention by the proviso to the applicability still of section 10 of the old Factories Act, indicating that if fencing is necessary by reason of its being a dangerous part of the machinery fencing must be provided.

Thus I take a different view from that formed by Glyn-Jones J. I am satisfied, as he was, that this was a dangerous part of the machinery, but I take a different view as to the applicability of section 14 of the Act of 1937. I think it would be

wrong to say that because of the impact of the regulations upon the Act of Parliament the defendants are now free from providing any fence or guard for what is, admittedly, a dangerous piece of machinery—a fast revolving cutter in this horizontal milling machine.

Should my view be wrong, I am of opinion that the defendants would be responsible for damages for breach of the duty which they owed to their workmen under the common law. That is no more, and no less, than a duty to take reasonable care so as not to subject their employees to unnecessary risk. The defendants apparently took the view that they need not do any guarding of this dangerous part of the machinery. I have said that, in my opinion, this was wrong. On that ground the defendants are responsible for damages for negligence.

The only remaining point is a question of contributory negligence. Although I do not think I should have thought the plaintiff responsible to so high a degree as the judge found, I do not regard it as the duty of this court to interfere. Accordingly, I would allow the appeal and hold that the defendants are responsible in damages to the extent of 50 per cent. of the total amount provisionally assessed by the learned judge.

MORRIS L.J. I am of the same opinion. The result of the Horizontal Milling Machines Regulations, 1928, is that when the cutters on milling machines are being used other than for the purposes referred to in the exemptions those cutters must be fenced in the way laid down by regulation 3. At such times and in such circumstances it is to the provisions of regulation 3 that attention must be directed and not to the provisions of the statute. That is the effect of the decisions in *Miller* v. *Boothman (William) & Sons*,[3] and in *Benn* v. *Kamm & Co. Ltd.*[4] If there is a dangerous part of a horizontal milling machine other than a cutter then the provisions of the Factories Act, 1937, apply to such dangerous part.

The position was summarized in *Benn* v. *Kamm & Co. Ltd.*[4] in this sentence, which I take from the judgment of Denning L.J.[5]: "It seems to me that when the regulations say, that a "particular dangerous part is to be guarded in a particular way, "then the occupier satisfies his statutory obligations in regard "to that part by guarding it in that way; but the occupier "remains under his ordinary statutory obligations in regard to "other dangerous parts." In *Benn* v. *Kamm & Co. Ltd.*[4] injury arose in reference to another dangerous part than the cutter. In the present case the injury arose by contact with the cutter.

It seems to me that the determination of the present case depends entirely upon a construction of the regulations and in particular upon a construction of the proviso to the part of the regulations under the heading "Exemptions."

[3] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.
[4] [1952] 2 Q.B. 127.
[5] Ibid. 132.

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In *Benn* v. *Kamm & Co. Ltd.*, Somervell L.J., in his judgment, having referred to the proviso, said [6]: "Then there is a "proviso: 'Provided that these exemptions shall not prejudice "'the application of section 10 of the Factory and Workshops "'Act, 1901, in regard to fencing of such machinery,'" and he went on: "That shows that so far as the exemptions are con-"cerned the general provisions of section 10 of the Act apply." That was to the same effect as what Somervell L.J. had earlier said in *Franklin* v. *Gramophone Co. Ltd.*[7] in the passage to which my Lord referred.

I find myself taking entirely the same view. Before anyone reading the regulations would come to regulation 3 he would read the words beginning "Nothing in regulation 3 shall apply to any "milling cutter used on," then comes (i) of the exemptions, "or when used for," and then follow the remainder of the exemptions, (vii) of which is "automatic profiling." Therefore, in reference to this case, anyone reading the regulation would read it "Nothing in Regulation 3 shall apply to any milling cutter "when used for automatic profiling." That is the position in the present case. He would then read the proviso. "Provided "that these exemptions shall not prejudice the application of "section 10 of the Factory and Workshop Act, 1901, in regard "to fencing of such machinery." It is common ground that for the reference to section 10 reference to section 14 of the 1937 Act may be made. The proviso ends with the words "in regard to "fencing of such machinery." The question arises as to what is the meaning in the context of the phrase "such machinery." Mr. Thompson has submitted in the first place that "such "machinery" means the cutters. If that is so, then the position is abundantly clear, for the proviso would mean that "the "exemptions shall not prejudice the application of section 14 "in regard to the fencing of such cutters, namely, cutters that "are being used in one of the exempted processes." It would follow that if that is the correct construction section 14 would apply when the cutter is being used for automatic profiling.

Mr. Thompson alternatively submits that "such machinery" means the horizontal milling machines themselves. I think he submits that it is immaterial from his point of view whether his first or his second submission be accepted as correct. If "such "machinery" means the horizontal milling machines, then the proviso, he submits, has the meaning that if a cutter is being used for automatic profiling (which is the case here), then nothing is to prejudice the application of section 14 in regard to the fencing of the horizontal milling machines. That would include the whole of the machines.

Mr. Cantley, on the other hand, makes a different submission. He submits that one should read the phrase "such "machinery" as machinery excluding the cutters, or read it as denoting all parts of the machine other than the cutters. I find

[6] Ibid. 131.

[7] [1948] 1 K.B. 542, 557.

myself unable to accept that submission. It seems to me that it would have been very easy to frame the proviso in that way had that been the intention. I can only read this proviso in this way, that the regulation is saying "When a milling cutter is "being used for automatic profiling then regulation 3 does not "apply." In other words, you do not then have the fencing of the kind prescribed by regulation 3. But in that event there is an application of section 14 in regard to the fencing of such machinery. I do not think it matters whether such machinery in the context refers to the cutters or to the whole machinery. I incline to the latter view but I think it is immaterial.

I consider, therefore, that this case becomes one of construction and I can read the proviso in no other way than that which I have mentioned. I think it follows that there was a breach of statutory duty in this case and that the plaintiff is entitled to recover.

I do not wish to add anything in regard to the other parts of the case which have been covered by my Lord, except to say that I do not think for myself that I would, if I had been sitting, have arrived at the percentage of 50 per cent. as being the degree of fault of the plaintiff; but in all the circumstances of the case I do not think that we can interfere with the apportionment fixed by the judge.

ROMER L.J. I agree and I have very little to add. In fact, were it not for the fact that we are differing from the judge, I would do no more than express my complete agreement with what my brethren have said. It is quite clear that the whole difficulty in this case has arisen out of two words in the proviso to the regulations, the words "such machinery," the difficulty being as to what the draftsman had in mind in using them. They might be referring, possibly, to the milling cutters themselves, which in the specified processes are the subject of the exemption, though I think that, perhaps, is not altogether probable because the draftsman would, I think, have said "such "cutters." Alternatively, they might be referring to the milling machine as a whole, or, thirdly, they might be referring to the machinery mentioned in section 10 of the Act of 1901. But I quite agree with my brethren that in whatever sense one does read the words one is driven irresistibly to the conclusion that section 10 of the old Act (now section 14 of the 1937 Act) was not intended to be displaced except in relation to the unexempted cutters. I think the proper approach is that the section does apply to all dangerous parts of machinery unless and to the extent that it is displaced either expressly or sufficiently clearly by implication by regulation made by the Minister.

As the result of these regulations, the unexempted cutters (if I may so describe them) are taken out of the section and become subject to the regulations instead. But I can see nothing of sufficient force to warrant the suggestion that cutters when used

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for exempted processes are similarly taken out of the operation of section 14. Indeed, in order to arrive at the opposite conclusion, it seems necessary, as far as I can see, to introduce into the proviso an exception, which is not there, by introducing the words "except the milling cutters specified in the exemption." I think there is no justification for introducing any such exception as that. One must take the language as one finds it and give it its general signification, with the result, as I have indicated, that section 14 is not displaced with regard to these exempted cutters.

I accordingly would allow the appeal, and in regard to the other matters I have nothing to add to what my brethren have said.

Appeal allowed.
Leave to appeal to the House of Lords refused.

Solicitors: *W. H. Thompson; Gardiner & Co. for A. W. Mawer & Co., Manchester.*

A. W. G.

[COURT OF APPEAL.]

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May 9, 10.
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[Plaint No. L. O. 5092.]

Landlord and Tenant — Rent restriction — Repairs and rent — Notice of increase — Proceedings in county court by landlord to recover increase—Right of tenant to challenge validity of notice in such proceedings—Notice issued under mistaken assumption of repairs being landlord's sole responsibility — Power of county court to amend notice and correct errors—Housing Repairs and Rents Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *ss.* 23 (1), (2), (5), 25 (1), (4), 26 (1), (2), (4), (5), *Sch. II,* 1, 4 (1), 5.

In 1931 the plaintiff landlords by an agreement in writing let a dwelling-house protected by the Rent Acts to the husband of the defendant tenant, the agreement providing that the tenant was to "keep the said premises in good and tenantable repair (fair wear "and tear excepted) and be responsible for and replace all broken "glass and missing keys." At all times since 1931 repairs were in effect carried out by the landlords. On the death of the husband the defendant remained in occupation as statutory tenant.

After the coming into force of the Housing Repairs and Rents Act, 1954, the landlords served on the tenant a notice of increase of rent under section 25 of the Act.[1] The tenant then obtained

[1] Housing Repairs and Rents Act, 1954, s. 23: "(1) Where a dwelling-"house is let under a controlled "tenancy or occupied by a statutory "tenant, and the landlord is respon-"sible, wholly or in part, for the "repair of the dwelling-house, then, "subject to the provisions of this Part "of this Act,—(a) if and so long as "the following conditions (hereinafter "referred to as 'the conditions jus-"'tifying an increase of rent') are

from the local authority a certificate under section 26 (1) that the conditions specified by section 23 as justifying an increase were not fulfilled; this certificate was later revoked on the landlords' application under section 26 (4). The notice of increase and accompanying declaration were drawn up on the footing that the landlords were wholly responsible for repairs.

On proceedings being brought in the county court to recover an unpaid balance of the increased rent, the landlords took a preliminary objection that the tenant could not in such proceedings

" fulfilled, that is to say—(i) that the " dwelling-house is in good repair; " and (ii) that it is reasonably suitable for occupation having regard to " the matters specified in paragraphs " (*b*) to (*h*) of subsection (1) of section " 9 of this Act; and (*b*) if in accordance with the Second Schedule to " this Act the landlord has produced " satisfactory evidence that work of " repair to the value specified in that " Schedule has been carried out on " the dwelling-house during the period " so specified, the rent recoverable " from the tenant shall be increased " by virtue of this subsection so as to " exceed by the amount hereinafter " mentioned the rent which apart " from this subsection would be recoverable from the tenant under the " terms of the tenancy or statutory " tenancy and having regard to the " provisions of any enactment. (2) The " amount of any increase payable by " virtue of the last foregoing subsection (. . . hereinafter referred to as " a ' repairs increase ') shall be at the " annual rate of twice the statutory " repairs deduction . . . Provided that " where the landlord is responsible " in part only for the repair of the " dwelling-house, the amount of the " repairs increase shall be reduced " proportionately. . . . (5) Any question arising under the foregoing " provisions of this section whether " the landlord is responsible for repairs or as to the amount of any " reduction under the proviso to subsection (2) of this section shall be " determined by agreement in writing " between the landlord and the tenant " or, on the application of either of " them, by the county court."

S. 25: " (1) No sum shall be recoverable by way of repairs increase " unless the landlord has served on " the tenant . . . a notice in the prescribed form of his intention to increase the rent (hereinafter referred " to as a ' notice of increase '), accompanied by—(*a*) a declaration in " the prescribed form that at the date " of service of the notice the conditions justifying an increase of rent " were fulfilled; and (*b*) a declaration " in the prescribed form such as is " mentioned in the Second Schedule " to this Act. . . . (4) The county " court, if satisfied that any error or " omission in a notice of increase or " a declaration accompanying such a " notice is due to a bona fide mistake " on the part of the landlord, shall " have power to amend the notice or " declaration by correcting any errors " or supplying any omissions therein " which, if not corrected or supplied, " would render the notice or declaration invalid, and may exercise the " said power on such terms and conditions . . . as appear to the court " to be just and reasonable. . . ."

S. 26: "(1) On the service of a " notice of increase . . . the tenant " . . . may apply to the local authority for a certificate that either or " both of the conditions justifying an " increase of rent are not fulfilled; " and the local authority, if satisfied " that the dwelling-house fails to fulfil either or both of the conditions, " shall certify accordingly in the prescribed form and the certificate " shall be deemed to have been in " force as from the application therefor. (2) Where the local authority " have granted a certificate . . . then " during . . . any period during which " the certificate is in force no sum " shall be recoverable by way of " repairs increase . . . but if the " landlord, in proceedings for the " recovery of such a sum, satisfies " the court that at the time when the " certificate was given the conditions " justifying an increase of rent were " fulfilled, the court shall order that " the certificate shall cease to be in " force. . . . (4) Where after the " giving of a certificate . . . the " landlord has executed to the satisfaction of the local authority such " work as requires to be executed in " order that the dwelling-house shall " fulfil both the conditions justifying " an increase of rent, the local authority shall on the application of the " landlord revoke the certificate. (5) " Where . . . the local authority

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challenge the landlords' assertion that paragraph (*a*) of section 23 (1) had been complied with, her only remedy being to obtain from the local authority a certificate of the nature set out above. The judge upheld the landlords' objection, but proceeded to hear evidence. It was then contended that the tenant had no case to answer, as the notice was invalid in that the amount claimed should have been proportionately reduced in accordance with section 23 (2) as the tenant was partially responsible for repairs. The judge gave judgment for the landlords for the amount claimed. On appeal:—

Held, (1) that the landlords' preliminary objection failed, as there was nothing in the Act to oust the jurisdiction of the courts to entertain such a contention by a tenant in such proceedings.

(2) That the fact that the landlords had throughout carried out the repairs did not throw on them the contractual burden to do so, or constitute a variation of the original agreement; so that the notice of increase did not comply with the Act.

Asher v. *Seaford Court Estates Ltd.* [1950] A.C. 508; 66 T.L.R. (Pt. 1) 945; [1950] 1 All E.R. 1018 applied.

(3) That the case should be remitted to the county court to adjudicate on the tenant's objections, and, if thought fit, to amend the landlords' notice under the jurisdiction conferred by section 25 (4) of the Act.

Appeal from Judge Elder Jones, sitting at Shoreditch County Court.

By an agreement in writing dated May 8, 1931, the plaintiff landlords let to Solomon Jacobs, the deceased husband of the defendant tenant, No. 33 Turner Street, Shoreditch, a dwelling-house protected by the Rent Acts at a weekly rent of £2 7s. The agreement contained a provision whereby the tenant agreed "to "keep the said premises in good and tenantable repair (fair "wear and tear excepted) and be responsible for and replace all "broken glass and missing keys." On the death of Solomon Jacobs his widow remained in possession as a statutory tenant,

"have refused to revoke a certificate, "then if . . . the landlord satisfies "the court that at the time of the "application both the conditions "justifying an increase of rent were "fulfilled the court shall order that "the certificate shall cease to be in "force. . . ."

Sch. II: "1. . . . the declara- "tion mentioned in paragraph (*b*) of "subsection (1) of section 25 of this "Act is a declaration that . . . work "of repair of a general description "specified in the declaration has been "carried out on the dwelling-house "to a value not less than three times "the amount of the statutory repairs "deduction for the dwelling-house. ". . . 4.—(1) . . . the tenant may "apply to the county court to deter- "mine whether work of repair has "been carried out . . . and if . . . "the court is not satisfied that work "of repair has been carried out as "aforesaid . . . the court shall cer- "tify accordingly and thereupon the "notice of increase shall be . . . of "no effect. . . . 5. Subject to the "provisions of the last foregoing "paragraph, the service with a notice "of increase of such a declaration as "is required by this Schedule shall "be treated for the purposes of sub- "section (1) of section 23 of this Act "as the production of satisfactory "evidence that work has been carried "out as mentioned in paragraph (*b*) "of that subsection; and subject as "aforesaid the validity of a declara- "tion shall not be questioned on the "ground that the value of the work "of repair stated in the declaration "to have been carried out on the "dwelling-house is less than that "required by the foregoing provisions "of this Schedule."

the rent being subsequently raised to £2 14s. 6d. per week on account of increases in the rates.

In May, 1955, the landlords served on the tenant a "notice of "increase" of rent with an accompanying declaration pursuant to section 25 of the Housing Repairs and Rents Act, 1954, requiring her in future to pay £3 6s. 6d. per week. The tenant then applied to the local authority pursuant to section 26 (1) of the Act for a certificate that owing to certain defects in repair the conditions specified by section 23 (1) as justifying an increase of rent were not fulfilled. The local authority issued such a certificate, but later revoked it on being satisfied that the landlords had executed the necessary repairs. As the tenant continued in her refusal to pay the increased rent, the landlords instituted the present proceedings to recover the balance alleged to be due.

At the hearing in the county court, a preliminary objection was taken on behalf of the landlords that, having regard to the provisions of section 26 of the Act, it was not open to the tenant in proceedings in that court to assert that the conditions precedent set out in paragraph (*a*) of section 23 (1) of the Act had not been complied with, as on the proper reading of the Act her only remedy was to obtain the certificate under section 26 which had been granted and later revoked. The judge accepted this submission, but proceeded to hear certain evidence. Counsel for the tenant then submitted that there was no case to answer; as the notice of increase and accompanying declaration were drawn up on the footing that the landlords were responsible in law for the whole of the cost of repairs, whereas under the terms of the original letting, which had not been varied, the landlords were, in the words of section 23 (2), "responsible in part only for the repair "of the dwelling-house," so that the amount of the repairs increase should be reduced proportionally. The county court judge rejected this contention, holding that on the facts the responsibility for all repairs had devolved on the landlords. The tenant appealed.

Ralph Millner for the tenant.
C. G. Armstrong Cowan for the landlords.

Case cited in argument not referred to in the judgments: *Penfold* v. *Newman*.[2]

LORD EVERSHED M.R. In these proceedings the plaintiffs, the Board of Governors of the London Hospital (to whom I will hereafter refer as "the hospital"), sued the tenant defendant, Mrs. Rose Jacobs, for a relatively small sum for arrears of rent of premises belonging to the hospital at 33 Turner Street, Whitechapel, of which Mrs. Jacobs, the defendant, was at all material times statutory tenant. The sum involved, for which judgment was given for the hospital, is £13 11s. 1d., but the questions

[2] [1922] 1 K.B. 645.

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which have arisen are of some significance. We were informed that this was one of a number of somewhat similar proceedings brought by the hospital against other tenants, and it is probable that the decision in this case will substantially affect the decisions in other cases.

The arrears of rent sued for represent in fact certain increases in the pre-existing rent of £2 14s. 6d. per week to which the hospital claim to be entitled as a repairs increase, under the terms of the Housing Repairs and Rents Act, 1954. The provisions relative to rent increases under that Act are contained substantially in Part II of the Act, beginning with section 23, and they are undoubtedly (as I think the subject-matter almost inevitably required them to be) somewhat complex. I am not sure that I agree with the criticism which the county court judge has made of the combined efforts of the Parliamentary draftsman and the legislature, because I think the purpose and intendment of the sections is not seriously doubtful.

Section 23 opens by stating what are the two conditions precedent to any repairs increase which may be validly made under the Act. I shall not read subsection (1) in full. It is sufficient to say that the first condition (which is itself a double-barrelled condition, if I may use the phrase, and is called thereafter "the conditions justifying an increase of rent") is found in subsection (1) (*a*) and is, in brief, that the dwelling-house in question is in good repair and that it is reasonably suitable for occupation. That first branch of the subsection constitutes, as I have said, the first (though it is two-fold) of the conditions precedent to an increase. The second is found in paragraph (*b*) of the same subsection and is to the effect that, in accordance with the provisions found in Schedule II, satisfactory evidence has been produced that repair work to the extent intimated has been done. Subsection (2) provides for the quantifying of the repairs increase which can be made, and there is a proviso to that subsection to this effect, that if in any case the landlord is only partly responsible, instead of wholly responsible, for the repair of the dwelling-house in question, then the quantum of the increase has to be (and I am quoting) "reduced propor-" tionately." Those two last words obviously introduce an element of degree into the question of quantum where the repair liability is shared between landlord and tenant; and, although guidance is later given for the fixing of the proportions, it is plain that there must in many cases be room for some doubt what the true proportion is. To that matter I shall have to return presently.

Having read the two conditions precedent, I can now state that in this court two points (or two substantial points, for there have been others intimated) have been debated, one arising under each of the two conditions precedent; and I shall deal with them, so far as I can, separately. The first one, which affects paragraph (*a*) of subsection (1), the "conditions justifying an increase

" of rent," arises out of a preliminary objection taken by the hospital at the trial. The objection was that it was not open to the tenant, in the circumstances, to challenge the declaration by the landlords in their notice for increasing the rent that those conditions had been complied with.

In order to make clear the nature of that point, I must embark a little further upon the waters of these sections. In addition to the conditions laid down in section 23, it is also provided by section 25 that a landlord cannot recover any sum by way of repairs increase unless he has served upon the tenant a notice of increase as therein defined, which includes declarations to the effect that both the conditions precedent which I have stated and which are found in paragraphs (*a*) and (*b*) of section 23 (1) have been satisfied; and there is statutory provision made (into which I will not go in detail) as to the form and requirements of the notice of increase.

In the present case, the hospital possessed itself of the appropriate form (or what, upon this part of the case, was the appropriate form) and, in due compliance with it, the hospital, by their financial secretary, who was qualified to execute it, stated that at the date of the service of the notice the " conditions " justifying the increase of rent " had been fulfilled; that is to say, they declared that the conditions to be found in paragraph (*a*) of section 23 (1) had been satisfied. When the action started, the hospital, by their particulars of claim, alleged that this notice had been given, and they accordingly alleged that they were entitled to the increase. But the defendant, by way of defence, specifically challenged the contents of the declaration to which I have referred. She said: " The conditions justifying " an increase of rent referred to in section 23 (1) (*a*) of the Act " have not been fulfilled "; and, on request, she gave particulars of the extent to which, as she alleged, those conditions had not been satisfied. I need not pause to read them or to go into them, because it is at this point that the preliminary objection arises. It is said that the effect of section 26 of the Act, in the circumstances of this case, is altogether to prevent the defendant from challenging the truth of this declaration. Of course, since fulfilment of these conditions is a condition precedent to any increase of rent, it is obvious that this preliminary objection is, on the face of it, a somewhat bold one; since it involves saying that the courts are not entitled to inquire at all into the question of fact raised by the tenant. Have those essential requirements been satisfied?

I must now, however, look at section 26. Subsection (1) is in these terms: " On the service of a notice of increase under " [section 25] or at any subsequent time, the tenant "—and I will try to shorten my reading—" may apply to the local " authority for a certificate that either or both of the conditions " justifying an increase of rent are not fulfilled; and the local " authority, if satisfied that the dwelling-house fails to fulfil

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"either or both . . . shall certify accordingly." Then subsection (2) provides that where the local authority have granted a certificate of the kind I have mentioned and the tenant has served a copy of it on the landlord, then during any period for which the certificate is in force the landlord cannot recover the repairs increase; but, subsection (2) goes on to provide that if the landlord, in proceedings for the recovery of the sum—that is, the repairs increase—satisfies the court that when the certificate was given the conditions in truth had been fulfilled, then the court may order that the certificate shall cease to be effective. Subsections (3) and (4), taken together, I need only mention to indicate that a local authority may, on the application of a landlord, revoke a certificate, particularly where work has since been done by a landlord; and, on the revocation, of course, the stop on the recovery of the repairs increase ceases. Then subsection (5) provides further in relief of the landlord that, in proceedings to recover the increase claimed, a landlord may challenge a refusal of the local authority to revoke the certificate.

I think that citation of the section will suffice; and it will be seen at once that a certificate, if granted or (as the case may be) if not revoked is open to challenge by the landlord in proceedings in court. But there is no express provision in the section for the converse case. It nowhere provides that if a local authority refuses to grant a certificate, or revokes one that it has granted, then a tenant in proceedings in the courts may challenge the refusal of the local authority or challenge the local authority's revocation. It is the basis of Mr. Cowan's argument that we should infer from the absence of that countervailing provision that a tenant cannot challenge at all, in any proceedings, the refusal to grant a certificate by a local authority or its revocation when granted. Indeed, the argument I think goes so far as this: it is said that the only remedy available to a tenant when a landlord serves a notice of increase (so far as concerns the declaration that paragraph (*a*) of section 23 (1) is satisfied) is to go and get, if he can, a certificate from the local authority; and that the powers of the court are wholly ousted, so far as any challenge is concerned on the part of the tenant, to a declaration of fulfilment by the landlord of what is (as I have already said) an absolute condition precedent to any right of the landlord to recover any increase of rent whatever under this part of the Act. It was the view of the county court judge that such was the effect of the section. His Honour went so far as to say that, in his view, the contrary result would make a mockery of the Act and the scheme of these sections in it. With all respect to the county court judge, I entirely fail to see that that is so. Indeed, I am bound to say, for myself, that had it not been for the fact that this point had appealed to his Honour, I should have been disposed to think the point was really hardly tenable at all.

After all, this is not a case in which Parliament is indicating some particular tribunal and saying that that tribunal shall have

exclusive jurisdiction to deal with the particular matters in question. Examples from legislation can be found for such provisions. A familiar one is under the Public Health Acts, where for certain purposes there is exclusive jurisdiction given to the justices. Indeed, in these Acts themselves, the Acts dealing with rent restriction, it is well known that in certain very substantial respects exclusive jurisdiction is given to the county courts. But what is claimed here is not the giving to some tribunal of exclusive jurisdiction, but is that the jurisdiction of any of Her Majesty's courts is wholly excluded by the ipse dixit (or, indeed, the converse, the failure to speak) of an official of a local authority acting in a purely administrative capacity. The point contended for seems to me of so far-reaching a character that I find it difficult and unnecessary to express at any length the grounds for the view that I take, which rest, indeed, upon principles of very long standing, namely, that very clear words will be required to oust altogether the jurisdiction of the Queen's courts in matters of private rights. But I would point out that if the view contended for were right, it would result in a provision somewhat difficult to administer, since it would not by any means follow that a landlord would know whether a tenant had or had not made any application for a certificate. So far from it being a mockery of the Act if the view of the tenant is right, I am inclined to think that it is the contrary view which would produce a stultification of any usefulness in these provisions; for if the acts of the local authority were only challengeable by the landlord, it is not unlikely that the local authority would proceed to grant certificates whenever it was humanly possible to do so, leaving it to the landlord to challenge them if he could. But, in truth, I cannot see anything in the formulation of the section which leads to the result as one which can be said to be contemplated by its language. After all, what the Act is doing is surely this: it is saying, for the protection of the tenant, that the landlord must declare that this condition precedent, i.e., "the "conditions justifying an increase," has been satisfied. I think that, if there is no challenge, it is the scheme of the Act that the landlord can then rely on the declaration in the notice and would not have to go on and prove affirmatively what he has declared. But the tenant is given an opportunity of getting, at the price of a shilling (which seems to be what he has to pay), a certificate, if such a certificate is justifiable, which in his hands will be prima facie evidence that a case for an increase has not been made out. It is made clear that it is not conclusive. The landlord may challenge it; but it is a quick and an inexpensive means of immediate protection for the tenant, if in truth the circumstances warrant the grant of a certificate. That, I think, is all that the section is intended to do. In the present case (as I should perhaps have earlier stated) the tenant did apply for a certificate and obtained one; but later, the landlord having done certain works which the certificate indicated should be done,

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that certificate was revoked; and it is on that ground that the landlords, the hospital, now say that the tenant has exhausted all her remedies by way of challenging the first condition, paragraph (*a*) in subsection (1) of section 23. I, for my part, am wholly unable to find any warrant in the section for such an ouster of the jurisdiction of the courts.

If any further emphasis is needed to support that conclusion, I will cite two matters. The declaration correspondingly required to support the second of the conditions (found in paragraph (*b*) in section 23 (1)) is a declaration in a form mentioned in Sched. II to the Act, the reference to that Schedule having (as I earlier said) been also found in section 23 itself; and, if one looks at Sched. II, it is there provided in quite plain terms by paragraph 4 that a tenant may, within 28 days, apply to the county court—not, be it observed, to an administrative authority, but to a tribunal—to determine whether in fact work of the required value, which the landlord has declared to be done, has been done. By the succeeding paragraph of the Schedule, it is provided, also in clear terms, that if the tenant does not avail himself of that right to go to the court, then his chance of challenging that declaration as to the value of the work done is gone, if the landlord brings proceedings to recover the increase of rent. For paragraph 5 says: "Subject as aforesaid the validity of a declaration shall not be questioned on the ground that the value of the work stated in the declaration is less than that required by the foregoing provisions of this Schedule."

My second example I take, not from this Act, but from another Act in pari materia, namely, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, section 3 of which provides, among other things, for a right to the court, if it thinks it reasonable to do so, to make an order for possession where satisfied that suitable alternative accommodation is available for the tenant. By subsection (2) of that section it is further provided that a certificate of the housing authority (which is the local authority) certifying that the authority will provide suitable alternative accommodation at a specified date shall be conclusive evidence that suitable alternative accommodation will be available. To my mind, it is quite plain that if Parliament had intended so to provide in this Act, having the precedent of the Act of 1933 before it, it would have said in plain terms that the certificate of the local authority, either that the conditions had or had not been complied with under section 23 (1) (*a*), would be conclusive evidence of that matter of fact.

Without more, then, I must say that it is to my mind clear that this preliminary objection was not well founded and, the tenant having in this case challenged (and given particulars of the challenge) the truth of the declaration that the conditions justifying an increase of rent had been complied with, that matter was open to her, and it is (and was) the duty of the county court judge to determine it.

In this connexion, we have been asked questions about the situation of the onus of proof. I have already said that, as I understand the scheme of the Act, if notice of increase has been served containing the relevant declaration, and if there is no challenge to the declaration, that suffices, and the landlord could not then be called upon to prove the truth of his own declaration. But, where it is challenged, then the matter is otherwise. In the present case, the local authority, having given a certicate, later revoked it; and it is plain to me that, assuming that by reason of the challenge, any onus rested on the hospital, they would shift it by proving the authority's revocation of its challenge (as they have done). In this case, therefore, the present position is, I should have thought, that it is now for the tenant to make good, if she can, her allegations which are contained in her particulars of defence. I would, for my part, prefer to go no further, and not to lay down some general principle or proposition as to onus of proof in these cases, because in any given case the circumstances might be such as to be inconsistent with the general rule I had attempted to formulate. In actual practice, if the veracity of the declaration is challenged, I think the question where the onus of proof lies will not present any difficulty.

So much for the first point argued. The second point (or the second point of substance) arises under the second of the two conditions precedent which is found in paragraph (*b*) of subsection (1) of section 23. There the introduction of Sched. II and the forms which are mentioned also in section 25, introduce a number of complications, and also the necessity on the landlord's part for making a number of arithmetical calculations. But, quite briefly, this point arises as follows: The form of notice served, otherwise complying in all respects with the Schedule and the forms provided by the Minister, proceeded on the premise that in this case the landlords, the hospital, were exclusively responsible for repairs. I have stated that by a proviso to section 23 (2), where the obligation or responsibility is divided, the amount which the landlord can claim has to be proportionately reduced. Having regard to the premise on which the notice was given, there was here no proportionate or other reduction. The full amount was claimed. In addition to her specific challenge of the declaration of compliance with paragraph (*a*), Mrs. Jacobs in her defence generally put the hospital to proof of their claim.

Now, the claim, so far as is relevant to this part of the case, was as follows: "The said premises were let by the plaintiffs to "Solomon Jacobs," the deceased husband of the present tenant, "from February 16, 1931, by an agreement in writing dated "May 8, 1931, for a weekly tenancy at a rent of £2 7s. 0d. a "week. From the death of Solomon Jacobs the defendant as his "widow remained in occupation," and then the difference between the original figure of £2 7s. 0d. and £2 14s. 6d. which I mentioned

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as being the rent today (apart from the alleged increase) is accounted for by increases in rates. On the face of that pleading it is not, I should have thought, open to the smallest doubt that the hospital were saying: "The terms of the tenancy, "originally contractual, now statutory, are those found in "the original written contract a quarter of a century ago, almost "to the day, dated May 8, 1931." Mrs. Jacobs apparently had no copy of that document, or, if she had, she had not looked at it, until some short time before the trial, when it was obtained, and the eye of her legal advisers then fell upon the somewhat striking terms for present purposes of paragraph (c) of clause 1 of the agreement, which reads: "And the tenant hereby agrees "... to keep the said premises in good and tenantable repair "(fair wear and tear excepted) and be responsible for and replace "all broken glass and missing keys." Armed with that piece of intelligence, counsel for the tenant, not unnaturally, then took the point that the premise upon which the notice had proceeded (namely, that the hospital were solely responsible for repairs) was ill-founded. An argument then developed on that. It was first said that that defence was not open to the defendant on the pleadings, and the county court judge seemed to intimate that he thought that was right. With all respect to him again, I cannot see it. I think that the defendant was entitled to say that in this respect the plaintiffs' pleading was, on the face of it, demurrable. But I do not think that that now matters, because the question of fact was then gone into. If the hospital wanted time to deal with this point, they could have asked for it; but they called evidence intended to show that, notwithstanding the terms of the contract which I have read and notwithstanding their pleading, the true position was that at some unspecified time and on some unspecified occasion there had been a transfer of the liability for repairs from the shoulders of the tenant, so as to rest exclusively upon the shoulders of the hospital; and to that end the evidence given was to the effect that over this long period of time the hospital had in truth done substantially the whole of the repairs. I say "substantially" because I do not forget Mr. Millner's reminder that there were some things done (decorative, it may be, mainly) for which Mrs. Jacobs or her late husband had provided the material, at any rate. We have this morning been given a schedule which shows that substantial repairs, decorative and otherwise, were done from time to time over the period, as indeed one would expect with landlords such as the London Hospital; though it is far from clear to me whether those repairs or any of them were or were not within the exception of fair wear and tear. However, the evidence merely was that in actual fact over the whole period of the tenancy, the landlords had done all these repairs and had never called upon the tenant to pay for them or do them or to contribute to them except to the very limited extent which I have mentioned.

Thereupon, that evidence having been given by the hospital's

financial secretary and the surveyor, Mr. Millner submitted that on this point he had no case to answer, because proof that in fact repairs had been done by the landlords, having regard to the contract which the hospital had pleaded and relied on, did not prove any more than that the landlords might have done work which they were not bound to do. But the evidence certainly did not prove that there had been any change in the original contract or any transfer of the burden. With all respect to the judge, I am quite unable to accept his view that this evidence compelled or entitled him to draw the inference that at some time, unspecified, there had been a change in the terms of the bargain. It is not uncommon that landlords (particularly good landlords) may do things, both in their own interests and in the interests of their tenants, which they are not bound to do; and in a case which came before the House of Lords, *Asher* v. *Seaford Court Estates Ltd.*[1] it was pointed out that the fact that a landlord had undertaken a burden which he was not under an obligation to do did not produce the result that, if later the landlord contractually undertook to do those same things, there was not a transfer of the burden. As Lord Normand observed[2] (and, I think, the ratio of these words is applicable to the present case): "The cost of "supplying hot water", which was the matter then in question, "was under the old lease a burden which lay on the tenant "and was borne by him because he could call on no one else "to bear it. The fact that the landlord bore it for him did not "make it any the less the tenant's burden. On any day the "landlord by his own volition could have ceased from heating "the water unless the tenant agreed to pay the cost." Those words seem to me to apply here. The fact that the landlord elected to do these works, assuming that they were not covered in any case by the fair wear and tear exception, does not prove that there had been a transfer of burden from the tenant to the landlord. It seems to me that the inference which the county court judge drew, therefore, cannot be sustained.

The result is that the defendant, on this point (rightly, as I think) took her stand that the hospital had established no case for her to answer. That being so, what is the result? The result is that the form, the notice of increase, on the face of it fails to satisfy the provisions of the Act, because it proceeds on the assumption, expressly stated in it, that the hospital are exclusively responsible for the whole of the repairs. Mr. Millner suggested that that was the end of the matter, that the notice was thereby rendered totally invalid and ineffectual, and that the duty of the court was to dismiss the hospital's action and cast them from the judgment seat. I am unable to accept that extreme conclusion. Under earlier legislation, a defect of this kind in the notice might well have produced such a result. Mr.

[1] [1950] A.C. 508; 66 T.L.R. (Pt. 1) 945; [1950] 1 All E.R. 1018.
[2] [1950] A.C. 508, 522.

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Millner referred us, very properly, to *Bourne* v. *Litton* [3] in this court, where in a somewhat similar way the notice of increase under the Act of 1920 misstated the proper proportion of the figure used to justify the rent increase. But there was this very marked distinction between the Act of 1920 and the present Act, namely, that by section 25 (4) of the latter express provision is made empowering the county court, where there is an error in any notice of increase and that is due to some bona fide mistake, to correct the error in the notice and to let the notice take effect as amended from such date as the county court judge thinks proper. The opening words of the judgment of Scrutton L.J. in *Bourne* v. *Litton* [4] show quite plainly that, had there been in the Act of 1920 such a saving power, then, in the view of that Lord Justice, the result in *Bourne* v. *Litton* [5] would almost certainly have been different.

I have given the effect of subsection (4), but I should read a few of its words, to show how extensive the power is: "The "county court, if satisfied that any error or omission in a notice "of increase or a declaration accompanying such a notice is due "to a bona fide mistake on the part of the landlord, shall have "power to amend the notice or declaration by correcting any "errors or supplying any omissions therein which, if not "corrected or supplied, *would render the notice or declaration* "*invalid*"; and then the subsection goes on to provide the terms or conditions on which the power may be exercised.

In the event, as it seems to me, the position now reached is that the landlords, the hospital, are entitled to ask the county court judge to make whatever amendment is required to rectify whatever bona fide error there is in their notice or in the declaration. It is plainly necessary that this matter should now go back to the county court judge. The view which I have taken on the preliminary objection—that is to say, the first of the points raised—does not, of course, mean that the tenant has proved that the conditions in paragraph (*a*) of section 23 (1) are not satisfied. She will now have to prove them, or try to do so, and she may or may not succeed. That is a matter that the county court judge must now embark upon. If the tenant should fail on that matter, the landlords (the hospital) are then entitled to deal with this question of the proportion by inviting the county court first of all to decide what the proper proportion is. I referred earlier in this (I am afraid) over-long judgment to the fact that provision is made in the Act for arriving at the true proportion, and by section 23 (5) it is stated that the question of the amount may be a matter of agreement and, failing that, determination by the county court. It was suggested that the section contemplated some preliminary procedure for that purpose, but I cannot for my part see why the whole thing

[3] [1924] 2 K.B. 10; 40 T.L.R. 390.
[4] [1924] 2 K.B. 10, 18.
[5] Ibid.

cannot be properly and sensibly done in one proceeding. Of course, if the two parties agree, that is the end of it. How much the proportion ought to be will depend on considering, as a matter of expert evidence and value, what the liability (so to speak) of the tenant, under the clause I have read, is really worth; what proportion of the total liability for repairing, expressed in figures, ought to be treated as borne by the landlord and what proportion by the tenant. The hospital may desire, in the circumstances, to take other steps—that is a matter for them to determine—and they will no doubt then make such application to the county court judge as they think appropriate; but I think, as the case has to go back, that it would serve no useful purpose for this court to express any views on any of these detailed matters of quantum and so forth.

In my judgment, the proper answer to this appeal is that it should be allowed, that the judgment in favour of the hospital for £13 11s. 1d. should be set aside, and that the matter then should be referred back to the county court for further hearing on the outstanding questions; and the county court judge will then grant such applications as he thinks proper for amendment or otherwise, as occasion may require.

JENKINS L.J. I agree. Two matters were debated before us. The first was a submission by Mr. Cowan, which commended itself to the county court judge, to the effect that it was not open to the tenant in this case to assert and seek to prove that the conditions mentioned in section 23 (1) (*a*) of the Act had not been fulfilled. Those are the conditions described in the Act as "the conditions justifying an increase of rent," the first of them being that the dwelling-house is in good repair and the second of them being that it is reasonably suitable for occupation having regard to the matters specified in paragraphs (*b*) to (*h*) of section 9 (1) of the Act. Prima facie, where an Act provides that if certain conditions are fulfilled an increase is to be made in the rent payable by a tenant, then in any proceedings brought against the tenant to recover the increased rent it is open to the tenant to prove, if he can, that the conditions on which the increase depends have not been fulfilled; and I think, generally speaking, clear words would be needed in the enactment to deprive the tenant of that elementary right. But Mr. Cowan says that this particular Act does exclude what one may call the ordinary right of the tenant to defend himself in proceedings brought against him for recovery of the increased rent. He contends that provisions having that effect are to be found in section 26 of the Act. I find myself wholly unable to accept that argument. Section 26, as I read it, merely purports to give the tenant a cheap and simple method of repelling the landlord's claim. The tenant can, if so minded, under section 26 obtain

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a certificate from the local authority, if the local authority are prepared to give it, to the effect that the conditions have not been fulfilled; and, so long as such a certificate has been issued and remains unrevoked, the landlord is precluded by section 26 (2) from recovering the increase of rent. But it by no means follows that if a tenant does not obtain a certificate, or if a tenant obtains a certificate which is subsequently revoked, then he is to be disabled from contending that the conditions justifying an increase of rent have not been fulfilled. Clear words must be found in section 26 to justify us in giving it that effect. So far from there being any clear provision in section 26 to support Mr. Cowan's contention, it seems to me that it is really impossible to extract it from the language of section 26 without doing serious violence to that language.

If Mr. Cowan's contention were accepted, somewhat remarkable results would ensue. In the first place, the local authority, an administrative body, would be given exclusive jurisdiction for the purpose of deciding that the conditions have not been fulfilled. The jurisdiction of the court so to decide would be ousted; and it is well settled that clear words are necessary to justify the imputation to the legislature of an intention to oust the jurisdiction of the court. But the matter would not rest there. The local authority would not be made the tribunal to decide the issue of fulfilment or non-fulfilment of the conditions conclusively as regards both parties, for the position would be different for the tenant and for the landlord respectively. The refusal by the local authority to give a certificate would apparently be as against the tenant conclusive evidence that the conditions had been fulfilled, but on the other hand the granting and existence of a certificate would not be conclusive against the landlord that the conditions had not been fulfilled; for it is open to a landlord, under section 26 (2), to apply to the court for an annulment of the certificate on cause shown, whereas, according to Mr. Cowan's argument, if a certificate is refused to the tenant, he is left completely defenceless so far as this issue is concerned.

I will not elaborate the matter further, for I entirely agree with my Lord that the construction placed on section 26, and the effect attributed to it, by the county court judge are clearly wrong. I will not repeat at length my Lord's references to other provisions which bear out this conclusion, but I confess that I was much impressed by the special treatment accorded to the declaration dealt with in Sched. II to the Act by paragraphs 4 and 5 of the Schedule. The effect of those paragraphs is to curtail the tenant's right of disputing the question whether the relevant work of repair has been done, and clear and unambiguous language is used for the purpose of effecting such curtailment. There is also my Lord's reference to the Rent Act of 1933, s. 3 (2),

which is a good example of a case in which the legislature, being minded to make the decision of an extra-judicial body conclusive, has provided to that effect in express terms.

As to the second matter on which we have heard argument—that is to say, Mr. Millner's objection, which the judge rejected, to the effect that he had no case to answer because the notice of increase and the second declaration accompanying it were framed on the footing that the landlord was solely responsible for repairs, whereas in fact the tenant was under an obligation, whatever it might amount to, to keep the premises in good and tenantable repair, fair wear and tear excepted—the judge rejected Mr. Millner's submission partly on the ground that the point had not been taken in the defendant's pleading and also on the ground that there was evidence from which a new agreement of tenancy, whereunder the whole of the liability for repair was thrown on the landlord, could be inferred. With respect to the county court judge, I find myself obliged to differ on both points. As to the point of pleading, it is true that the objection was taken, but the hearing went on and evidence was led as to what had in fact been done in regard to the repairs. That being so, it seems to me difficult to justify insistence upon the point of pleading. Moreover, Mr. Millner could, I think, have put this part of his case by saying that the statement of claim itself was, on its face, demurrable. It pleads the particular agreement of May 8, 1931, as a tenancy agreement in writing. That has the effect of (as it were) incorporating the tenancy agreement in the pleading. Indeed, under the High Court practice, I think I am right in saying that a document thus specifically mentioned in a pleading can be made the subject of a special order for discovery before defence. This particular tenancy agreement was pleaded and, when looked at, it is found not to cast the whole liability for repairs on the landlord. A tenancy agreement which threw part of the liability on the tenant could not suffice to support a notice of increase and declaration under the Act framed on the footing that the landlord was liable for the whole of the repairs.

In these circumstances, there being, in my view, no ground for holding that the terms of the tenancy ag eement were ever altered, I think the proper way of dealing with this case is, as my Lord proposes, to send it back to the county court. The defendant will then have an opportunity of calling whatever evidence may be available on the question whether the conditions justifying an increase of rent have been fulfilled or not and, on the other hand, the hospital will be able to invite the county court judge to determine what proportion of the full amount which the hospital could properly claim for the repairs, if they were solely responsible for them, is appropriate, having regard to such liability for repairs as is thrown on the tenant under the terms of the tenancy agreement of May 8, 1931.

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I agree with my Lord that this appeal should be allowed, with the consequences which he proposes.

HODSON L.J. I agree.

Appeal allowed.
Case remitted to the county court.

Solicitors: *Pearce & Sons; Hanbury, Whitting & Ingle.*

F. R. D.

[CHANCERY DIVISION.]

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April 16, 17, 18, 19, 23, 24; *May* 7.
Danckwerts J.

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[1955 B. No. 4526.]

Landlord and Tenant — Act of 1954 — *Business premises* (*Security of tenure*)—*Landlords' intention to reconstruct—Application for new tenancy—Relevant time of landlords' intention to reconstruct—At time of service of notice of opposition—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

A landlord who opposes an application by a tenant of business premises for the grant of a new tenancy under the Landlord and Tenant Act, 1954, on the ground that he wishes to obtain possession for the purposes of the reconstruction of the premises, or a substantial part of them, must, in order to satisfy the provisions of section 30 (1) (*f*) of the Act, prove the existence of an intention at the time when he served the notice of opposition to the application of reconstructing the premises at the termination of the tenancy.

Dicta of Evershed M.R. in *X. L. Fisheries Ltd.* v. *Leeds Corporation* [1955] 2 Q.B. 636; [1955] 3 W.L.R. 393; [1955] 2 All E.R. 875; *Atkinson* v. *Bettison* [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340 and *Fisher* v. *Taylors Furnishing Stores Ltd.* [1956] 2 W.L.R. 985; [1956] 2 All E.R. 781 applied.

ADJOURNED SUMMONS.

Betty's Cafés Ltd., who were the tenants of business premises known as Nos. 42 and 44 Darley Street, Bradford, in the county of York, by the present summons applied to the court under section 24 of the Landlord and Tenant Act, 1954,* for the grant

* Landlord and Tenant Act, 1954, Part II: "SECURITY OF TENURE FOR "BUSINESS, PROFESSIONAL AND OTHER "TENANTS."

S. 30: "(1) The grounds on which "a landlord may oppose an application under section 24 (1) of this "Act are such of the following "grounds as may be stated in the "landlord's notice under section 25 "of this Act or, as the case may be, "under section 26 (6) thereof . . . "(*f*) that on the termination of the "current tenancy the landlord intends "to demolish or reconstruct the premises comprised in the holding or "a substantial part of those premises "or to carry out substantial work of

of a new tenancy. The application was opposed by the landlords, Phillips Furnishing Stores Ltd., under section 30 (1) (*f*) of the Act on the ground that they intended to reconstruct the premises, or a substantial part of them, on the termination of tenancy, and that they could not do so without obtaining possession of the holding.

The rateable value of the property being £1,160 (until its present re-assessment at £1,627) the court was, by virtue of section 63 of the Act, the High Court.

Betty's Cafés Ltd. had carried on the business of café proprietors and retail confectioners in the greater part of Nos. 42 and 44 Darley Street, since 1925, as tenants under a series of leases; the last, dated April 29, 1946, was for a term of eight years expiring on December 31, 1953, at an annual rent of £1,400. Part of the property had been sublet to a company, who carried on a retail business for the sale of boots and shoes in the ground floor of No. 42 and the basement of No. 44, but on June 24, 1955, that company left the premises, and since then Betty's Cafés Ltd. had carried on their business in the whole of the property. For this purpose they made a doorway giving access between Nos. 42 and 44 on the ground floor so that the ground floor of No. 42 could be used as an extension of the ground floor of No. 44, and they used the shop front of No. 42 simply for display purposes. The basement of the property was used for a boiler-house and storage and service in connexion with café meals. The ground floor was used for the shop for the sale of bread and chocolates and sweets, and partly as a café for light meals, for which the first floor was also used. There was a ballroom on the second floor, and there was some evidence that a parquet floor had been put in on this floor by the company's predecessors while tenants. The top floor was used for the kitchen required by the company's business. The company had similar businesses at Harrogate, York and Leeds, and a factory at Starbeck, Harrogate. Darley Street was one of the principal shopping streets in Bradford, and Nos. 42 and 44, though not in the most sought-after parts of the Bradford shopping district, were in a very good position. The company did a substantial business with their shop and café, and the ballroom floor was used extensively

"construction on the holding or part "thereof and that he could not "reasonably do so without obtaining "possession of the holding; (*g*) sub-"ject as hereinafter provided, that "on the termination of the current "tenancy the landlord intends to "occupy the holding for the purposes ". . . of a business to be carried on "by him therein . . . (2) The land-"lord shall not be entitled to oppose "an application on the ground "specified in paragraph (*g*) of the "last foregoing subsection if the "interest of the landlord . . . was "purchased . . . after the beginning "of the period of five years which "ends with the termination of the "current tenancy . . ."

S. 31: "(1) If the landlord opposes "an application under section 24 (1) "of this Act on grounds on which "he is entitled to oppose it in accord-"ance with the last foregoing section "and establishes any of those "grounds to the satisfaction of the "court, the court shall not make an "order for the grant of a new "tenancy."

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for dances, dinners and weddings. The site was thus a very valuable one for the purposes of the company's business. The building was probably built about 1903.

Phillips Furnishing Stores Ltd. acquired the reversion by a contract dated August 25, 1953, at a price of £38,750, and their intention had been to finance the purchase by a resale and a lease back to the company by an investor at a rent equivalent to 6 per cent. on the investment. The company had hoped to occupy the property for the purposes of their furniture business. The company, directly or through subsidiaries, owned some 60 shops, but did not have a shop in Bradford when the purchase was made. The purchase transaction appeared to have been approved at a board meeting of the company's directors on September 4, 1953, but the purchase was not completed till March 1, 1954. The interest acquired was the remainder of a term of 999 years from January 1, 1806, at a ground rent of £15 6s. 0d. per annum under a lease dated May 1, 1806.

An application had in the meanwhile been made to the Bradford county court under the Leasehold Property (Temporary Provisions) Act, 1951, by Betty's Cafés Ltd. for a new tenancy of the property, and on September 23, 1953, the court made an order for a new tenancy of No. 42 and No. 44 Darley Street (then occupied partly by the tenants and partly by the subtenants) for a period of 12 months from January 1, 1954, at a rental of £2,000, and on the same terms otherwise as in the existing lease.

On October 27, 1953, one Buckle, an estate agent, acting on behalf of Phillips Furnishing Stores Ltd., on instructions from a director of the firm, approached one Hall, a member of a firm of estate agents (who acted for Betty's Cafés Ltd.), with a tentative proposition that Phillips Furnishing Stores Ltd. should resell the property to Betty's Café Ltd. for £45,000. The matter was mentioned to Mr. Wild, a director of Betty's Cafés Ltd., but the matter proceeded no further at this stage, although Mr. Wild was interested.

On December 16, 1954, a Mr. Jones, the secretary and a director of Phillips Furnishing Stores Ltd., wrote to Mr. Ovenden, the company's architect, instructing him to prepare plans of the work which the company would carry out in Nos. 42 and 44 Darley Street to adapt the property for the company's use. Mr. Jones wrote: "List them out, roughly price them and let me "have it," and added "This is most important as structural "alterations and so on form one of the means upon which a "landlord can serve notice and possibly secure possession."

Accordingly, Ovenden visited the site, and on January 7, 1955, he sent to Jones a copy of the drawing of the premises as existing and a proposed suggestion together with a brief outline specification describing the latter, and he mentioned that the approximate cost of the work would be £20,000. Those were the works on which the landlords, Phillips Furnishing Stores Ltd., now relied for the purpose of section 30 (1) (*f*) of the Act. No

bills of quantities or detailed plans were, however, prepared, and no steps were taken to secure the approval of the local authority.

On January 26, 1955, a meeting of the board of Phillips Furnishing Stores Ltd. decided that "unless Messrs. Betty's "were prepared to vacate for a more or less nominal considera- "tion, the present position should not be disturbed until the "required five years had elapsed (approximately 3½ years to "run), at the end of which the company could with security "serve the appropriate notice upon Betty's and their subtenants "and obtain possession." Mr. Jones was present at this meeting, but there was no evidence that the proposed plans and details of work were ever mentioned at this meeting.

In March, 1955, however, as the result of a discussion between Mr. Buckle and Mr. Jones and Mr. M. Winstone, one of the managing directors of Phillips, the suggestion of a purchase of the property by Betty's Cafés Ltd. was re-opened. In June, 1955, agreement had been reached, subject to contract, that Betty's Cafés Ltd. should purchase the property for £55,000, and should resell the property to the National Coal Board Superannuation Fund for £56,250, and take a lease from the latter for 42 years with full repairing and insuring covenants at an annual rent of £3,515 6s. 0d., and on June 17, 1955, the solicitors for Phillips Furnishing Stores Ltd., in pursuance of instructions given by Mr. Jones, sent to the solicitors for Betty's Cafés Ltd. a formal contract for approval. On that day, June 17, 1955, however, a meeting of the board of directors of Phillips Furnishing Stores Ltd. was held. The minute of this meeting was as follows: "Mr. M. Winstone recorded that Betty's Cafés, the "sitting tenants, were prepared to purchase the property for "£55,000. After a full discussion it was resolved that it would "be in the company's interest to retain the property although "the company would not obtain possession for some three years."

It was stated in evidence by Mr. Jones that Sir Ronald Matthews, the chairman of the company, secured this decision against the views of those directors who were in favour of the sale. On the same day Mr. Jones wrote to Mr. Buckle, informing him of the board's decision and asking him "to call off all "negotiations."

The contentions put forward at the trial, and supported by the evidence of Mr. Jones, involved the total repudiation of any authority from the board for Mr. Jones or Mr. Winstone to have opened or pursued the negotiations or to bind the company in any way without the authority of a resolution of the board of directors.

Having been deprived of their expectation of acquiring the property by purchase, Betty's Cafés Ltd. decided to make an application under the Landlord and Tenant Act, 1954. On June 28, 1955, they served a notice requesting a new tenancy of the whole of the property for a period of 14 years and at a rent of £2,500, since raised to £2,750 per annum, the other terms

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of the tenancy to be those contained in the lease of April 29, 1946. On August 15, 1955, a notice of opposition was sent, purporting to be signed by Mr. Jones on behalf of Phillips Furnishing Stores Ltd. No resolution of the board of directors of that company authorizing this step was proved, and in view of the attitude of the company in regard to the ostensible authority of Mr. Jones, his Lordship stated that he was doubtful whether he should treat this notice of opposition as having any validity. The grounds relied on in the notice were that on the termination of the current tenancy the company intended to reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof, and that the company could not reasonably do so without obtaining possession of the holding; and were, therefore, entitled to possession under paragraph (*f*) of section 30 (1) of the Act. On November 25, 1955, according to the landlords' minute, there was a meeting of the board of directors of the company at which Mr. M. Winstone reported that the company's architect had surveyed the property and estimated that reconstruction would cost in the region of £15,000. It was decided to approve expenditure thereon up to that sum.

L. A. Blundell and *C. B. Priday* for the tenants.

E. Ryder Richardson Q.C. and *J. P. Widgery* for the landlords.

Case cited in argument not referred to in the judgment: *Salisbury* (*Marquis of*) v. *Gilmore*.†

May 7. DANCKWERTS J., having stated the facts, read the following judgment: It is upon the proper construction and application of the provisions contained in paragraph (*f*) of section 30 (1) of the Landlord and Tenant Act, 1954, that this case really depends. There is no question of demolition of the building in the present case. The landlords, Phillips Furnishing Stores Ltd., therefore, have to prove that on the termination of the current tenancy they intend to reconstruct the premises comprised in the holding, or a substantial part of those premises, or to carry out substantial work of construction on the holding or part thereof, and that they could not reasonably do so without obtaining possession of the holding. The provisions of this paragraph have already been considered by the Court of Appeal and have given rise to doubt and confusion.

In *Atkinson* v. *Bettison* [1] the tenant of a provision shop was applying for a new lease. The landlord, who was a jeweller, could not oppose on ground (*g*), in order to acquire possession for his

† [1942] 2 K.B. 38; [1942] 1 All E.R. 457; sub nom. *Salisbury* v. *Marcel*, 58 T.L.R. 226.

[1] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

own business, as he had only recently acquired the premises. But he claimed under paragraph (*f*) that he intended to reconstruct a substantial part of the premises. The proposed work was the provision of a new shop front of a different type, the demolition of a wall at the back of the shop so as to throw the whole ground floor into the shop, a complete relaying of the floor in a different material, and the provision of extensive new shop fittings. No work was to be done on the upper floors. The county court judge found that the real purpose of the landlord was to get possession so as to carry on a business of his own, and that the proposed reconstruction was merely ancillary to that purpose. He also found that the part of the premises affected was not a substantial part, and he directed the grant of a new lease. The Court of Appeal dismissed an appeal by the landlord. They held that the question whether the work was a reconstruction of a substantial part of the premises was a question of degree and a question of fact, on which the decision of the county court judge should prevail. But the court also discussed the question whether the real purpose of the landlord was not to get possession of the property and the work was merely ancillary. Denning L.J. said[2]: "There is no doubt, however, on the evidence, and on "the findings of the county court judge, that the real purpose "of the landlord is to get possession in order to carry on a "business of his own. The proposed work is a secondary or "ancillary matter. By the decision of this court in *J. W. Smart* "(*Modern Shoe Repairs*) *Ltd.* v. *Hinckley and Leicestershire* "*Building Society*[3]—a decision, it is true, on the Leasehold "Property (Temporary Provisions) Act, 1951, but nevertheless "on very similar provisions—it was held that in order to come "within a similar subsection the landlord's *primary purpose* must "be to reconstruct the premises or a substantial part thereof. "In the present case that is not his primary purpose. His "primary purpose is to get possession for his own business. He "cannot get the premises on that ground because he has not "owned the premises for five years. He should not be allowed "to circumvent that provision by putting forward a secondary "purpose as though it were the main purpose." Hodson L.J.[4] and Morris L.J.[5] also referred to the importance of the primary purpose as compared with an ancillary purpose.

Those observations, however, have been qualified in some way in two later decisions of the Court of Appeal. *Fisher* v. *Taylor's Furnishing Stores Ltd.*[6] was decided on March 20, 1955. In this case two adjoining shops, one a retail shop for electrical goods, and the other a wool shop, were purchased in September, 1954, by Taylor's Furnishing Stores Ltd., who wished to obtain possession of both shops in order to put up a new shop for their

[2] [1955] 1 W.L.R. 1129, 1130.
[3] [1952] 2 T.L.R. 684; [1952] 2 All E.R. 846.
[4] [1955] 1 W.L.R. 1131.
[5] Ibid. 1132.
[6] [1956] 2 W.L.R. 985; [1956] 2 All E.R. 781.

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furnishing business at a cost of some £20,000. One of the tenants had applied for an order for a new tenancy under the Landlord and Tenant Act, 1954. The buildings were about 250 years old and were very near the end of their useful life, and in any case they ought to be demolished in about five years' time. The county court judge found it impossible to distinguish the case from *Atkinson* v. *Bettison* [7] and refused an order for a new lease, though I am bound to say that it appears to me to have been an utterly different case from *Atkinson* v. *Bettison*.[7] In the Court of Appeal Denning L.J. proceeded to explain *Atkinson* v. *Bettison* [7] in the following manner [8]: "The correct ground of "the decision"—that is, in *Atkinson* v. *Bettison* [9]—"was that "the proposed work was not 'substantial' within section 30 (1) "(*f*); but the court considered also section 30 (1) (*g*) and (2), "which says that if the landlord wants to get possession for his "own purposes, he must have been owner for the last five years. "In this connexion the court gave an emphatic warning against "allowing a landlord too easily to escape from the five years' "rule. That is the full extent of *Atkinson* v. *Bettison*,[9] and it "should not be taken to decide anything more. I there said that "the landlord 'should not be allowed to circumvent that pro-"'vision [the five-year rule] by putting forward a secondary "'purpose as though it were the main purpose.'

"The sort of case which I had in mind was where a landlord "wants to get possession of a shop for his own business and for "that reason buys it over the tenant's head a year or so before "the lease comes to an end. He knows that he cannot oppose a "new lease under section 30 (1) (*g*) because he bought the "property less than five years before the end of the tenancy. "So he puts forward a case for reconstruction under section 30 "(1) (*f*) hoping to get possession on that ground. In such "circumstances the court must be careful to see that section 30 "(1) (*f*) is fully satisfied before it allows him to get possession. "For this purpose the court must be satisfied that the intention "to reconstruct is genuine and not colourable; that it is a firm "and settled intention, not likely to be changed; that the "reconstruction is of a substantial part of the premises, indeed "so substantial that it cannot be thought to be a device to get "possession; that the work is so extensive that it is necessary "to get possession of the holding in order to do it; and that it is "intended to do the work at once and not after a time. Unless "the court were to insist strictly on these requirements, tenants "might be deprived of the protection which Parliament intended "them to have. It must be remembered that if the landlord, "having got possession, honestly changes his mind and does not "do any work of reconstruction, the tenant has no remedy. "Hence the necessity for a firm and settled intention. It must "also be remembered that the Act is intended for the protection

[7] [1955] 1 W.L.R. 1127.
[8] [1956] 2 W.L.R. 987.
[9] [1955] 1 W.L.R. 1127.

" of shopkeepers, and that this protection would be nullified if a " big concern could buy the property and get possession by " putting in, say, a new shop-front. Hence the necessity for the " work being substantial.

" Whilst I adhere to the view that the landlord should not be " allowed to circumvent the five-year rule by putting forward " a colourable case of reconstruction, nevertheless I think it is " going too far to say that the work of reconstruction must be the " primary purpose. The word ' primary ' is taken from the " judgment of this court in the case of *Smart* v. *Hinckley and* " *Leicestershire Building Society*.[10] It was perfectly accurate " in that connexion. The 1951 Act contained temporary pro- " visions which only extended the lease for a year or two, and " so a landlord ought not to be allowed to get possession unless " there was an overpowering necessity for the work to be done " at once. The 1954 Act contains permanent provisions to which " different considerations apply. In many cases the landlord will " have two purposes, both of which are genuine and important: " the one is to get possession for his own business, and the other " is to reconstruct the premises. He does not lose the benefit " of section 30 (1) (*f*) simply because he bought the premises less " than five years before. Suppose a man buys up derelict " premises and the only sensible thing is to pull them down at " once and rebuild. If he intends to let them to a new tenant, " he clearly can rely on section 30 (1) (*f*). He should not be " debarred from so doing simply because, instead of letting them, " he intends to occupy them himself. The legal position is made " clear by section 31 (1), which says that, if the landlord estab- " lishes *any* of the grounds set out in section 30 (1), a new lease " must be refused. The fact that he cannot establish one ground " does not prevent him from relying on another."

I have thought it right to read these remarks in full, because in one part they tend to lend support to the claims of the tenants in the present case; in another part they seem to lend aid to the landlords' contentions. I have to discover whether they provide me with a guide to the proper application of the Act. Morris L.J., in the same case, in the course of his judgment said[11]: " If a " case occurs in which it appears that a landlord had a desire to " obtain possession for his own occupation, and had no thought " at all of making any alteration to the premises, but if, after " realizing that because he had not owned for five years, he " could not oppose an application of his tenant for a new lease, " he then proclaimed an intention to reconstruct, the court " would have to decide whether the newly proclaimed intention " was genuine. It certainly could be entirely genuine even " though it owed its birth to a realization of the effect of " section 30 (2) upon a desire and intention coming within " section 30 (1) (*g*); but the circumstances would call for careful

[10] [1952] 2 T.L.R. 684; [1952] 2 All E.R. 846.

[11] [1956] 2 W.L.R. 992.

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" examination. Intentions can easily be asserted: their genuine-
" ness must be established. In such examination the only
" inquiry would be and must be as to whether the landlord
" had proved an intention which brings him within the language
" of section 30 (1) (*f*). Any consideration of primary and
" secondary purposes, where any such consideration can occur
" and is helpful, must always be subordinate to an inquiry
" directed to the actual words of the section."

Parker L.J., after examining in detail the provisions of the Act, said [12]: " Each ground is entirely separate and independent, " and each, if proved, entitles the landlord to succeed. Thus, if " ground (*f*) is proved to the satisfaction of the court, it matters " not to what use the landlord ultimately intends to put the hold-" ing. He may intend to let it when the work is done to a third " party. He may intend ultimately to occupy it himself for his own " business; or he may not have made up his mind at all. To " suggest that if his intention is ultimately to occupy it himself " and he cannot by reason of subsection (2) of section 30 rely on " ground (*g*), he is thereby debarred from relying on ground (*f*) " is to apply a proviso to the operation of ground (*f*) which is not " there and for which there is no warrant. Of course, if he finds " himself debarred from relying on ground (*g*) and is forced to " rely on ground (*f*), his task will not be an easy one; it will at " once be suspected that his alleged intention is not genuine, " and that it is merely put forward to circumvent his inability to " rely on ground (*g*). But assuming that he satisfies the court " that the intention is genuine, I can see no reason why he should " be debarred from relying on ground (*f*). To succeed, however, " he must establish his case under the paragraph. Thus, not only " must he satisfy the court that the intention is genuine, but " also that it was firm and settled, and that (to use the words in " *Cunliffe* v. *Goodman* [13]) it had 'moved out of the zone of " 'contemplation—the sphere of the tentative, the provisional " 'and the exploratory—and had moved into the valley of " 'decision.'" In the result, the court allowed the landlord's appeal. One thing, at any rate, is clear, that the facts in *Fisher's* case [14] were very different from those in the present case.

Another case which was also decided by the Court of Appeal on March 20, 1956, was *Town Tailors Ltd.* v. *Peacocks Stores Ltd.*[15] In that case Town Tailors Ltd., a tailoring firm, had applied for a new tenancy on the expiration of their tenancy, which they had held for 21 years. Their landlords, Peacocks Stores Ltd., opposed the application on the ground that they wanted to get possession in order to reconstruct a substantial part of the property. These comprised bulidings 100 to 150 years old and cried aloud (it was said) for reconstruction. The landlord had the two upper floors

[12] Ibid. 994.
[13] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.
[14] [1956] 2 W.L.R. 985.
[15] Unreported.

and the tenancy was only of the shop on the ground floor. The work proposed involved in effect the rebuilding of the shop, taking in an extra part of the yard, and making walls to support a new upper storey. The county court judge was satisfied that the landlords had a bona fide intention to reconstruct and that the work was substantial, and that the landlords intended to do it at the termination of the current tenancy. But he thought he was bound to decide against the tenants by reason of *Atkinson* v. *Bettison*.[16] The Court of Appeal reversed his decision. I think that it is clear that this is a very different case from the present.

With such help as I can obtain from these cases I now turn to the situation in the present case. The contentions of the landlords are based on the plans and details of work supplied by Mr. Ovenden to Mr. Jones, being work which it is intended to carry out on the determination of the current tenancy. The minutes of the landlords did not show any adoption or authorization of these proposals by the board of directors on behalf of the company (unless this can be extracted from the minute of November 25, 1955), but on Monday, April 23, 1956, at 10 a.m. (after the hearing had been proceeding for four days) a meeting of the board of directors was called which passed the following resolutions: "(1) That in the event of the company obtaining "possession of these premises from Betty's Cafés Ltd. on the "termination of the last-mentioned company's current tenancy "thereof the work detailed in Mr. Ovenden's specification dated "January, 1955, and plan numbered 45/2 be forthwith carried "out and that expenditure up to £20,000 upon such work be "approved. (2) That counsel appearing for the company in "the application by Betty's Cafés Ltd. now proceeding in the "Chancery Division be authorized to give an undertaking either "to the court or to Betty's Cafés Ltd. that the above-"mentioned works will be carried out as soon as is practicable "in the event of possession being so obtained."

Assuming that the works above mentioned can be regarded as relevant for the purposes of the present application, it is necessary to consider the nature of these works. From the plans and details of works supplied by Mr. Ovenden and his evidence before me it appears that the work proposed may be summarized as follows: "All the existing staircases and the existing service "lift are to be removed. Instead, a larger staircase of reinforced "concrete is to be constructed in the corner of the premises, and "a much larger lift is to be installed, enclosed in brick walls in "the back part of the premises, involving the bricking up of the "existing windows at that part of the back wall. Party walls "between Nos. 42 and 44 will be removed on the ground floor so "as to turn that floor into one space, and the floor of No. 42 will "have to be built up so as to make it the same level as that of "No. 44. The kitchens will disappear from the third floor and

[16] [1955] 1 W.L.R. 1127.

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" new lavatory accommodation will be installed on that floor. " All the floors will be cut about to a considerable extent in the " process, and it may be that the upper floors will require " strengthening. The cost of all those works will be considerable, " amounting to at least £20,000."

It is true that no reconstruction of the main walls is involved in the proposals, except in respect of the blocking of windows, and the object is to adapt the premises for the purposes of the respondents' business, which involves the storage, exhibition and moving of bulky articles. But it seems to me that it is a reconstruction of a substantial part of the premises—the greater part of the interior—for these purposes, and that it involves substantial work of construction. Accordingly, in my view, the provisions of ground (*f*) would be satisfied by the works in these respects. It was contended on behalf of the applicants that these works could be carried out without the respondents obtaining possession of the holding: that is to say, that the applicants' business could be continued upon the premises, notwithstanding the carrying out of the work, by work being done during week-ends and holidays, and screens being erected to minimize the dust and other disturbance to customers. I think that it is plain that the cost of the works would be substantially increased if these methods could be adopted. Further, in view of the amount of débris which would have to be removed in the course of the operations, and the inconvenience or danger to customers, I do not see how the business could be carried on in these conditions. I think that Mr. Ovenden was probably correct when he said that the local authority would not permit the carrying out of the works in this manner. Thus, I reach the conclusion that possession of the holding would be necessary for the carrying out of the works, and this condition in paragraph (*f*) is also satisfied.

The next question, and, as it seems to me, the most important one, is whether I should be satisfied that at the material time or times on the termination of the current tenancy the landlord intends to carry out the work of reconstruction. On this question I have at any rate to guide me the warnings delivered by the Court of Appeal in the cases to which I have referred. The Act is intended for the protection of shopkeepers, and I must be satisfied that the requirements of paragraph (*f*) are complied with. There must be a firm and settled intention. Intentions can easily be asserted. The intention must have moved out of the zone of contemplation—the sphere of the tentative, the provisional and the exploratory—and have moved into the valley of decision. It is to be observed that the whole object of the proposed works is to adapt the building for the purposes of the landlords' business, and no other purpose. The works will not be carried out unless they acquire possession against the request and application of the tenants for a new tenancy. The landlords have stated this frankly, and the resolution of April 23, 1956, is expressed in those terms. Therefore the intention, if it existed

or exists, is conditional upon the tenants' application being defeated and possession being obtained forthwith by the landlords. It is questionable whether an intention which is dependent upon a condition of this kind, which is not within the sole volition of the landlords, is such a firm and settled intention as is required by the terms of paragraph (*f*). In this respect, the enlightening observations of Asquith L.J. in *Cunliffe* v. *Goodman* [17] are very relevant. The Court of Appeal would seem now to disapprove of the word "ancillary" in regard to this Act, but the intention to reconstruct in the present case is obviously wholly ancillary to the object of the landlords to get possession of the property for their business.

There is, however, an even more important question, namely, whether any intention whatever to carry out the works on which reliance is placed has been formed by the landlords at any relevant time. It may be useful to consider, first, what is the relevant time when the firm and settled intention required by paragraph (*f*) must exist. On this point there are some important observations, even if obiter, by Evershed M.R. in *X. L. Fisheries Ltd.* v. *Leeds Corporation.*[18] In this case, after the service on the landlord of a request by a tenant for a new tenancy, but before the expiration of the two months in which notice of opposition could be served, the landlord sold the property to a local authority. No notice of opposition was served and the local authority relied on the privileges afforded to a public authority by section 57 of the Act. In the course of expressing the view that the landlord need not be the same person throughout for the purposes of the Act, Evershed M.R. said [19]: "It is, in other "words, I think quite plain that when the landlord comes to put "in his notice of opposition, it is sufficient if at the time he puts "it in he is in fact the landlord. It is, therefore, sufficient if "he, having acquired the premises or the reversion since the "date of the request, is able to say when he puts in his notice "of opposition before the two months' period expires that he is "the landlord and (to take the example that I chose from "section 30) that on the termination of the current tenancy he "intends to reconstruct." It seems to me that this must be the vital moment, that at the date of the service of the notice of objection it must be true in fact that the landlord intends to carry out the work of reconstruction.

But on the evidence the landlords are quite unable to prove any such intention. A company is an artificial person and its intentions must be formed by those who are entitled to govern and to represent the company in regard to such matters. The articles of this company are in usual form and enable the directors to exercise the powers of the company for all practical purposes. Sometimes, of course, a company may exercise its functions by means of some agent, but it does not appear to me that there is

[17] [1950] 2 K.B. 237, 253, 254.
[18] [1955] 2 Q.B. 636.
[19] Ibid. 646.

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any such contention which can help the company in the circumstances of this case. The company repudiated the authority of Mr. Jones or Mr. M. Winstone and Mr. Buckle to act on its behalf in respect of the property in question, and Mr. Jones disclaimed any right to bind the company by his acts without a directors' meeting. It is remarkable that no other director of the company was called to give evidence, and the affidavit for the purpose of the opposition to this application (such as it is) was made by the acting secretary of the company (Mr. Jones was ill for a considerable period during the later stages of this matter); and not even Mr. M. Winstone or Sir Ronald Matthews were called as witnesses.

In these circumstances the intention of the company can only be discovered from the acts of the board of directors as recorded in the minutes of the company. There is no minute recording any resolution of the directors to carry out the works suggested by Mr. Ovenden either at the determination of the current tenancy or at any time until the conditional resolution is passed on April 23, 1956, which is, it seems to me, too late. The earlier resolutions, before the date of the request for a new tenancy, are only consistent with the company awaiting the end of the five-year period (when an intention to reconstruct would be immaterial). The resolution of November 25, 1955, which was in any case after the expiration of two months from the date of the applicants' request, does not adopt or authorize the carrying out of the work at the determination of the current tenancy. It merely vaguely approves expenditure of £15,000, which is not identified with any particular works or time, and is less than Mr. Ovenden's estimate of the cost of the works which he suggested.

In the result the landlords have not established the ground contained in paragraph (*f*) of section 30 (1) of the Act to my satisfaction, and their opposition to the grant of a new tenancy fails.

It remains for me to consider the terms upon which a new tenancy should be granted, pursuant to sections 33 and 34 of the Act. In all the circumstances of this case, in my view it is reasonable that the tenants should be granted a tenancy for the maximum period of 14 years allowed by the Act. The Act is designed to provide security of tenure for the tenants, and it does not seem to me to be an objection that the longest term of their previous tenancies did not exceed eight years.

As regards the rent, the highest figure put forward on behalf of the respondents was £3,500 per annum. It is true that in the course of the negotiations for the abortive purchase and financing by a resale the tenants were prepared to accept a lease at an annual rent of £3,500, in addition to the ground rent; but that was on the footing of receiving a lease for an unbreakable term of 42 years. On the evidence given by the various experts some lower rent would be appropriate to a term so much shorter, as

14 years will be. Having regard to all the circumstances I think the rent should be £3,000 per annum. The other terms of the tenancy will be similar to those contained in the lease of April 29, 1946. The tenancy will be of the whole of Nos. 42 and 44, Darley Street, and the term of 14 years will run from June 24, 1956.

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Application for a new tenancy allowed.

Solicitors: *Ward, Bowie & Co. for Booth & Co., Leeds; Clifford-Turner & Co.*

I. G. R. M.

[PROBATE, ETC., DIVISION.]

*GEORGIA (OWNERS) *v.* TIMANDRA (OWNERS). THE TIMANDRA.

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April 25, 26, 27.

Willmer J.

[1953 G. No. 267.]

Shipping—Collision—River Thames—Duty of vessel navigating against the tidal stream when approaching or rounding point or sharp bend—Port of London River Bye-Laws, 1938, *bye-law* 42 (*a*).

Bye-law 42 (a) of the Port of London River Bye-Laws, 1938, provides that "Every steam vessel navigating against the tidal "stream shall if necessary in order to avoid risk of collision ease "her speed or stop on approaching or when rounding a point or "sharp bend so as to allow any vessel navigating with the tidal "stream to pass clear of her."

Where risk of collision exists and a vessel, navigating the River Thames against the tidal stream, is approaching or rounding a point or sharp bend in the river, it is not a sufficient compliance with bye-law 42 (a) merely to stop the engines of the vessel; the bye-law requires that the speed of the vessel be eased and, if necessary, the vessel be stopped in a position so as not to reach the point simultaneously with the vessel navigating with the tidal stream.

The Libra (1881) 6 P.D. 139, *The Margaret* (1884) 9 App.Cas. 873 and *The Hontestroom* [1927] A.C. 37; 42 T.L.R. 741 applied.

ACTION.

At about 10.30 p.m. on January 15, 1953, the plaintiffs' vessel *Georgia* was in collision with the defendants' vessel *Timandra* off Jenningtree Point in the River Thames.

Shortly before the collision the *Georgia*, a vessel of 2,292 tons gross, 326 feet in length and 44 feet in beam, fitted with turbine engines of 364 M.N., was on a downriver course, approaching Jenningtree Point and navigating against a tidal stream of a force of about 2–2½ knots, well over on the starboard side of the river. Those on board the *Georgia* stopped their engines, on observing below the point the *Leicestershire*, the *Psara* and, some distance further down river, the *Timandra*, all of which vessels were on an upriver course. The *Georgia* passed the *Psara* port to port, as

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the latter vessel was overtaking the *Leicestershire*, in a position some distance above the point. At a time when both sidelights of the *Timandra* were open on the starboard bow of the *Georgia*, the wheel of the *Georgia* was starboarded to round the bend in the river, a signal of one short blast being sounded.

Shortly before the collision the *Timandra*, a vessel of 499 tons gross, 197 feet in length and 30 feet in beam, fitted with diesel engines of 800 H.P.I., was approaching Jenningtree Point, well over on the wrong side of the river, astern of the *Leicestershire* and *Psara*. When the speed of the *Timandra* was reduced to prevent overtaking the *Psara*, the head of the *Timandra* fell off to port, opening her green light to the *Georgia* and bringing her still further over onto the wrong side of the river.

A signal of one short blast was sounded from the *Timandra* in reply to that of the *Georgia*, and her wheel was put to starboard. On this signal being heard, and at a time when the vessels were about 1½ cables apart, the engines of the *Georgia* were immediately put full speed astern, a signal of three short blasts being sounded. Immediately thereafter the engines of the *Timandra* were put full speed astern and a signal of three short blasts sounded. Less than a minute later, the collision occurred in a position about a cable off the light at Jenningtree Point. Both vessels had headway at the time of the collision, the greater headway being on the *Timandra*.

It was agreed between the parties, that the collision occurred between the stem of the *Georgia* and the port bow of the *Timandra* at an angle of about 30 degrees, leading aft on the *Timandra*, and that the damage indicated a joint speed of about five knots.

The plaintiffs claimed that the collision was solely caused by the improper and negligent navigation of those on board the *Timandra*. The defendants denied negligence and counterclaimed against the plaintiffs, alleging that the collision was solely caused by the improper and negligent navigation of those on board the *Georgia*, in that, inter alia, those on board the *Georgia* had failed to comply with bye-law 42 (a) of the Port of London River Bye-Laws, 1938.

J. V. Naisby Q.C., *S. Knox Cunningham* and *Barry Sheen* for the plaintiffs.

J. Roland Adams Q.C. and *J. B. Hewson* for the defendants.

Two nautical assessors sat with the judge.

The following cases were cited in argument: *The Esso Plymouth* [1]; *The Crackshot* [2]; *The Tolworth* [3]; *The Comanchee*.[4]

[1] [1955] 1 Lloyd's Rep. 429, 438.
[2] (1949) 82 Ll.L.Rep. 594, 607.
[3] (1950) 84 Ll.L.Rep. 81, 87.
[4] (1933) 46 Ll.L.Rep. 115, 120.

WILLMER J. stated the facts and found, after consulting the Elder Brethren, that there was nothing improper in the *Georgia* starboarding to follow the bend in the river, when the green light of the *Timandra* was open on the starboard bow; that the *Timandra* was to blame for navigating on the wrong side of the river, and failing to correct this error by taking the appropriate action to get over onto the proper side of the river; and that the *Timandra*, having got so far over on the wrong side of the river that a position of safety was reached to pass the *Georgia* green to green, determined this position by starboarding, thus bringing about a situation of immediate danger. He continued: It seems to me, in those circumstances, that the only point which can be made against the *Georgia* is the suggestion that, being a ship navigating against the tidal stream, she was in breach of bye-law 42 (a). That bye-law and its predecessors have been considered on a number of occasions in this court during the last century, but it will do no harm, I think, to read it again to remind oneself of what it actually says. The wording as it stands today is: "Every steam vessel navigating against the tidal stream "shall if necessary in order to avoid risk of collision ease her "speed or stop on approaching or when rounding a point or sharp "bend so as to allow any vessel navigating with the tidal stream "to pass clear of her."

Two points seem to me to arise in relation to that: first of all, what does the bye-law mean, and secondly, does it apply to the facts of this case? Mr. Naisby, on behalf of the plaintiffs, argued that all that was required of a ship going against the tidal stream, in order to comply with the bye-law, was that she should stop her engines. No doubt he said that because, on the evidence in this case, that is what the *Georgia* did. But the question arises whether stopping the engines is what is meant by the use of the word "stop," or whether it should not rather be interpreted as meaning to stop the ship.

It seems to me, after looking at a number of the older cases which arose under the predecessor to this bye-law, that there is no room for doubt that the court has always interpreted the bye-law as meaning stopping the ship. The purpose of the bye-law has frequently been described, in different words but in the same sense, as being to prevent the possibility of the ship going against the tide reaching the point at the same time as the ship which is going with the tide.

That, I think, is the effect of what was said many years ago by Brett L.J. in *The Libra*.[1] It is, I think, equally the effect of what was said by Lord Watson in *The Margaret*.[2] But I do not take up time by reading what was said in those cases, because it seems to me that the matter is summed up very neatly in the much more recent case of *The Hontestroom*,[3] in the words used by Lord Phillimore, himself, I suppose, one of the greatest

[1] (1881) 6 P.D. 139.
[2] (1884) 9 App.Cas. 873.
[3] [1927] A.C. 37, 55; 42 T.L.R. 741.

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possible authorities on a matter of this sort: "Having been long "familiar with this rule, I have thought that its object was to "prevent the simultaneous passing of a point by vessels, one "bound up and the other down, if such simultaneous passing be "dangerous, and that the expressions in the rule about navigating "against or with the tide, were only inserted because, to prevent "this simultaneous passing, one has to give way and the other "to come on."

In the light of that statement it seems to me that I must come to the conclusion that, if the bye-law applies at all, the requirement which is involved is a requirement that the ship shall be stopped, if necessary to avoid risk of collision, and stopped so as not to reach the point simultaneously with the up-coming vessel. That means to say that, if I were to hold in this case that the bye-law applied, then prima facie I should have to say that the *Georgia* was in breach of it because, having regard to my finding with regard to the place of collision, she had not in fact held back or stopped above the pitch of the point.

But I think that one must also consider whether, in the circumstances of this case, the bye-law applies; and I observe that in the case which I have just cited Lord Phillimore went on, a few paragraphs later, to say this, which I think is not immaterial in a case such as the present[4]: "a witness in the course of the "case tried to throw some ridicule upon the application of the "rule by saying that, if he accepted that application, he would "never get down the river. There is, of course, no such meaning "in the rule. Vessels may constantly pass each other at a point. "If the curve is gradual, if the channel is wide, if it is not "encumbered by any navigation except the two vessels which "are meeting each other, if the vessels are not of great size, "perhaps with any one of these conditions, there is no danger "of collision. Each vessel can keep in her proper water, and "there is no necessity to stop and wait." It is perfectly true that, since Lord Phillimore said those words, the wording of the rule has been altered, but I am far from suggesting that its general effect or its purpose has been in any way altered.

Applying that, it can fairly be said that in the present case, as opposed to that of *The Hontestroom*,[5] we are dealing with a case where the river is broad, a case where the curve is gradual, and a case where the ships concerned are not of great size. Both the *Georgia* and the *Timandra* were small, handy vessels, and they were, at the material time, in a part of the river where there was plenty of room. But it may be said that this is a case, such as was envisaged by Lord Phillimore, where the river was encumbered by navigation, having regard to the presence of the *Psara*, the *Leicestershire*, and, I suppose, the tugs attendant upon them. It may be said that that fact makes all the difference, and in that connexion it is fair to point out, as was pointed out

[4] [1927] A.C. 37, 56. [5] [1927] A.C. 37.

by Mr. Adams in his forceful argument, that the pilot of the *Georgia* himself said he recognized that the presence of the *Psara* and the presence of the *Timandra*, both of which were in view at the same time, did together constitute to his mind some risk of possible collision.

I have given careful consideration to that point, but I think the answer to it is to be found in the fact which I have found, namely, that the two large vessels, the *Psara* and the *Leicestershire*, had in fact been passed, and safely passed, by the *Georgia* substantially above Jenningtree Point. From that time onwards, the *Timandra* still being a substantial distance away, the *Georgia* had nothing else of materiality, except the *Timandra*, to consider in relation to her navigation.

In those circumstances, was the presence of the *Timandra* coming up, as she was seen to be coming up, on the wrong side of the river, a circumstance producing such a risk of collision as to call into play bye-law 42 (a), and to make it necessary, in order to avoid risk of collision, to stop the *Georgia* above the pitch of the point? It is, I think, important to observe that the rule only applies if such action is necessary to avoid risk of collision. One thing is clear, namely that, insofar as there was a risk, it was a risk of the *Timandra's* own making: it was her wrongful action in coming up on the wrong side—in being on the wrong side and staying on the wrong side—that produced such risk of collision as there was. I appreciate that that in itself does not answer the question whether the bye-law applies; indeed, words of my own have been quoted to me this morning to the effect that it is no answer to say that the risk of collision, if such exists, is produced by the fault of the other ship.

But did the risk of collision exist, within the meaning of the rule, at any time when it can fairly be said that the *Georgia* was required to act? It seems to me that the proper approach to the matter is to remember the well-worn maxim, that every ship is entitled up to a point to assume that every other ship will do the right thing. There must be many occasions when ships navigating the Thames observe that other ships are momentarily on the wrong side of the river. That necessarily happens in the ordinary course of navigation. But, until the contrary is proved, it seems to me, and I think this has repeatedly been said by this court, that every ship is entitled to assume that the other ship, although for the moment on the wrong side of the river, will get over in good time on to her own proper side. Unless ships were entitled to act upon some such assumption as that, it would be impossible to carry on navigation in the river at all.

If that be right, then I think it follows that, for so long a period as it lay within the power of the *Timandra*, by taking the proper action, to get over to her right side of the river, it cannot be said that there was any such risk of collision as would bring this bye-law into play. On the facts I have found—and, indeed, I think it must be obvious having regard to the size of the ships—

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the *Timandra* could have determined any danger there was by getting over on to her own side of the river up to a very late moment. I say that bearing in mind that she is a small and handy ship. It seems to me that up to that very late moment the *Georgia* was entitled to expect that she would do so.

After that moment passed it may be said to follow from the findings of fact, which I have already stated, that danger no longer existed in this case, because, as I have found, the *Timandra* had by then got so far over to the south side of the river that the vessels could in fact pass without danger starboard to starboard, provided that the *Timandra* did not then starboard. It is at any rate clear that risk of collision, in the sense which is meant by this rule, only arose at a very late moment. I will not say that it arose only when the *Timandra* took her action of starboarding at the last moment; I think it may be said that it arose shortly before that, when the last safe moment at which the *Timandra* could have starboarded back to her own side of the river had passed. When, in the judgment of a competent pilot, that moment had passed, that is to say, when it was no longer without danger for the *Timandra* to do the right thing, then I think bye-law 42 (a) would have come into play.

If that be right, I think it really follows, on the facts of this case, that bye-law 42 (a) does not add anything to the ordinary requirements of good seamanship. I say that because it would be the duty of a competent pilot on board the *Georgia* in any case, in such circumstances, to take drastic action to reduce his way, and that whether or not he was approaching a sharp bend, and whether or not he was navigating against the tide.

At any rate, that is the way in which I have put the matter to myself, and it seems to me that the question to be determined is whether, in all the circumstances, the *Georgia* waited too long before taking the emergency action which she did in fact take. It is, of course, very easy to be wise after the event. It is easy enough to say that the fact of a collision happening proves that the *Georgia* did not act soon enough. But one has to look at these things through the eyes of man who was on the bridge at the time and to size up the problem which presented itself to him. That, I suppose, is one reason why a judge of this court is given the inestimable advantage of having two Elder Brethren of the Trinity House to advise on matters of seamanship. I may say that I have taken full advantage of their presence in this case to seek advice as to how the matter would appear to a pilot of competent skill on board the *Georgia*.

The view which I have formed myself—and, I am happy to say, it accords with the advice which the Elder Brethren have given to me—is that it would be quite impossible, in the circumstances of this case, to find that the pilot of the *Georgia* was guilty of negligence in not reducing way more drastically or earlier than he did.

In those circumstances I am not prepared to find any fault

on the part of the plaintiffs. In my judgment, this collision was brought about solely by the improper navigation of the *Timandra*.

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Judgment for the plaintiffs on the claim and counterclaim.

Solicitors: *Thomas Cooper & Co.; Holman, Fenwick & Willan.*

A. S-R.

[COURT OF APPEAL.]

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April 30;
May 1.

Jenkins and Hodson L.JJ., Danckwerts J.

[Plaint No. L. 1407.]

Landlord and Tenant—Rent restriction—Premises within the Acts—Shop—Business premises with living accommodation above—Covenant to use and occupy premises for certain named trades and business only—Tenant carrying on business and living on premises—Whether premises let as separate dwelling—Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3).

By a lease dated December 7, 1935, premises consisting of a shop with living accommodation behind and above it, access to which could be obtained either through the shop or by means of a separate entrance, were demised for a term of 14 years at the yearly rent of £75. The lease contained a covenant that the tenant would not use or permit to be used the demised premises or any part thereof for any illegal or immoral purpose but would use and occupy them for certain specified trades or businesses only. On the expiration of that lease in 1949, a new lease was granted to the same lessee for a further term of 21 years on the same terms but at a higher rent. The lessee carried on the business of a newsagent and tobacconist until January, 1954, when she assigned the lease and the goodwill of the shop to E. who in July, 1954, assigned the lease and the goodwill of the business to the present tenants, who, as E. had done, continued to carry on the business and live on the premises. The tenants obtained in the county court a decision that the premises were let as a separate dwelling-house within the meaning of the Rent Restriction Acts:—

Held, that the covenant in the lease did not prohibit the use of the premises as a dwelling-house, but merely restricted the businesses which would be carried on to those named in the lease; and that, accordingly, by virtue of section 3 (3) of the Act of 1939,[1] the

[1] Rent and Mortgage Interest Restrictions Act, 1939, s. 3: "(1) "Without prejudice to the operation of the two preceding sections "in relation to any dwelling-house "to which the principal Acts applied "immediately before the commencement of this Act, the principal "Acts, as amended by the last preceding section, shall, subject to the "provisions of this section, apply to "every other dwelling-house of which "the rateable value on the appropriate day did not exceed—(*a*) in "the metropolitan police district or "the city of London, one hundred "pounds; . . . (*c*) elsewhere, "seventy-five pounds; and in relation "to any such dwelling-house as "aforesaid, not being a dwelling-house to which the principal Acts "applied immediately before the "commencement of this Act, the "provisions of the Rent and Mortgage

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premises were let as a dwelling-house notwithstanding that they were to be used in part for business purposes, and, therefore, the county court had jurisdiction to determine the standard rent.

Reg. v. *Brighton and Area Rent Tribunal, Ex parte Slaughter* [1954] 1 Q.B. 446; [1954] 2 W.L.R. 289; [1954] 1 All E.R. 423 applied.

Wolfe v. *Hogan* [1949] 2 K.B. 194; [1949] 1 All E.R. 570 and *Court* v. *Robinson* [1951] 2 K.B. 60; [1951] 1 All E.R. 209 considered.

Per curiam. In construing a lease for the purpose of deciding whether it effects a letting of a dwelling-house the court is not precluded from looking at the subject-matter of the lease, namely, the property let, to ascertain whether it is or is not adapted for living purposes.

Appeal from Judge Glazebrook, sitting at Bromley County Court.

By a lease dated December 7, 1935, the landlord, Florence Eliza Jobey, demised to one Alice Charlotte Brown [the lessee] "all that building or tenement shop and premises known as "No. 224 Algernon Road Ladywell in the parish of Lewisham ". . . to hold the same unto the lessee from December 25, 1935, "for the term of fourteen years yielding and paying therefor "during the said term the clear yearly rent of £75 by equal "quarterly payments on the usual quarter days and the last "payment to be made in advance two calendar months before "the expiration of the said term"; and there followed a provision for the payment of the cost of insurances as additional rent.

The lessee covenanted with the lessor thus: "(11) and also "will not do or suffer anything to be done or take place or remain "on the demised premises which may render an increased or "extra premium payable for the insurance of the premises "against fire as hereafter provided or which may make void or "voidable any policy for such insurance. And will not use or "permit to be used the demised premises or any part thereof for

"Interest Restrictions Acts, 1920 "to 1933, set out in the first column "of the First Schedule to this Act "shall have effect as if there were "made in those provisions the modi- "fications respectively prescribed by "that Schedule. (2) The principal "Acts shall not, by virtue of this "section, apply—(*a*) to any dwelling- "house consisting of, or comprising, "premises licensed for the sale of "intoxicating liquor for consumption "on the premises; . . . (3) Subject "to the provisions of paragraph (*a*) "of the last preceding subsection, "the application of the principal "Acts, by virtue of this section, to "any dwelling-house shall not be "excluded by reason only that part "of the premises is used as a shop "or office or for business, trade or "professional purposes; . . ."

S. 7: "(1) In this Act the follow- "ing expressions have the meanings "hereby respectively assigned to "them, that is to say:— . . . and "other expressions have the same "meanings as in the Rent and Mort- "gage Interest Restrictions (Amend- "ment) Act, 1933."

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16: "(1) In this Act, unless the "context otherwise requires, the fol- "lowing expressions have the mean- "ings hereby respectively assigned "to them, that is to say:—. . . "'Dwelling-house' has the same "meaning as in the principal Acts, "that is to say, a house let as a "separate dwelling or a part of a "house being a part so let; . . ."

" any illegal or immoral purpose but will use and occupy the " demised premises and permit them to be used and occupied " as and for the trades or business of a news vendor stationer " bookseller toy merchant and tobacconist only. . . . (13) AND " ALSO will not assign transfer underlet or part with the posses- " sion of the demised premises or any part thereof without the " previous written licence in that behalf of the lessor but so " that such licence shall not be withheld to an assignment or " underletting of the demised premises to a respectable and " responsible person."

On the expiration of that lease in 1949, a new lease was granted to Mrs. Brown for 21 years expiring on December 25, 1970. The terms were identical with the former lease except that the rent was £100 per annum for the first three years and thereafter £125.

By two deeds dated January 29, 1954, Mrs. Brown assigned to one Esterson the lease of the premises and the goodwill of the business of a newsagent and tobacconist carried on by her on the premises. By a deed of July 16, 1954, Esterson assigned the lease and the goodwill of the business to Sidney Charles Levermore and Rose Winifred Levermore, the present tenants. The premises had three floors and the accommodation was as follows: On the ground floor at the front was a shop; behind that was a living-room, a dining-room and a small kitchen. On the first floor was the main sitting-room and a bedroom. Between these two floors, on a half landing, there was a bedroom, a bathroom and a w.c. On the top floor there were two small bedrooms. The main door led from the street into the shop and through the shop access could be had to the floors above. There was also a separate door from the street to the upper floors. The present tenants, as Esterson had done, lived in the rooms above and behind the shop.

It appeared that the premises had been built about 1895 and that they had always included a shop. The rateable value, net, was £52 in 1931 and £40 in 1939.

The present tenants applied to the county court registrar to determine the standard rent of the premises. The registrar dismissed the application on the grounds that the premises were not " let as a dwelling-house " within the meaning of the Rent Restriction Acts. On appeal, the county court judge reversed the decision of the registrar and the matter was referred back to the registrar for determination of the standard rent in default of agreement.

The landlord appealed.

John Wilmers for the landlord.
Roger Willis for the tenants.

The following cases, not referred to in the judgments, were

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cited in argument: *Hazell, Watson and Viney Ltd.* v. *Malvermi* [2]; *Barrett* v. *Hardy Brothers (Alnwick) Ltd.* [3]

JENKINS L.J. This is an appeal by the landlord of premises known as 224, Algernon Road, Ladywell, in the parish of Lewisham, from a decision of the county court judge that these premises were within the protection of the Rent Restriction Acts. The matter arose in the county court as an application by the tenants, now the respondents, to fix the standard rent of the premises on the footing that they were premises within such protection.

The question at issue is whether these premises are let as a separate dwelling, for it is only on that footing that the protection of the Acts can be claimed for them. I should, I think, refer briefly to the relevant provisions. [His Lordship referred to the relevant parts of sections 3 and 7 (1) of the Rent Restriction Act, 1939, and section 16 (1) of the Rent Restrictions Act, 1933, and continued:] The judge held that 224 Algernon Road was let as a separate dwelling within the meaning of the Act, with the consequence that the Act applied to it. The landlord now appeals to this court and contends that the premises are excluded from the protection of the Act because they were not let as a separate dwelling or indeed as a dwelling at all, but were let wholly and exclusively for business purposes and that consequently the Act does not apply to them.

This question has been many times before this court, and it has been laid down that the first thing that must be looked at in considering it in any particular case is the formal lease or tenancy agreement, if any, by which the letting was created. If from the provisions of that lease or tenancy agreement it appears that the premises were let upon terms excluding their use for residential purposes, then the matter is concluded against the tenant, notwithstanding the use to which the premises may in fact have been put, unless on the facts it can be shown that by the common consent of the tenant and the landlord the provision excluding use for residential purposes was relaxed, so as to create a new or modified letting of the premises which, as modified, constitutes a letting of them for residential purposes. If there is no formal lease or tenancy agreement, or any document there may be is silent on the question of user, then it is legitimate to look at what was actually done, to look at the purposes for which the premises were in fact used with the assent of the landlord, in order to ascertain whether they were let as a separate dwelling or were let for business purposes.

The first thing to be done, therefore, in the present case is to look at the terms of the lease. [His Lordship read the relevant portions of the lease and continued:] For the purpose of construing the lease and in particular tenant's covenant (11) it is

[2] [1953] 1 W.L.R. 782; [1953] 2 All E.R. 58.

[3] [1925] 2 K.B. 220, 226; 41 T.L.R. 426.

permissible for the court, and indeed obligatory on it, to pay regard to the surrounding circumstances with reference to which the lease was entered into, and in particular to look at the nature of the subject-matter of the letting. As to that, I may quote from the judgment of the county court judge. He described the premises in this way: "The house has three floors "and the accommodation was described by the tenant (in "uncontradicted evidence) as follows: On the ground level at "the front, is a shop; behind that is a living room, a dining "room, and a small kitchen. On the first floor is the main "sitting room and a bedroom. Between these two floors, on a "half landing there is a bedroom, a bathroom and a w.c. On "the top floor there are two small bedrooms. The main door "leads from the street into the shop and through the shop access "can be had to the floors above. There is also a separate door "from the street to the upper floors." That is a description of premises of a very familiar kind, consisting of a shop fronting the street with living accommodation behind and above it. Such being the nature of the premises with which the lease was concerned, I pass to the question of construction.

I observe first of all that the parcels are described as "all "that building or tenement shop and premises." That indicates that the shop is regarded as something distinct from the rest of the building. I think I may also note the expression "tene-"ment." That is an expression which is sometimes used to mean a house and in particular a dwelling-house. That, however, is not its strictly correct meaning in law, its correct meaning extending, as I understand, to every kind of hereditament, both corporeal and incorporeal. I therefore do not found myself on the use of the word "tenement," but I do gain some slight assistance from the fact that the shop is specially and separately mentioned.

As to covenant (11), which is the crux of the case, I approach it bearing in mind that this was a lease of premises consisting of a shop with premises above and behind it plainly adapted for living purposes. The relevant part of covenant (11) begins with the words, "And will not use or permit to be used the demised "premises or any part thereof for any illegal or immoral "purpose." That is a prohibition which I should have thought would be more appropriate to a dwelling-house than to a shop. Prima facie it would hardly be within the contemplation of the parties that a shop in which nobody lived at all or business premises in which nobody lived at all would be used for any illegal or immoral purpose. That, perhaps, is a slight indication, but I think it is an indication of some small significance.

Then comes the provision directly in point. I will read it again: ". . . but will use and occupy the demised premises and "permit them to be used and occupied as and for the trades or "business of a news vendor stationer bookseller toy merchant "and tobacconist only." It is ungrammatically expressed, since

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the words "occupied" and "for the trades or business" are separated by the words "as and" which have no grammatical connexion with what follows, but it does purport to impose an obligation on the tenant to use and occupy the demised premises and permit them to be used and occupied for the specified trades or business only. For the landlord it is urged that the effect of it is to impose upon the tenant a positive obligation to use and occupy every part of the demised premises and permit every part of the demised premises to be used and occupied for the trades or business specified and for no other purpose. If that were the right construction, then it follows that the tenant by using as a dwelling-house or as living accommodation those parts of the demised premises clearly adapted for such purposes would be committing a breach of covenant upon which the landlord could bring proceedings for forfeiture. I cannot accept that construction of the language used, and in rejecting it I think I am entitled to take into account as part of the surrounding circumstances the design and the layout of the premises and the adaptation of the rear and upper parts of it as living accommodation. It is quite incredible to me that the parties to a lease of premises such as those would intend that the tenant should be subject to a covenant such as that.

But in my view that is not the right construction. I think the word "only" with which the covenant concludes means "and for no other trade or business"; I think it is at least equally capable of that meaning as it is of the meaning "and for no other purpose." I think the effect of the covenant is that the tenant undertakes to use the premises for the designated purpose but not for any other trade or business; so that the lease upon its true construction is a lease of the premises under which the tenant is under an obligation to carry on the trade or business of a news vendor, stationer and bookseller, toy merchant and tobacconist on the premises, and, further, is under an obligation not to carry on any other trade or business on the premises, but the tenant is under no prohibition against living on the premises. If that construction is right, then one has the position that premises adapted for use as a shop with living accommodation over are let to a tenant with a provision to the effect that he is to carry on a specified trade or business on the premises but no other trade or business. That means, in my view, that so far as the terms of the lease are concerned, the tenant is allowed without breach of covenant to live on the premises, and it would seem to me that the effect of that is that the premises were let as a dwelling-house, notwithstanding that they were to be used in part for business purposes. I think that follows from section 3 (3) of the Act of 1939.

Accordingly, were the matter free from authority I, speaking for myself, would have little hesitation in holding that these premises were let as a separate dwelling, albeit they were to be used partly for business purposes, and consequently that they

were premises to which the Act applied. But in a very careful and interesting argument on the part of the landlord it was pressed on us that it was not open to this court to come to that conclusion inasmuch as the matter was concluded in a contrary sense by authority binding upon this court. We were referred to a number of authorities. I can begin with *Wolfe* v. *Hogan*,[1] part of the headnote of which is as follows: "On the issue "whether premises of which possession is sought by a landlord "are 'let as a separate dwelling,' within the meaning of section "12 (2) of the Rent and Mortgage Interest (Restrictions) Act, "1920, it must be shown by the tenant prima facie, that the "two parties to the contract have on the one hand let, and on "the other taken, the premises as a separate dwelling. That "may be shown by the terms of the original letting, or it may "be shown where the tenant has altered, subsequently to the "original letting, the user of the premises to that of a separate "dwelling, with the full knowledge of the landlord, by the land-"lord having accepted the changed position, so that the court "must again imply a mutual consensus of the two parties to the "contract in regard to the user (whether or not there had been "in the original letting a prohibition against that use). Where "the terms of the tenancy provide for or contemplate the user "of the premises for some particular purpose, that purpose will "prima facie be the essential factor. Thus, if the premises are "let for business purposes, the tenant cannot claim that they "have been converted into a dwelling-house merely because "someone lives on the premises. If, however, the tenancy "agreement contemplates no specified user, then the actual "user of the premises at the time when possession is sought by "the landlord, must be considered."

Evershed L.J. referred to some observations of Bankes L.J. in *Epsom Grand Stand Association Ltd.* v. *Clarke*[2] and went on[3]: "I think, if I may say so, that the matter is more "accurately stated by Mr. Megarry in the fourth edition of his "book on the Rent Acts, and I quote and adopt as part of my "judgment the brief summary of the position which I find on "page 19 of his book: 'Where the terms of the tenancy provide "'for or contemplate the use of the premises for some particular "'purpose, that purpose is the essential factor, not the nature of "'the premises or the actual use made of them. Thus, if "'premises are let for business purposes, the tenant cannot "'claim that they have been converted into a dwelling-house "'merely because somebody lives on the premises.'" Continuing a little lower down with the quotation from that work Evershed L.J. went on: "'If, however, the tenancy agreement "'contemplates no specified use, then the actual use at the "'time when possession is sought by the landlord must be "'considered.'"

[1] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

[2] [1919] W.N. 170; 35 T.L.R. 525.

[3] [1949] 2 K.B. 194, 202, 203.

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I will next refer to *Court* v. *Robinson*.[4] That was a case where premises were let on lease with a covenant that the tenant should use them only for the purposes of a working-men's social club, and it was held "that the premises were let for business "purposes and not as a separate dwelling. The user had been "specified in the lease and there was no evidence that the "contract in the lease had been superseded by a different con-"tract between landlords and tenants providing that the "premises should be used as a separate dwelling." Counsel had said that the premises were let under a certain lease, and Asquith L.J. said this[5]: "Undoubtedly they were let at that time, but "were they let as a dwelling-house? Prima facie when you have "a plain stipulation that premises are to be used solely for the "purposes of, say, a working-men's social club, I should read "that as excluding the notion that they were intended to be "let or were let as a dwelling-house. When the lease itself "specifies clearly a particular purpose for which, and a fortiori "for which alone, the premises are to be used, for instance, for "the purpose of an office or for the purpose of a barn, it is, as "Denning L.J. said in *Wolfe* v. *Hogan*,[6] unnecessary to look "further." Then Asquith L.J. referred to his judgment in *Whitty* v. *Scott-Russell*[7] and said: "In my judgment there I "said[8]: 'It is, however, argued in answer to this objection "'that the Court of Appeal, in certain of its decisions of which "'the most recent is *Wolfe* v. *Hogan*,[9] has held that, where "'there has been a formal instrument of letting the terms of "'which express the purpose for which the premises were let, "'this is conclusive, and evidence of any other purpose derived "'from, for example, the actual use, is excluded. In that "'case Denning L.J. used language which lends strong colour "'to such a contention when he said, in the opening sentence "'of his judgment[10]: "In determining whether a house or "'"part of a house is 'let as a dwelling' within the meaning "'"of the Rent Restriction Acts, it is necessary to look at the "'"purpose of the letting. If the lease contains an express "'"provision as to the purpose of the letting, it is not necessary "'"to look further, but, if there is no express provision, it is "'"open to the court to look at the circumstances of the "'"letting."'" Asquith L.J. continued[11]: "There are cases "in which a covenant not to use the premises otherwise than "as an hotel or a lodging-house or a temperance hotel have "been held not to be broken by the tenant sleeping there, "nor the house thereby denuded of the protection of the Rent "Restriction Acts; but those cases are clearly distinguishable

[4] [1951] 2 K.B. 60; [1951] 1 All E.R. 209.
[5] [1951] 2 K.B. 60, 67.
[6] [1949] 2 K.B. 194.
[7] [1950] 2 K.B. 32; 66 T.L.R. (Pt. 1) 1003; [1950] 1 All E.R. 884.
[8] [1950] 2 K.B. 32, 39.
[9] [1949] 2 K.B. 194.
[10] [1949] 2 K.B. 194, 204.
[11] [1951] 2 K.B. 60, 69.

" to my mind from the present case because it may be difficult " to conduct the business of an hotel efficiently without sleeping " there, and in that case to sleep there would be to observe the " covenant, not to violate it."

Those cases, I think, indicate sufficiently for the present purpose the principles which the court has laid down; and the question is whether without departure from those principles it is open to the court to arrive at the conclusion which I have provisionally indicated. In my view it is. I do not think it is necessary to adduce from any of the observations in these and other cases that a letting cannot be a letting of a dwelling-house in any case in which it is contemplated that any part of the premises should be used as business premises. In my view what the court has had in mind in the cases where lettings have been held to be business lettings is a stipulation in the lease which may be said to define the whole purpose of the letting or to preclude the use of the premises as a dwelling-house or to be inconsistent with such use. In my view the stipulation relied on here by the landlords does none of these things. In its application to premises of the kind here in question covenant (11) to my mind should be construed merely as providing that a particular trade or business shall be carried on and that no other trade or business shall be carried on; but it does not stipulate that this shall be the exclusive use of the premises, rather indicating that the business is to be carried on in the shop while the tenant is free, if so minded, to live in the upper part of the premises.

I am fortified in this conclusion by the judgment of Lord Goddard C.J. in the Divisional Court, in *Regina* v. *Brighton and Area Rent Tribunal, Ex parte Slaughter.*[12] In that case the premises were comparable to those in the present case. They consisted of a shop on the ground floor with a self-contained flat over it, and they were let for the first time as a whole for 21 years at a rent of £350 a year. The headnote goes on to say: " The lease contained a covenant that the tenant would not " permit the premises to be used otherwise than for the business " of a greengrocer. The tenant carried on a greengrocer's business " in the shop and lived in the flat above. On an application by " the tenant under section 1 (1) of the Landlord and Tenant " (Rent Control) Act, 1949, to a rent tribunal to fix a reasonable " standard rent for the premises, the landlords objected that, in " view of the covenant in the lease, the premises were not a " dwelling-house to which the Act applied and that the tribunal " had no jurisdiction." It was held " that, if the covenant " debarred the use of the whole of the premises as a dwelling- " house so that the tenant could be restrained from such user, " that was conclusive against the premises being a dwelling- " house, but if it appeared that the premises were let for the

[12] [1954] 1 Q.B. 446; [1954] 2 W.L.R. 289; [1954] 1 All E.R. 423.

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"purpose of the tenant living in them, provided he was not a "service tenant, then they came within the Act. In the present "case, so long as the tenant carried on a greengrocer's business "it was impossible to say that he was in breach of his covenant "because he lived on the premises, and, therefore, the tribunal "had jurisdiction to fix the rent."

Lord Goddard C.J. said [13]: "Provided that the tenant carries "on a greengrocer's business it would in our opinion be impos- "sible, and, indeed, absurd to say that he was in breach of his "covenant because he lived on the premises. So to hold would "mean that the whole of the upper part was sterilized, at least "to the extent that the rooms could only be used as a store or "for some such purpose, and not for that for which they were "designed which the tenant is under covenant to preserve and "not to alter." Then his Lordship went on to refer to certain repairing covenants which in that case were inappropriate in some respects to business premises, and continued: "The "premises are obviously let both for residential and shop "purposes, but a shop is to be maintained there because they "are in a shopping street and if they were not used as such "their value would or might be impaired." He continued at the bottom of the same page: "Cases in which the demise was "of a barn or a warehouse, but in which the lessee squatted, to "use a convenient expression, or lived as a caretaker, are not in "pari materia with the present. To use a convenient phrase "borrowed from the judgment of Moore L.J. in *Burns* v. *Rad-* "*cliffe*,[14] 'the nature of the business is not incompatible with "'the residence of the tenant and I can see no reason for holding "'that the whole premises were not his dwelling-house.'"

In my view, there is nothing in that judgment which is in conflict with the other authorities to which I have referred. Nor do I think there is anything in those authorities which, fairly construed, precludes this court, in construing a lease for the purpose of deciding whether it effected a letting of a dwelling-house, from looking at the subject-matter of the lease, namely, the property let, and seeing whether it is or is not adapted for living purposes.

A subsidiary argument was advanced to the effect that the exigencies of a newsagent's business were such that a newsagent carrying on a business of the kind carried on by the tenants here must perforce live over the shop for the sake of the efficient carrying on of his business, and it was sought to equate this case in that respect with the cases of hotel keepers and so forth adverted to in a passage I have already quoted from the judgment of Asquith L.J. in *Court* v. *Robinson*.[15] In the view I take the tenants succeed on the main argument, and it is therefore not necessary to decide whether this subsidiary argument, if it had

[13] [1954] 1 Q.B. 446, 453.
[14] [1923] 2 I.R. 158, 162.
[15] [1951] 2 K.B. 60, 69.

been essential to that success, would have sufficed to entitle them to hold their judgment.

I am much indebted to the careful judgment of the county court judge in which the authorities were more completely and effectively reviewed than I have been able to do, and for the reasons which I have endeavoured to give and those which he has given in his judgment, I think that he came to a right conclusion and that this appeal should be dismissed.

HODSON L.J. I entirely agree with the judgment which has just been delivered. I agree also with the county court judge in the construction which he places on the lease in question.

Mr. Wilmers, on behalf of the landlords, has argued before us that in some respects the courts have been fettered in construing such documents by their own decisions, in particular by a decision of this court in *Court* v. *Robinson*,[15] to which my Lord has referred. I do not accept that submission. The courts could not, unless directly ordered to do so by statute, construe documents except by reference to surrounding circumstances, and that approach must necessarily be correct.

These premises were adapted not only as a shop but also for living accommodation, and that is the situation in which they were let, and those are the premises which are the subject-matter of the lease. I see no conflict at all in approach between that of the Court of Appeal in *Court* v. *Robinson*[15] and that of the Divisional Court in *Regina* v. *Brighton and Area Rent Tribunal, Ex parte Slaughter*,[16] and I respectfully adopt the test which the Lord Chief Justice expressed in the latter case in these words[17]: "If the covenant debars the use of the whole of the "premises for the purposes of a dwelling-house so that the "tenant can be restrained from such user, that is conclusive "against the premises being a dwelling-house apart from any "assent to change of user." It has to be remembered that what we are considering here is section 3 (3) of the Act of 1939 which lays down that "the application of the principal Acts . . . "to any dwelling-house shall not be excluded by reason only that "part of the premises is used as a shop or office or for business, "trade or professional purposes." It has been decided by this court that the question is not whether the dominant user is for business or for a dwelling-house: that was decided in *Vickery* v. *Martin*.[18] In my opinion, when one looks at the relevant covenants in this case and at the parcels one necessarily arrives at the conclusion that there is, as the county court judge held, no prohibition against the use of these premises for the purposes of a dwelling-house.

I need not repeat the features of the agreement to which my Lord has referred. I arrive at the same conclusion as he did and

[15] [1951] 2 K.B. 60, 69.
[16] [1954] 1 Q.B. 446, 452.
[17] Ibid. 452.
[18] [1944] K.B. 679; 60 T.L.R. 513; [1944] 2 All E.R. 167.

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for the same reasons, and I also adopt the reasons which were given by the county court judge on this part of the case. It is unnecessary to express any opinion on the subsidiary question whether the tenant's business required his residence on the premises, where I think the tenant is not on quite such secure ground. I agree that the appeal fails and should be dismissed.

DANCKWERTS J. I agree also and will only add a very few words. It seems to me that it would be useless and quite wrong to construe a lease without reference to the nature of the premises with which the lease was dealing. A lease is not intended to be either a mental exercise or an essay in literature; it is a practical document dealing with a practical situation. Therefore it is right to look and see what is the property with which the document is dealing. That is a very different matter from considering to what use the property may have been put at a subsequent date.

When one looks at the property in the present case it is plain that it is a dwelling-house and a shop. There is a bathroom, there are bedrooms, there is a separate entrance to the upper part of the property. It is plain that the house has been, so far as one can see, the same ever since it was built in about 1895, a dwelling-house with a shop. It is plain from the parcels to the lease that it is dealing with something more than a shop. That being so, it seems to me that it would be absurd to construe the covenant contained in paragraph (11) of the lessee's covenants as confining the use of the whole of the property to the use for a tobacconist's shop and nothing else. That covenant, as it seems to me, is really a compendious covenant which is attempting to deal with more than one thing. It is attempting to prevent the use of the dwelling part of the premises for illegal or immoral purposes, and is designed to confine the business part of the premises to a particular trade. That being so, there is nothing provided by the covenant to prevent one reaching what seems to me the sensible conclusion that the property is what it obviously is, a dwelling-house with a shop.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker; James & Charles Dodd.*

J. A. G.

[COURT OF APPEAL.]

* ESDAILE AND OTHERS *v.* LEWIS.

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May 2.

[Plaint No. M. 15051.]

Jenkins and Hodson L.JJ. and Danckwerts J.

Landlord and Tenant—Rent restriction—Assignment of lease or underletting — Construction of covenant — "No subletting allowed" — Whether subletting of part of premises a breach.

The tenant of premises within the Rent Acts sublet the basement and a room on an upper floor to the defendant without the landlords' knowledge or consent. The conditions on which the tenancy was held included a condition "No subletting allowed without the "written consent of the landlord." The tenant gave notice to quit and left the premises, the defendant remaining in occupation of the part sublet to her which was also within the protection of the Rent Acts.

The landlords sought possession against the defendant on the ground of breach of the condition relating to subletting:—

Held (Danckwerts J. dissenting), that on its true construction the condition was a condition against a subletting of the premises as a whole, and that, accordingly, a subletting of part of the premises was no breach of the condition.

Cook v. *Shoesmith* [1951] 1 K.B. 752; [1951] 1 T.L.R. 194 applied.

APPEAL from Judge Elder-Jones, sitting at Bow County Court.

The plaintiffs, in their capacity as personal representatives, were the landlords of premises known as 53 Merchant Street, Bow, a dwelling-house within the protection of the Rent Acts. The tenant was formerly one Kaufman, who in April, 1955, gave notice to quit and left. The plaintiffs sought possession of the premises and found that the defendant, Fanny Lewis, was in occupation of part of the premises without their knowledge or consent. She claimed the right to remain in occupation as a person to whom part of the premises had been lawfully sublet, notwithstanding that a condition of Kaufman's tenancy was "no "subletting allowed without the written consent of the landlord." She therefore remained in occupation of her part of the premises, whereupon the plaintiffs brought proceedings against her for possession. On March 1, 1956, the county court judge refused the plaintiffs' claim for possession.

The plaintiffs appealed.

J. C. Lawrence for the plaintiffs, the landlords.

R. Gavin Freeman for the defendant, the tenant.

The case cited in argument is referred to in the judgment.

JENKINS L.J. stated the facts and continued: The sole question in this case is whether a stipulation relating to subletting contained in the conditions of the tenancy as they appear on the inside cover at the back of the rent book applied to the

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letting effected to Mrs. Lewis. Various other questions arose relating to the possibility of waiver by the plaintiffs of any breach of the tenancy agreement that might have been constituted by the letting to Mrs. Lewis. The judge resolved these questions in favour of the plaintiffs and held that there had been no waiver, but on the stipulation as to subletting he held that it did not upon its true construction extend to a subletting of a part only of the premises, and that is the sole matter which has been debated before us.

The subject-matter of Mrs. Lewis's tenancy was the basement and a room on an upper floor of the premises, and it was not in dispute that these parts of the premises were separately let to her so as to be capable of protection under the Act. The conditions of the tenancy as printed on the back inside cover of the rent book are these: "Conditions upon which this rent book is "accepted: Tenants must give notice according to the terms "of their agreement: quarterly, monthly, or weekly, or alter- "natively pay the amount of such term previous to removal. "Notice to quit will not be taken until all arrears have been "paid, broken windows and other damage repaired. The key "to be delivered to the landlord or his agent before 12 o'clock "noon on the day of leaving. No subletting allowed without "the written consent of the landlord. The landlord reserves the "right to refuse to pay the rates and taxes if the tenant is in "arrears in the payment of his rent." Then attention is called to those conditions on the outside of the back cover at the foot of it, where these words are printed: "Conditions upon which "this rent book is accepted, see inside cover." We have been provided with a specimen rent book with the names and so on not filled in, but it appears that on the outside front cover of the book there would be the tenant's name, and, as his address, the property the subject-matter of the tenancy. That would be followed by a figure to be inserted against the word "rent" printed on the cover, and finally the date of entry with a space for the insertion, I take it, of the date from which the tenancy was to operate.

The appeal, then, turns entirely on the true construction of these words in the conditions: "No subletting allowed without "the written consent of the landlord." I confess, speaking for myself, that if the matter had been free from authority I would have been disposed to hold that the words "no subletting "allowed" meant that there was to be no subletting at all in relation to the premises, whether in whole or in part. The county court judge felt constrained to reject that view on the authority of the case in this court of *Cook* v. *Shoesmith*.[1] We have been invited by counsel for the plaintiffs to hold that the judge was wrong in regarding the condition now under considera- tion as in pari materia with the condition which was construed

[1] [1951] 1 K.B. 752; [1951] 1 T.L.R. 194.

in *Cook* v. *Shoesmith*.[1] The material provisions of the tenancy agreement in *Cook* v. *Shoesmith* [1] were these. The tenant agreed as follows: "I hereby agree to rent" the house in question at a specified rent "and I further agree not to sublet." Then the headnote states: "The tenant, without the landlord's consent, "sublet two of the top rooms of the house, and the landlord "sought possession for breach of the undertaking not to sublet," and it was held, "that, on its true construction, the undertaking "in the agreement 'not to sublet' was not broken by subletting "part of the premises, for the verb 'to sublet' must have an "object and its only possible object was the house which was "the subject-matter of the agreement. Consequently the prin- "ciple that a covenant not to sublet 'the premises' demised "was not broken by the subletting part of them applied." The headnote concludes: "Dictum of Lord Eldon in *Church* v. "*Brown*,[2] as applied in *Grove* v. *Portal*,[3] followed."

The reasoning underlying the decision in *Cook* v. *Shoesmith* [4] was of this nature. It is a well-established principle, treated as such by Lord Eldon in *Church* v. *Brown*,[5] that a covenant not to sublet premises is not broken by the subletting of part only of the premises. It follows that wherever there is a stipulation in a tenancy agreement against subletting, or a covenant not to sublet, then if, upon its true construction, that stipulation or covenant prohibits the subletting of the premises it is not broken by the subletting of part only of the premises. I think it is right to add that it behoves a landlord who is seeking to cut down the rights prima facie conferred on his tenant by the letting to express in clear words the extent to which those rights are intended to be cut down. Under a tenancy agreement containing no stipulations regarding subletting the tenant is entitled to sublet in right of his proprietary interest. If that right is to be denied him then the provision by which it is denied should be clearly expressed. It is true that in *Cook* v. *Shoesmith* [6] the undertaking not to sublet was in the form, "and I further agree not "to sublet," following upon and in the same sentence as the words, "I hereby agree to rent" the particular house. On that form of words the court felt bound to hold that inasmuch as the verb "to sublet" must have an object, and inasmuch as the agreement not to sublet occurred in the same sentence as the agreement to rent "the above house," 53 Marine Avenue, Hove, the only object that could be assigned to the verb was "the "above house," or, in other words, the premises. Once that conclusion was reached the principle recognized in *Church* v. *Brown* [7] applied, so that the agreement not to sublet was construed simply as an agreement not to sublet the whole of the

[1] [1951] 1 K.B. 752.
[2] (1808) 15 Ves. 258, 265.
[3] [1902] 1 Ch. 727; 18 T.L.R. 319.
[4] [1951] 1 K.B. 752.
[5] 15 Ves. 258.
[6] [1951] 1 K.B. 752.
[7] 15 Ves. 258.

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premises, and not as an agreement not to sublet the premises or any part thereof.

Counsel for the plaintiffs says that while he does not and could not challenge the correctness of the decision in *Cook* v. *Shoesmith* [8] on the language which the court there had to consider, the language here is of wider import and is not covered by the *Cook* v. *Shoesmith* [8] decision. The words here are "no "subletting allowed without the written consent of the landlord," and counsel says that, according to the ordinary meaning of those words, what is prohibited is the act of subletting in any shape or form. He says the meaning can be brought out by adding after "subletting" the words "at all," so that it would read "no "subletting at all allowed," that is to say, "nothing amounting "to a subletting to be done at all." Counsel for the plaintiffs asks us to hold that these words, "no subletting allowed," have that comprehensive significance and, according to their natural meaning, apply to the letting of part as well as to a letting of the whole. I find that argument attractive, and I would be glad to accede to it if, on the authorities, I felt able to do so. But it seems to me that, just as the words "I agree not to sublet" in *Cook* v. *Shoesmith* [9] demanded an object, so the words "no "subletting allowed" demand some subject-matter to which they can relate. "No subletting allowed" immediately raises the question "No subletting of what?" It seems to me that it is impossible to say that the subletting which is not allowed is anything other than a subletting of the premises. I see no more warrant here for adding "or any part thereof," than there would have been in *Cook* v. *Shoesmith* [9] for adding to the words "I "further agree not to sublet the premises" the words "or any "part thereof." Whatever one may think of the principle which the cases establish, it is an established principle for better or for worse, and I do not think that any service would be done to the law or to the public in seeking to whittle it down by means of fine distinctions. The distinction here sought to be drawn seems to me to be altogether too fine to command acceptance, and for these reasons I think that the county court judge came to the right conclusion, and I would dismiss this appeal.

HODSON L.J. I agree. If the matter had been free from authority I should, as indeed would the county court judge, have accepted the submission of counsel for the plaintiffs that the words here, "no subletting allowed without the written consent "of the landlord," mean "no subletting at all allowed without "the written consent of the landlord": that is to say, no subletting of any part of the premises in question. But, in my judgment, we are constrained by authority to dismiss this appeal.

The principle that a covenant not to underlet the premises demised is not broken by underletting a part of them only is laid

[8] [1951] 1 K.B. 752.

[9] [1951] 1 K.B. 752.

down by authority going back to a dictum of Lord Eldon in *Church* v. *Brown*,[10] given in the year 1808, and on the construction of a provision of this kind reliance is always placed upon the principle that the courts have always held a strict hand over these conditions for defeating leases, which goes back to the year 1771, and to *Crusoe d. Blencowe* v. *Bugby*.[11] I would refer to a passage from my Lord's judgment in *Cook* v. *Shoesmith* [12] to which reference has been made. He concluded his judgment by saying: "any doubt should be resolved in favour of the tenant "whose prima facie right to dispose as he thinks fit of the interest "vested in him under the tenancy is cut down by the stipulation "in question." The stipulation in question, "no subletting "allowed without the written consent of the landlord," must have an object, and the question is whether it is reasonable to construe this provision as having for its object the premises as a whole. The rent book has not been produced, but it appears that on the face of the original rent book there appeared the address of the premises in question, that is to say, 53 Merchant Street, Bow, and on the inside cover there were conditions upon which the rent book was accepted, and then on the back a notice drawing attention to those conditions. There were five conditions, and excluding for the moment the one in question, all the other conditions must I think necessarily have as their object the premises in question. They are provisions as to giving notice, a provision as to the key, and a reservation of the landlord's right to refuse to pay rates and taxes. All those provisions, in my opinion, relate to the premises and the whole of the premises. The fourth and penultimate condition deals with the subletting, and I think Mr. Freeman is right in his contention that it is a reasonable construction of that condition to give it the same object as the other conditions have, that is to say, to give it as its object the premises and the whole of the premises. This, to my mind, makes the present case virtually indistinguishable from *Cook* v. *Shoesmith*,[12] where the court had to determine whether the agreement not to sublet had as its object the whole of the premises. The problem in that case differed in this way. There is, I think, no distinction proper to be drawn between the words "I agree not to sublet" and "no subletting allowed," but the address was contained in the same sentence as the agreement not to sublet, so that the court was able readily to reach the conclusion that the object of the subletting was the premises as a whole; whereas Mr. Lawrence points out in this case that the condition as to subletting stands in a sentence by itself, and therefore he argues that the court is at liberty to give this sentence its widest and, as he says, its natural meaning. For my part, I feel unable to accept that contention. There is this fine distinction, but I think it would be an over-refinement for the court to seek to free itself from the fetters which are imposed upon it by

[10] 15 Ves. 258.
[11] (1771) 2 Wm.Bl. 766.
[12] [1951] 1 K.B. 752, 756.

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the authorities which were summarized in *Cook* v. *Shoesmith*,[13] and, indeed, by the authority of *Cook* v. *Shoesmith*[13] itself, which is a decision of this court. I think, therefore, that the appeal must be dismissed.

DANCKWERTS J. I am sorry to say that I find myself unable to agree. Of course, if *Cook* v. *Shoesmith*[13] covers the matter, that is an end of it, but I remember the words of Sir George Jessel M.R. in regard to rules of construction of wills. He pointed out in regard to the construction of documents how a case of one kind may be extended to a slightly different wording in another will, until finally you get a result which outrages the common sense of the judge who has to decide the matter. I quite agree that if a landlord wishes to restrict the rights of a tenant to dispose of his interest or part of it in the property he must use clear words, and I agree, of course, that if there is any doubt about the proper construction of the words they should be construed against the landlord. The trouble is that the words in the present case seem to me to be perfectly clear. The words are confined within the limits of the property, 53 Merchant Street, Bow. The rent book and the conditions in it are not dealing with anything else. But it seems to me that "no sub-"letting allowed" is a perfectly plain expression which means, if the other members of the court will forgive me, exactly what it says, that there is to be no subletting whatever, and that therefore there must be no subletting of a part of the premises any more than of the whole premises. There simply must be no subletting, and therefore I should be in favour of allowing the appeal.

Appeal dismissed.

Solicitors: *Barnes & Butler; Breeze, Benton & Co.*

J. A. G.

[13] [1951] 1 K.B. 752.

[COURT OF APPEAL.]

C. A.
1956
May 4, 7.
Lord Evershed M.R., Jenkins and Hodson L.JJ.

*DIRPHYS (OWNERS) *v.* SOYA (OWNERS). THE SOYA.

[1953 D. No. 2543.]

Shipping—Collision—Damages for detention—Vessel under charter—Rise in freight market during detention of vessel—Vessel delayed from trading under enhanced freight rates in subsequent charter—Measure of damages.

The plaintiffs' vessel *Dirphys*, while on a voyage to London for loading under a charter dated October 13, 1950, was in collision

with the defendants' vessel *Soya*. The *Dirphys* was diverted to Rotterdam for repairs, which occupied a period of 20 days. While the *Dirphys* was undergoing repairs, the plaintiffs fixed the vessel under a charter dated January 18, 1951, for a subsequent voyage at a much enhanced freight rate, owing to a sharp rise in the freight market. But for the collision, the *Dirphys* would have completed the earlier charter and entered upon the subsequent charter 20 days earlier. The net rate of profit under the charter dated October 13, 1950, was £144 3s. 10d. per day, and that under the subsequent charter was £819 17s. 4d. On the question of the measure of damages to be awarded to the plaintiffs in respect of the detention of their vessel during the period of repair:—

Held, that in assessing damages for the detention of a vessel arising from a collision at sea, there is no rigid and unalterable rule of practice or convenience limiting the measure of such damages to the profit which, but for the collision, would have been earned under a charter existing at the time of detention; but that in the present case the alleged loss, arising from delay in embarking on a subsequent and more profitable period of trading was not proved with reasonable certainty and was too speculative and remote to be considered a consequence in law of the detention; accordingly the proper measure of damages was the equivalent of 20 days' profit at the rate of £144 3s. 10d. per day.

The Argentino (1888) 13 P.D. 191; affd. sub nom. *Gracie (Owners)* v. *Argentino (Owners)* (1889) 14 App.Cas. 519 applied.

Decision of Willmer J. [1955] 1 W.L.R. 1246; [1955] 3 All E.R. 621; [1955] 2 Lloyd's Rep. 376 affirmed.

APPEAL from Willmer J.[1]

The plaintiffs' vessel *Dirphys* was in collision with the defendants' vessel *Soya* on December 30, 1950. By an agreement of terms of settlement, the respective claims of the vessels were referred to the Admiralty registrar. At the time of the collision, the *Dirphys* was under a charter whereby a net profit of £144 3s. 10d. was earned per day. Owing to a sharp rise in the freight market during the period of detention, the net profit earned by the *Dirphys* in the subsequent charter was £819 17s. 4d. per day.

Before the registrar and the judge, the plaintiffs claimed damages for 20 days' detention at the rate of £819 17s. 4d. per day, contending that, as a result of the collision, they had been delayed by 20 days from engaging their vessel upon a voyage at the profitable rates existing at the beginning of 1951 in the Far East; or alternatively, 20 days' detention at a rate of profit arrived at by averaging previous and subsequent voyages. The defendants contended that the rate should be that under the charter dated October 13, 1950, or alternatively, the mean between that rate and the rate of the voyage previous to the collision, being £203 10s. 9d. per day.

Willmer J. held, confirming the registrar's report, that the loss of profits arising from the detention of a vessel was a question of fact to be proved with reasonable certainty, and was not a matter on which the court was entitled to speculate. A

[1] [1955] 1 W.L.R. 1246; [1955] 3 All E.R. 621; [1955] 2 Lloyd's Rep. 376.

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claim for loss of profits at the enhanced rate was not proved with reasonable certainty, and was thus a speculation and too remote to be considered a consequence in law of the detention. An average of previous and subsequent voyages should not be resorted to, since it had not been proved that, but for the collision, the plaintiffs would have had any use of their vessel during the period of detention, other than that under the charter, dated October 30, 1950. Accordingly, the measure of the plaintiffs' damages for loss of profits was the equivalent of 20 days' detention at the rate of £144 3s. 10d. per day.

The plaintiffs appealed.

K. S. Carpmael Q.C. and *R. F. Stone* for the appellants.
H. V. Brandon and *J. F. Willmer* for the respondents.

The following cases and authorities were cited in argument: Roscoe's Measure of Damages in Maritime Collisions, 3rd ed., pp. 80 and 99; *The Argentino* [2]; *The Ikala* [3]; *Admiralty Commissioners* v. *S.S. Valeria.* [4]

Lord Evershed M.R. These are proceedings for the assessment of damages to the plaintiff appellants' vessel *Dirphys*, arising out of a collision between that steamship and the respondents' motor vessel *Soya*, which occurred at the entrance of the Baltic sea on December 30, 1950. It has now been agreed that both vessels were to blame for the collision, and the proportions have also been agreed—30 per cent. to the *Dirphys*, 70 per cent. to the *Soya*. When the collision occured, the *Dirphys* was proceeding in ballast to London, being at the time subject to a voyage charter (which I will hereafter refer to as "charter No. 3"), dated October 13, 1950. By the terms of that charter, the *Dirphys* was to proceed to London, and there load a cargo of sugar for carriage to the Indian port of Bombay. The result of the collision was that the *Dirphys* had to be diverted to the port of Rotterdam and she was there detained for a period, which again has been agreed at 20 days, for the purpose of repairs, the 20 days being the first 20 days of January, 1951. The *Dirphys* was, however, able to carry out her obligations under charter No. 3 and she was able to earn, and she earned, the full freight of over £8,000 due to her in respect thereof. So far, therefore, as profits were derived from charter No. 3, no damage or loss whatever was suffered by the *Dirphys* as a result of the collision; but she arrived at Bombay on March 21, 1951, or thereabouts, later than she would have done had it not been for the collision—though how much later is a matter I will discuss presently. At that time (that is to say, from the month of December, 1950) there was a marked and remarkable rise in freights, whether as a result of the Korean war or otherwise, especially in Far Eastern waters. On January 18, 1951, the agents for the owners of the *Dirphys* made a new fixture for

[2] (1888) 13 P.D. 191; (1889) 14 App.Cas. 519.
[3] [1929] A.C. 196.
[4] [1922] 2 A.C. 242.

which the *Dirphys* was later nominated. That also was a voyage charter, and I will refer to it as "charter No. 4," the obligation thereunder being to load, at the Malayan port of Dungun, a cargo of metal or metal ore and take it to a safe port in Japan. The freight under charter No. 4, expressed in the terms of the daily rate of profit while engaged on the charter, was something like six times the daily rate earned under charter No. 3. By the terms of charter No. 4, the ship was expressed to be expected ready to load about March 17. The *Dirphys* was in fact ready to load some 14 days later or thereabouts; but, as in the case of charter No. 3, again the full benefit, in terms of freight, of charter No. 4 was reaped by the owners. Therefore, again, no damage from the collision can be attributable to any loss in the earnings of the *Dirphys* under charter No. 4. According to the evidence, two more charters in immediate succession followed charter No. 4, and again there was no loss attributable to the collision in respect of either of these two last charters. But, as I have said, the ship spent 20 days at the port of Rotterdam, and therefore arrived later than she would, or could otherwise have done, in these very profitable Far Eastern waters.

The case of the appellants before us, has been that the damage suffered should be treated as the loss of 20 days' trading in these profitable waters, at a rate equivalent to the rate of freight earned under charter No. 4, or alternatively, at an average, taking all the charters which I have mentioned together. As was said in the courts below, the appellants' case was attractively simple. On the other side it was said that since no loss was suffered at all in respect of any of the charters which were proved in evidence, the rule (a rule of practice and convenience) is that the loss ought to be estimated by multiplying the 20 days of detention by a daily rate of profit, based on the freight recoverable under charter No. 3, which was in fact the charter operative at the date of the collision and at the date when the repairs were being done at the port of Rotterdam. Put more specifically and arithmetically, what is said is: Had not the collision occurred, 62 days would have been occupied in the performance of charter No. 3 instead of 82, and the freight recoverable under charter No. 3 being divided by 62 gives you a figure of approximately £144 per day. The damage, say the respondents, should therefore be arrived at, according to this rule of convenience or practice, by multiplying the sum of £144 odd by 20.

The rule of practice or convenience is said to be based on what fell from Bowen L.J. in *The Argentino* [1] in this court, and also from Lord Herschell in the same case in the House of Lords. Alternatively, it is said that any loss which the owners of this vessel suffered is a matter of mere speculation; not a penny piece was lost in respect of any of the charters 3 to 6 inclusive which I have mentioned, and to see what profit (if any) was lost, one would have at least to go on examining the commercial history of

[1] (1888) 13 P.D. 191; (1889) 14 App.Cas. 519.

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the ship till the end of her life, a plainly impossible task. It is therefore said, in the terms of Willmer J.'s judgment that it is at least doubtful whether really any damage was suffered at all. The judge said [2]: "It may very well be true that, but for the "collision, the *Dirphys* would have started her profitable Far "Eastern trading, if I may so describe it, 20 days earlier than "in fact she did; but whether in the long run the plaintiffs would "have been any better off has been left, as far as I can follow "the evidence, as a matter of complete speculation. If the "plaintiffs could have proved that, because of those 20 days' "detention, they lost the opportunity of a complete voyage at "those enhanced rates, then that would have been a measure of "damage which I could well understand. But I do not know, "on the evidence which has been given, what the ultimate out-"come of this loss of 20 days may have been. For all that I "know, that loss of 20 days may, in fact, have cost the plaintiffs "nothing at all. All the engagements to which the ship was com-"mitted were in fact carried out. There is nothing to show, one "way or the other, what would have been the result if the pro-"gramme had all been accelerated by 20 days." Therefore, says Mr. Brandon, you must do the best you can, as in all cases of estimating damage, and it is certainly not shown that the sum awarded is materially wrong, or based on any wrong principle. He also says, as a further alternative, that one should resort to some averaging.

I should not myself wish to say that there was, on the special facts of this case, some rigid rule binding us, and that that rule was laid down for us by what was said in *The Argentino*.[3] The rule in marine collisions is, as I understand it, the ordinary rule applicable in all cases of estimating damage. In *The Argentino* Bowen L.J. said [4]: "The damages recoverable from a wrongdoer "in cases of collision at sea must be measured according to the "ordinary principles of the common law." It is, I think, important to have in mind what were the facts in *The Argentino*, having regard to the reliance placed upon the language used in the case by Bowen L.J. and by Lord Herschell. It is stated briefly in the headnote thus: "Previous to a collision between two "vessels, the owners of one of them"—that is the *Argentino*—"had made an oral arrangement with a firm of shipbrokers that "the vessel upon the completion of the voyage upon which she "was then engaged should go to Antwerp, and there load a cargo "in turn as one of a line of steamers, and proceed by a particular "route to the Black Sea. In consequence of repairs necessitated "by the collision, the vessel was not ready to start for Antwerp "so as to load in turn, and, by arrangement, another smaller "vessel was substituted for the injured vessel, the latter vessel" —that is the *Argentino* again—"shortly afterwards taking the "place of the substituted vessel on a less remunerative route."

[2] [1955] 1 W.L.R. 1246, 1251.
[3] 13 P.D. 191; 14 App.Cas. 519.
[4] 13 P.D. 191, 200.

It follows, therefore, that the *Argentino*, as a result of the collision, lost the opportunity (which was, though not a matter of firm bargain, a matter of virtual certainty) of obtaining a particular profitable venture had she taken her place in the line at Antwerp. Instead of that, she had to undertake, or did undertake, a less profitable venture. On the face of it, therefore, the damage suffered was the difference between the greater profit she would have made had she taken her turn at Antwerp, and the actual profit she made from the less remunerative venture. The real point in the case was whether, in estimating the damage, it was right (as this court and the House of Lords said it was not) to pay regard to the actual profit made, not by the *Argentino* at all, but by the other smaller vessel which took her place in the line at Antwerp. It is in the light of those facts that Bowen L.J. used this language [5]: "It remains, however, still to be considered what "is the value at which this loss of employment"—that is, the loss of the Antwerp venture—"is to be calculated in the case of "a vessel which, but for the accident, would have been service-"ably used by her owner in a particular manner. This is a "difficult matter to calculate, but the difficulty is only, after all, "one of fact. Where there is an actual charterparty such diffi-"culty is reduced to a minimum. Where there is no charter-"party but merely a reasonable certainty of employment, the "matter is left more at large." Then in the House of Lords, in reference to the same facts, Lord Herschell used the language also cited [6]: "Where no claim is made in respect of loss arising "from the owner having been deprived of the earnings of a "voyage which was in contemplation, and the engagement for "which had been secured,"—as was not the case in *The Argentino*—"it would be right, and is no doubt the usual course, "to award damages under the name of demurrage in respect of "the loss of earnings which it must reasonably have been antici-"pated would ensue during the time of detention. But where "such a claim is made as in the present case, the owner cannot, "I think, be allowed in addition, as a separate item, demurrage "in respect of the time the vessel was under repair."

I venture to think that those observations were not made in reference to facts such as we have here. They were plainly made in reference to the special facts in *The Argentino*.[7] In this case the facts appear to be unusual, at any rate to this extent, that, as we were informed, there is no case in the books where facts comparable to the facts in this case have ever come before the court. But if that rule were a rigid unalterable rule, it would appear to me at any rate that somewhat strange results might follow. Let it be supposed, for example, that charter No. 3 was a charter under which the owners were obtaining an altogether unusual and extravagant profit, and that at the time freights generally had greatly fallen, and that no similar profit could

[5] Ibid. 202.
[6] 14 App.Cas. 519, 523.
[7] 13 P.D. 191; 14 App.Cas. 519.

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possibly be expected from any other fixture. It would seem strange in such a case if the damages were 20 multiplied by the extravagant daily profit; and Mr. Brandon, as I understood him, when I put the question, somewhat resiled from suggesting that such a result would follow, though the logic of the rule would appear to produce that result. Equally it would appear that if, by some mischance, charter No. 3 was not profitable at all, it would seem contrary to the ordinary rules of common law to say that therefore there was necessarily no loss of profit at all owing to the collision. But equally I cannot myself accept Mr. Carpmael's simple and attractive suggested answer, for that seems to me to be no less artificial. It supposes, so far as I can see, that for the 20 days, which I assume have been lost, the ship would have been employed in some additional or different fixture at the rate exactly applicable to charter No. 4, and that everything else for ever after in her life would have been exactly the same as it is. It seems to me that, even if allowance is made for contingencies, that supposition is not in accordance with the facts or the evidence.

What, indeed, are the facts? Mr. Brandon says that the judge below and the registrar did not find or intend to find that 20 days were in fact lost and that the ship did arrive 20 days late at Dungun. I cannot for myself agree with that submission. I feel, for my own part, no doubt on the evidence that the judges did find and were entitled to find, that if it had not been for the accident, the ship could and would if necessary have arrived at Bombay and at Dungun 20 days earlier than she did in fact arrive; but it is here that the difficulty seems to me to start. One does not, in this matter of making fixtures for ships, make an arrangement on Monday for the vessel to do some work on the following day, on Tuesday. It was no doubt clear in January 1951 that the Far Eastern market was going to be a very profitable market. It is clear also from the evidence that, when the plaintiffs' agent entered into charter No. 4 on January 18 for the Dungun market, he was doing what he would in any case have done, whether or not there had been a collision. He waited until the proper time for the opening of the March Dungun market—that is, the proper time for making fixtures for voyages from Dungun in March. It is to be noted that, according to the terms of charter No. 4, the ship (which was later, on February 1, nominated as the *Dirphys*) was expressed to be expected ready for loading about March 17. When the contract was made on January 18, the repairs at Rotterdam must have been very nearly completed and, as I have already said, the nomination took place some 14 days later, on February 1. It is not, therefore, to my mind, proved with reasonable certainty that, apart from the collision, this contract of January 18, 1951, would have been different as to loading date or indeed in any other material respect; and, even if the *Dirphys* could and would have loaded on or about March 10 or 11 at Dungun instead of March 31, it is not proved to my satisfaction

what the difference in total profits would have been under charters Nos. 4, 5 and 6 and all that followed in the end of all. I refer again to the language of Willmer J. which I have already read, though I do not take time by repeating it.

In so speculative a matter, what is the court's duty?—to do, as it would in any case of damages arising at common law, the best it can. It may well be, as Willmer J. said, that really no damages were proved satisfactorily at all. But there is no cross-appeal before us, and it is sufficient for me to say that in such circumstances, I am not satisfied that there was anything wrong or unfair to the plaintiffs in proceeding arithmetically as the registrar and the judge did; that is to say, in giving to the plaintiffs the full benefit for every day of the detention, namely, 20 days, and then applying to that period of time a figure of profit, which was derived from the figure of profit which was being earned by the ship at the time when the accident occurred, and when in fact the ship was being detained. It might be that a round figure rather more or rather less could fairly have been arrived at by a tribunal of fact; but I cannot think, on general principles which apply when this court is asked to consider matters of damages, that there is anything in the figure which was arrived at, or in the approach to that figure and the method adopted, which was wrong, or that we should interfere with that figure.

I would therefore dismiss the appeal.

JENKINS L.J. I agree. This is an appeal from Willmer J., dated November 7, 1955, dismissing a motion in objection to a decision of the registrar dated August 24, 1955.

The action arose out of a collision which took place in the entrance to the Baltic on December 30, 1950, between the appellant plaintiffs' steamship *Dirphys* and the respondent defendants' steamship *Soya*. Liability was settled by agreement as resting as to 30 per cent. on the *Dirphys* and 70 per cent. on the *Soya*.

The *Dirphys* was diverted to Rotterdam, where she arrived on January 1, 1951, and was there laid up for 19¾ days (treated for the purpose of the case as 20 days), undergoing repairs which were completed on January 20, 1951. The *Dirphys* was thus out of action for 20 days; and the sole question in the appeal concerns the figure at which her loss of profit due to this period of immobilization should be assessed.

At the time of the collision the *Dirphys* was on her way to London in ballast, under a charterparty, dated October 13, 1950, which required her to proceed to London and there load a cargo of sugar for carriage to Bombay. Notwithstanding the 20 days' delay, the *Dirphys* reached London just in time to prevent cancellation of this charterparty, which was duly performed, but which took 20 days longer to perform than it would have taken if there had been no collision and consequent immobilization of the vessel for that period. The collision thus did not cause the

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Dirphys to lose the benefit of the charterparty of October 13, 1950, save in so far as it may be said to have been rendered less beneficial by the addition to the time taken to perform it of the 20 days' immobilization which the collision imposed. Nor was the *Dirphys* left idle by reason of the postponement for 20 days of her arrival at Bombay, for immediately after discharging her cargo at that port, she set off again under a charterparty concluded on January 18, 1951, for the carriage of iron ore from Dungun in Malaya to a port in Japan.

On the facts as I have so far stated them, it would seem that prima facie, if the *Dirphys* suffered any loss of profit from the 20 days' delay due to the collision, it could amount to no more than 20 times the daily rate of net profit (agreed at £144 3s. 10d.) which the charterparty of October 13, 1950, would have produced, if the voyage under it had been performed in the normal time (agreed at 62 days) instead of the 82 days actually taken; for, if the collision had not taken place, the *Dirphys* would during the 20 days in fact spent on repairs have been proceeding on her voyage to Bombay and earning a net daily profit at that rate. On this basis, the damages properly allowable for loss of profit due to the collision amount approximately to £2,884, and that was the sum awarded by the registrar and approved by the judge.

Mr. Carpmael, for the plaintiffs, contends that this figure of £2,884 is very wide of the mark, and that the sum properly allowable in respect of loss of profit, which he originally put at £17,009, is, according to the revised calculation he invited us to adopt, of the order of £16,400, though he would, I think, be prepared to concede a reasonable reduction for contingencies.

This remarkable divergence is due to an extraordinary rise in freight rates for voyages to and from the Far East, which took place from December, 1950, onwards and reached its peak in May, 1951. Figures issued by the Chamber of Shipping of the United Kingdom, taking the rates in 1948 as equal to 100, show in 1950, 72·8 for January, 95·8 for October, 97·6 for November and 115·7 for December; and in 1951, 151·9 for January, rising to 203·8 for May, with an intermediate drop from 180·6 for March to 176·8 for April. After May, 1951, there was (with certain fluctuations) a downward trend to 168·5 in December of that year. The state of the market is well illustrated by the fact that, as compared with the £144 3s. 10d. net daily profit yielded (apart from the 20 days' delay) by the charterparty of October 13, 1950, the charterparty of January 18, 1951, showed a net daily profit of no less than £819 17s. 4d. The next two engagements, a voyage charter, dated March 22, 1951, and a time charter, dated June 14, 1951, were even more profitable, showing net daily profits of £892 1s. 9d. and £830 19s. 5d. respectively.

Mr. Carpmael submits that, in these circumstances, the £144 3s. 10d. net daily profit is not the right starting figure for the calculation of damages under this head, and that the figure

of £819 17s. 4d., being the daily rate of net profit under the charterparty of January 18, 1951, should be taken. That figure multiplied by 20 gives as the loss of profit for the 20 days' delay a total of approximately £16,400, and Mr. Carpmael claims on this basis.

For the principles to be applied in the assessment of damages in a case of this sort we were referred to the well-known cases of *The Argentino* [8] and *The Ikala*.[9]

From *The Argentino* [10] there was cited to us the following celebrated passage in the judgment of Bowen L.J.[11]: "With "this single modification or exception, which is one that applies "only to cases of breach of contract, the English law only "permits the recovery of such damages as are produced "immediately and naturally by the act complained of.

"A collision at sea caused by the negligence of an offending "vessel is a mere tort, and we have only therefore to consider "what has been in the particular case its direct and natural "consequence. This consequence (in the case of an innocent "ship which is disabled by an accident) is that its owner loses "for a time the use which he otherwise would have had of his "vessel. There is no difference in principle between such a loss "and the loss which the owner of a serviceable threshing-machine "suffers from an injury which incapacitates the machine, or the "loss which a workman suffers who is prevented from earning "money by the wrongful detention of plant which cannot at "once be replaced. A ship is a thing by the use of which money "may be ordinarily earned, and the only question in case of a "collision seems to me to be, what is the use which the ship-"owner would, but for the accident, have had of his ship, and "what (excluding the element of uncertain and speculative and "special profits) the shipowner, but for the accident, would have "earned by the use of her. It is on this principle alone that it "is habitual to allow in ordinary cases damages for the time "during which the vessel is laid up under repair in addition to "the cost of the repairs themselves. But this is merely an "application of the general principle, and is not the measure in "all cases of the loss. It might conceivably, upon the one hand, "be the fact that the damaged ship would not and could not "have earned anything at all while laid up for repairs, though "such a case must necessarily be exceptional. In such circum-"stances nothing ought to be allowed for demurrage. Upon the "other hand the direct consequence of the accident might be "that the injured vessel was necessarily thrown out of her "employment, not merely during the period of repair, but for a "longer period still. In such a case the loss could not properly "be measured by the time taken in repairs alone."

From the same case in the House of Lords there was cited

[8] 13 P.D. 191; 14 App.Cas. 519.
[9] [1929] A.C. 196.
[10] 13 P.D. 191.
[11] Ibid. 201.

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to us the following passage in the speech of Lord Herschell [12]: "I think that damages which flow directly and naturally, or in "the ordinary course of things, from the wrongful act, cannot "be regarded as too remote. The loss of the use of a vessel and "of the earnings which would ordinarily be derived from its use "during the time it is under repair, and therefore not available "for trading purposes, is certainly damage which directly and "naturally flows from a collision. But, further than this, I agree "with the court below that the damage is not necessarily limited "to the money which could have been earned during the time the "vessel was actually under repair. It does not appear to me to "be out of the ordinary course of things that a steamship, whilst "prosecuting her voyage, should have secured employment for "another adventure. And if at the time of a collision the "damaged vessel had obtained such an engagement for an ordin-"ary maritime adventure, the loss of the fair and ordinary "earnings of such a vessel on such an adventure appear to me to "be the direct and natural consequence of the collision."

Finally, we were referred to the following passage from Lord Sumner's speech in *The Ikala* [13]: "I only wish to say two things. "If, as was the case at the previous hearing, the appellants' "case is to be that the delay upset the general current of their "trade, which had to be maintained in spite of it, I think that "the extent and cost of this upset must be proved and must be "causally connected with the collision in accordance with the "ordinary rules of law as to damage. A ship's day is not like "a unit of currency, always good for so many shillings. It has "to be proved that, in doing the shipowner the wrong of laying "his ship idle at the time in question, work, which she would "otherwise have done during the time, went undone to his "measurable loss or was only done by resorting to other "expedients at a measurable outlay."

Mr. Carpmael submits that his claim is maintainable in accordance with these principles, and he puts his case in this way: As a direct and natural consequence of the collision, the *Dirphys* was laid up for repairs for 20 days, and accordingly arrived at Bombay 20 days later than she would have done if there had been no collision. Having arrived at Bombay 20 days late, the *Dirphys*, again as a direct and natural consequence of the collision, left Bombay in pursuance of the charterparty of January 18, 1951, and arrived at Dungun, 20 days later than she would have done if there had been no collision. Thus, according to Mr. Carpmael's submission, the *Dirphys* was, as a direct and natural consequence of the collision, 20 days late in beginning to earn the highly remunerative freight rates, which the general rise in rates in the Far Eastern trade made it possible to secure for charterparties negotiated in and after January 1951, and which the plaintiffs had in fact secured for the charterparty of January 18,

[12] (1889) 14 App.Cas. 519, 523. [13] [1929] A.C. 196, 205.

1951, and thereafter secured in even greater measure for the two subsequent charterparties, dated respectively March 22 and June 14, to which I have already referred. In other words, according to Mr. Carpmael's submission, the *Dirphys* lost, as a direct and natural consequence of the collision, 20 days' employment at a net daily rate of profit of £819 and upwards.

Mr. Carpmael rightly observes that the measure of damages in a case of this sort is not necessarily confined to what Bowen L.J. called [14] " the use which the shipowner would, but for the " accident, have had of his ship " during the actual period for which the ship is detained for repairs, but may also include (for example) the loss of earnings under any engagement for another voyage which the ship had secured at the time of the collision, but was thereby prevented from performing: see *per* Lord Herschell,[15] where he observed that the loss of such earnings appeared to him " to be the direct and natural consequence of the collision."

In the present case, the *Dirphys* lost no actual engagement existing at the time of the collision under which, but for the collision, she would have been employed at the daily rate of profit claimed by Mr. Carpmael. But in his submission the state of the market was such that, if the *Dirphys* had arrived at, and consequently left Bombay 20 days earlier, it is for practical purposes certain that during the " boom " period, if I may so describe it, she would have been employed at " boom " rates of remuneration for 20 days longer than she was in fact so employed. It is not clear to me on the evidence that the *Dirphys* did in fact sustain any such loss, or, in other words, that she did in fact profit less from the " boom," to the extent of the equivalent of 20 days' employment at upwards of £819 net profit per day, than she would have done if she had arrived in Bombay 20 days earlier. The charterparty of January 18, 1951, with its net daily profit of £819 17s. 4d. was, as already mentioned, immediately succeeded by that of March 22, 1951, with its net daily profit of £892 1s. 9d., and that of March 22, 1951, was immediately succeeded by that of June 14, 1951, with its net daily profit of £830 19s. 5d., which kept the vessel employed down to October 26, 1951. There is no evidence as to any subsequent engagements, but it is difficult to discern any loss so far. If the terms of the last engagement, of which we have evidence had been negotiated on May 25, 1951, instead of June 14, 1951, it may be that even better terms could have been secured. If that engagement had been completed on October 6, 1951, instead of October 26, 1951, and the terms of the next following engagement had been agreed on a correspondingly earlier date, it may be that such next following engagement would have been on more favourable terms than those in fact obtained, whatever they may have been. But the evidence as it stands seems to me to fall far short

[14] 13 P.D. 191, 201.

[15] 14 App.Cas. 519, 523.

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of showing that, during the period to which it extends, the *Dirphys* earned less by a sum equivalent to the profit of 20 days' employment at upwards of £819 per day, than she would have done if she had arrived in Bombay 20 days earlier; and I would point out that the charters brought to the notice of the court carry the matter down to October 26, 1951, which was several months after the peak of the boom period. Moreover, I cannot relate the loss alleged by Mr. Carpmael to any particular period of 20 days. It cannot be said that this loss was sustained during the period of 20 days following the date on which the *Dirphys* would, but for the collision, have arrived at Bombay; for the charterparty of January 18, 1951, had already been fixed, and it is not suggested that, if its performance had been begun 20 days earlier, it would have produced a greater profit. The only effect of the 20 days' postponement of the arrival of the *Dirphys* at Bombay thus appears to have been to postpone by 20 days the realization of the profit on the charterparty of January 18, 1951. Assuming in Mr. Carpmael's favour that there was a corresponding and consequential postponement of the performance of each subsequent engagement, I cannot see that the plaintiffs could be said to have thereby sustained the loss he claims on their behalf, or indeed any loss in the event of freight rates remaining constant or continuing to rise. In the event of freight rates falling, a stage might be reached at which the plaintiffs could point to a particular engagement and say: "If this engagement "had been negotiated 20 days earlier, we could have had it on "better terms." On the other hand, any fall in rates might have been counteracted by the fixing of the terms of a charterparty for a long voyage while the rates were still high. It is important to remember that the rate for a given voyage is determined at the date (up to perhaps two months in advance) on which the terms of the charterparty are fixed, and not at the date when the voyage is begun. Furthermore, in the event of freights continuing to rise, it might be to the advantage of a shipowner to postpone for a time the conclusion of a charterparty for a given ship, in the expectation of an improvement in the terms obtainable. Even if the plaintiffs should be regarded as having made out the loss, in the shape of curtailment of profit, on which they rely, I do not think it can reasonably be held to be a direct and natural consequence of the collision. It was the result of an unpredictable fall in the Far Eastern freight market, which did not make itself felt until after the *Dirphys* had completed at least three highly remunerative voyages since her arrival in Bombay. The contrary view, so far as I can see, must result in the postponement for an indefinite period, perhaps to the end of the ship's career, of the point of time at which the loss, if any, due to the 20 days' detention, could be ascertained, and the ultimate result in terms of profit or loss would necessarily be influenced or indeed determined by causes and factors wholly independent of the collision.

Surveying the position as matters stood on January 20, 1951, when the repairs were completed, would it have been possible to say that, as a direct and natural consequence of the collision and resulting immobilization of the *Dirphys* for repairs, she had lost or was bound to lose the equivalent of 20 days' employment at a net daily profit of upwards of £819? I do not think so. I think the position then was, that she might in the end earn more or less than she would have done or the same amount as she would have done in the way of profit, apart from the delay of 20 days, the ultimate result depending upon the movements of the market up or down, the freight rates ruling at the dates of any engagements made, and the duration of any such engagements.

The judge adverted to Bowen L.J.'s exclusion, in the passage I have quoted from his judgment in *The Argentino*,[16] of the element of "uncertain and speculative and special profits" and came to the conclusion, as did the registrar, that the loss of profit claimed by Mr. Carpmael was [17] "too speculative and too "remote to be taken into consideration as a consequence in law "of the detention in respect of which this claim arises." I fully agree with that view, and am accordingly of opinion that Mr. Carpmael's main argument fails.

A subsidiary point was taken to the effect that the net daily profit lost by the *Dirphys* during the 20 days' detention for repairs should be calculated by averaging the results of several voyages, rather than by taking the £144 3s. 10d. rate of daily profit for the voyage covered by the charterparty of October 13, 1950. The judge considered and rejected that contention, and I see no more reason for differing from him in his conclusion on that part of the case than I do for differing from him in his view as to Mr. Carpmael's main contention.

Accordingly, I would dismiss this appeal.

HODSON L.J. I agree with the judgment of the judge. This appeal concerns only one item of damages, namely, loss of profit during the period when the *Dirphys* was undergoing repair. Damages were also assessed in respect of the cost of running of the ship, but no question arises except upon this one matter, which is, after all, a matter of fact for the judge to assess, the injured party having to prove what he has lost by reason of the detention. The judge, I think, directed himself correctly by reference to Bowen L.J.'s well-known judgment in *The Argentino*,[18] which has already been read, and by reference to the speech of Lord Herschell in the House of Lords [19] in the same case.

The position in this case was that the loss of profit was calculated by the registrar and by the judge by reference to the

[16] 13 P.D. 191, 201.
[17] [1955] 1 W.L.R. 1246, 1251.
[18] 13 P.D. 191, 200.
[19] 14 App.Cas. 519, 521.

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profits, which the ship would have earned during the same period of 20 days under the charterparty to which it was then bound; and I think it is clearly consistent with the authority I have quoted, to limit the damages to the loss of profit attributable to the particular venture on which the ship was actually engaged for the time being in this case.

This is said to be a case which presented unusual features because of the remarkable rise in freight, so that by reason of the delay of 20 days the ship was put behind in getting into the profitable market; but I agree with the judge that there is an element of speculation in assessing the damages on that footing, for the reasons which he gave. We have been directed by Bowen L.J.[20] to exclude the element of uncertain and speculative and special profits, and I think that that direction was rightly followed by the judge in confirming the report of the registrar. Indeed, I agree with him that there is considerable doubt whether this 20 days' delay was proved to have had any certain effect in putting back the ship's programme. As Mr. Brandon pointed out in analysing the evidence which was given on this topic, the dates are not at all clear, and it may be that, at the end of all, this ship caught up with the number of voyages which it could otherwise have entered into.

Whatever way one looks at this matter, it seems to me quite impossible to find any valid criticism in the judgment by which Willmer J. arrived at the result he did on this item of damages attributable to loss of profit. I agree, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan; Thomas Cooper & Co.*

A. S-R.

[20] 13 P.D. 191, 201.

[COURT OF APPEAL.]

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April 18, 19, 20; *May* 17.
Lord Evershed M.R., Jenkins and Hodson L.JJ.

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[No. 53 of 1954.]

Bankruptcy—Fraudulent preference—Intention—Misappropriation of building society's moneys by its solicitor—Misappropriation unknown to society—Society paid in full to assist third party—Inferences from facts—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, c. 59), *s.* 44 (1) (*as amended*).

The bankrupt was a solicitor having as one of his most important clients a building society. He was also a director of that society. Early in 1953, a mortgage to the society was discharged and, unknown to the society, the bankrupt applied the mortgage

moneys amounting to £3,303 for his own purposes. This was not the bankrupt's only defalcation. He had misapplied considerable sums of his clients' money. In November, 1953, the fact that the sum of £3,303 had been misappropriated came to the knowledge of W., who was a solicitor employed by the bankrupt in his office, and also a director of the building society. W. raised the question of the £3,303 with the bankrupt in November, 1953; W. did not, however, inform the society of the defalcation. In December, 1953, the Law Society inspected the bankrupt's books, which showed serious deficiencies in clients' accounts, but the Law Society did not discover that the bankrupt had defrauded the building society of the sum of £3,303. On March 12, 1954, the bankrupt paid the sum of £3,303 to the society. The bankrupt's name was struck off the roll of solicitors on June 24, 1954, and he was adjudicated bankrupt on September 6, 1954. His trustee in bankruptcy applied for a declaration that the payment of £3,303 was made by the bankrupt with intent to prefer the society at a time when he was unable to pay his debts and was void against the trustee. The county court judge held that the payment was a fraudulent preference under section 44 of the Bankruptcy Act, 1914, and ordered the society to repay that sum to the trustee. The county court judge held that W. had not put pressure on the bankrupt to make the payment and that the society had not done so, being at all material time ignorant of the defalcation. The payment had been made at W.'s request to try and retain the society as a client for the firm and also so as not to jeopardize W.'s position as a director of the society. The Divisional Court affirmed the decision of the county court judge:—

Held, (1) that the onus was on the person alleging a fraudulent preference to prove to the satisfaction of the court that the payment impugned was made by the bankrupt with the intention of preferring the payee over his other creditors; (2) that it was competent to the court to draw the inference of an intention to prefer from all the facts of the case; (3) that the intention to prefer, which must be proved, must be the principal or dominant intention; there might, however, be a valid distinction between an intention to prefer and the motive for that intention; (4) (Jenkins L.J. dissenting) that on the facts the bankrupt voluntarily made the payment with the intention of giving the society preference over the other creditors, and it was therefore a fraudulent preference within section 44 (1).

Peat v. *Gresham Trust Ltd.* [1934] A.C. 252; 50 T.L.R. 345 and *In re M. Kushler Ltd.* [1943] Ch. 248; 59 T.L.R. 328; [1943] 2 All E.R. 22 applied.

Decision of the Divisional Court affirmed.

APPEAL from a decision of the Divisional Court (Harman and Upjohn JJ), affirming a decision of Judge Dutton Briant Q.C. given at Brighton County Court.

This was an appeal by the Bognor Mutual Building Society against an order made by the county court judge, which had been affirmed by the Divisional Court, whereby it was declared that a sum of £3,303 7s. 9d. paid on March 12, 1954, to the building society by the bankrupt, Thomas Wintringham Cutts, constituted a fraudulent preference within section 44 (as amended) of the Bankruptcy Act, 1914, being made by him with intent to prefer the society, his creditor, at a time when he was unable

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to pay his debts as they fell due and was void against the bankrupt's trustee in bankruptcy and an order that the society should repay to the trustee that sum.

The facts are fully stated in the judgment of Jenkins L.J.

W. A. L. Raeburn Q.C. and *Morris Finer* for the appellant building society

Muir Hunter for the trustee in bankruptcy.

In addition to the cases referred to in the judgments the following cases were cited in argument: *In re Clay & Sons* [1]; *In re Drabble Bros.* [2]

Cur. adv. vult.

May 17. The following judgments were read.

Lord Evershed M.R. The question in this appeal is whether a payment made on March 12, 1954, of £3,303 7s. 9d. by the debtor (whose adjudication occurred within six months thereafter, on September 6, 1954) to the appellants, the Bognor Mutual Building Society (whom I will hereafter generally call "the society") constituted what is commonly called a fraudulent preference within the scope of section 44 of the Bankruptcy Act, 1914 (as amended).

The facts of the case are fully set out in the judgment of Jenkins L.J., which I have had the advantage of reading in advance; and my brother has also recited extracts from the evidence given, upon affidavit and orally, before the county court judge which I shall not take time by repeating. It will suffice, for the purposes of this judgment, to state the few essential facts with their respective dates.

The debtor, until he was struck off the roll of solicitors by order of the Disciplinary Committee of the Law Society on June 24, 1954, carried on at all material times the business of a solicitor in Bognor in Sussex. Among the clients of the debtor's firm the society (which had been founded in the days of the debtor's father in 1909) was among the most important. Its business was at all relevant times conducted in and from the debtor's office. The debtor, as his father had been before him, became a director and the solicitor of the society, capacities which he held at the time of the events shortly to be narrated. At that time also, a clerk in the debtor's office, one Willmer, was the society's secretary. There was also at that time, as an assistant in the debtor's office, Mr. R. C. Wintle, who had been admitted as a solicitor in the year 1950 and who was also appointed a director of the society in February, 1953, about the same time as, or very shortly after, the sale by the debtor of the house originally called Greystones, which was the occasion

[1] (1896) 3 Mans. 31. [2] [1930] 2 Ch. 211.

of the perpetration by the debtor of the fraud upon the society out of which this appeal has arisen.

This house, being then subject to a mortgage in favour of the society for £3,000, was sold by the debtor in January or February of 1953. For the purposes of completion to the purchaser, the debtor had obtained the execution of a discharge by or on behalf of the society. It does not appear from the papers before us how this discharge was obtained or what form it took. But, in answer to inquiries which we made, we were informed, during the hearing of the appeal, that a discharge had been executed on behalf of the society (not by the debtor himself or Mr. Wintle) as an escrow and was in the debtor's hands, presumably as solicitor for the society. Upon completion of the sale the debtor handed over the deeds, including the mortgage and its discharge, to the purchaser and received from him the purchase price. He did not, however, account to the society for the sum due on the mortgage which he applied for his own purposes. He successfully concealed the fraud from the society.

Unhappily, this fraud was not the only one of the debtor's misdeeds. He had also for a substantial period failed to comply with the Solicitors' Accounts Rules and had misapplied considerable sums of his clients' moneys. These last-mentioned malpractices had come to the knowledge of the Law Society as a result of an investigation of his books conducted on the Law Society's behalf. That investigation had been completed one week before the payment challenged in these proceedings and immediately upon its completion the requisite application had been made to the Disciplinary Committee of the Law Society to strike the debtor's name off the roll. The Law Society was not then or at any relevant time aware of the debtor's fraud upon the building society in regard to the mortgage on Greystones; nor was it at any relevant time aware of another fraud which the debtor had perpetrated on the building society which is briefly mentioned hereafter.

It is not now in doubt (it has been so found by the county court judge) that in October, 1953, Mr. Wintle became aware of the deficiencies on clients' accounts and of the debtor's misapplication of the money due on the Greystones mortgage. It is equally not in doubt and has been found that Mr. Wintle neither then nor at any other relevant time, though one of its directors, informed the society of the facts as to the discharge of the mortgage. What passed between Mr. Wintle and the debtor from October, 1953, onwards is a matter to which much of the evidence was directed, but it is to my mind clear that the county court judge did not accept the evidence that Mr. Wintle had put pressure upon or extracted promises from the debtor in regard to repayment of the £3,000 odd due to the society. Mr. Wintle was also (necessarily) aware of the investigation carried out by the Law Society. He was aware of the result of that investigation in the first days of March, 1954, including the

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application that the debtor's name should be struck off the roll. At the beginning of April, 1954—that is, after the payment challenged in these proceedings had been made—Mr. Wintle entered into an agreement with the debtor in somewhat peculiar form providing that Mr. Wintle should either become the debtor's partner or acquire the firm's business—the alternatives depending upon whether, as a result of the pending application to the Law Society, the debtor was or was not struck off the roll. It is, however, to be noted that Mr. Wintle's participation in the firm had been under discussion for several years, and it was not seriously suggested or argued—and certainly not found—that the payment to the society was made as a condition of Mr. Wintle's execution of this April, 1954, document.

To one other matter I wish to refer, since it does not in certain respects seem to me to be without significance. The matter of the discharge of the mortgage was not the only fraud which the debtor executed upon the society. In the year 1937 the debtor had obtained from the society a sum of £850, avowedly for the purpose of advancing it on the society's behalf to one Collis upon mortgage. The debtor in fact applied it for his own purposes. This fraud—the details of which do not now matter—was successfully concealed both from the society and from the Law Society. It came to light only upon its discovery by Mr. Wintle at the end of June, 1954, and it was repaid (with all interest due) to the society in July, 1954. When the present application came before the county court judge it included a claim also to set aside the July repayment, as having been (like the payment now the subject of this appeal) a fraudulent preference. But with regard to the July repayment it is to be noted that the county court judge accepted the evidence put before him by the debtor and Mr. Wintle to the effect that it had been made under pressure and threats of criminal proceedings on the part of Mr. Wintle and the society. The county court judge also accepted the additional explanation of the debtor that he regarded the sum in question as having been trust money in his hands and himself therefore under a special obligation to make restitution. But what to my mind is also by no means without some significance is this: if it is said that the true inference from the facts proved and found is that the debtor paid the £3,000 odd to the society to avoid the risk of discovery of his fraud on the society (unknown to the Law Society) and the serious consequences, for him, that would follow discovery—or, at least that such an inference is as legitimate as the inference of intention to prefer—then it is to be noted that the debtor at that critical time for him did not also take any steps to repay the £850, equally then unknown to the Law Society; though (apart from any disclosure that Mr. Wintle might have made) discovery of the one was not more unlikely than discovery of the other, and the consequences in either case would be equally disastrous. I do not forget Mr. Wintle's knowledge of the £3,000

matter: but, particularly since Mr. Wintle had already kept his knowledge to himself for four to five months it would, to my mind, have been highly improbable that he would have disclosed the matter to the Law Society where, for the debtor, the immediate and pressing danger lay.

The relevant words of section 44 (1) of the Bankruptcy Act, 1914, are few and well known. A payment deemed to be fraudulent and liable to be set aside under the subsection is one "made . . . by any person unable to pay his debts as they "become due from his own money in favour of any creditor . . . "with a view of giving such creditor . . . a preference over the "other creditors . . ."

Though the language of the subsection is, upon the face of it, straightforward and simple enough, the question of the applicability of the section to the facts of particular cases has not seldom proved in practice a matter of difficulty. So much appears clearly from the number of the cases containing judicial pronouncements upon the construction of the words now incorporated in section 44 and previously found in the corresponding section of the earlier Act of 1883, the principle expressed by the words being indeed earlier than its statutory adoption. I shall not attempt for myself any exhaustive exposition of the requirements of the subsection; but, so far as those requirements are in issue in the present appeal, it may, I think, now be safely stated: (1) The onus is upon the person alleging a "fraudulent "preference" to prove to the satisfaction of the court that the payment impugned was made by the debtor "with a view of" preferring the payee over his other creditors; in other words, the onus is upon the person alleging a fraudulent preference (normally, as here, the trustee in bankruptcy) to prove the fact of the debtor's requisite state of mind, that is, his intention. (2) It is competent for the court to draw the inference of intention to prefer from all the facts of the case, particularly when there is no direct evidence of intention before it. But the inference should not be drawn, having regard to the situation of the onus of proof, unless such inference is the true and proper inference from the facts proved. Thus, it will not be drawn, if the inference from the facts is equivocal and, in particular, it will not be drawn from the mere circumstance that the creditor paid was in fact "preferred," in the sense that he was paid when other creditors were not paid and could not be paid.

What I have stated in this paragraph appears to be the effect of the three cases of *In re Cohen*,[1] *Peat* v. *Gresham Trust Ltd.*[2] and *In re M. Kushler Ltd.*[3]

(3) The words used in the section are "with a view of." I have used the word "intention" as synonymous with the word "view"; and other words—e.g., "object"—have also been used as synonyms in the cases. But whether the word used be

[1] [1924] 2 Ch. 515.
[2] [1934] A.C. 252; 50 T.L.R. 345.
[3] [1943] Ch. 248; 59 T.L.R. 328; [1943] 2 All E.R. 22.

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" intention " or some other word, since it is notorious that human beings are by no means always single-minded, the intention to prefer, which must be proved, is the principal or dominant intention. There may also be a valid distinction for present purposes between an intention to prefer and the reason for forming and executing that intention.

It is at this point that the greatest difficulty, as it seems to me, arises, the difficulty being as often as not one of definition of the words used. If a debtor, knowing himself to be insolvent and knowing, also, that bankruptcy is imminent, deliberately elects to pay his oldest friend or his closest relative and to leave his other creditors unpaid or with little chance of being paid, it would appear to me to be irrelevant that he made the selection because of the love he bore for his friend or relative or because of his hopes for general but unspecified favours from them in the future. I am therefore not prepared to accept Mr. Raeburn's submission that a deliberate choice in the present case by the debtor of the building society for payment, because the society was the most important of his clients could not for that reason constitute a fraudulent preference. For if a debtor deliberately selects for payment A in preference to all his other creditors, it cannot, to my mind, matter, in the absence of other relevant circumstances, whether A is the debtor's oldest friend, closest relative or best client. On the other hand, where a debtor, owing money in all directions, has also robbed his employer's till, he may, knowing himself to be insolvent, elect to reimburse the till in order that, when the crash comes, the damaging fact of his robbery may not be discovered. Or a debtor may elect to make a particular payment under pressure of some threat, or to obtain for himself some immediate and material benefit or to fulfil some particular obligation. In these cases the reason for the payment affects, essentially, the intention in making it. In the instances given the intention, that is the real or dominant intention, will no longer be to " prefer " (that is to pay, as it were, out of turn) but will be to avoid the detection of a criminal act; to relieve the threat; to get the benefit and postpone the evil day; or to satisfy the particular obligation. Though the question of pressure in some form or another has, in the reported cases, often been the crux of the matter, it is plain that an inference of intention to prefer may be displaced in many other ways than by showing that the debtor acted under pressure. Examples are indeed legion. But in the present case the examples that I have given provide the closest analogies to the suggestions on the society's side; and the real question before us is whether, upon the evidence and the findings of the county court judge, the true inference is intention to prefer or whether an inference of some other kind similar to those in the examples given is, at the least, not equally legitimate.

There was before the judge direct evidence of intention, in the sense that the debtor himself went into the witness-box. The

judge, having heard and observed the debtor, having heard and observed also his associate in his business, Mr. Wintle, and having had the assistance of experienced counsel, concluded that there was here an intention to prefer the society. It is true that the evidence given by the debtor and Mr. Wintle was—not unnaturally—against an intention to prefer. And I agree that rejection of such evidence (with its inconsistencies to which the judges of the Divisional Court referred) does not of itself justify the opposite inference of intention to prefer. But a judge of fact, hearing that evidence, may nonetheless legitimately and rightly find that fact of intention as a state of mind. In such circumstances, I am most unwilling, unless persuaded that error has been made, to interfere with the judge's finding. So, also, were the judges of the Divisional Court. But I am bound to say that I share with them their regret that the county court judge was not more precise in his findings. His conclusion was cited at length by Harman J., but in the circumstances I think it right to set it out again in this judgment: "Having considered the "whole of the evidence and seen both Mr. Wintle and the "bankrupt in the witness-box, I am satisfied that the true "position was that the bankrupt made the payment at the "request of Mr. Wintle and to preserve his position with the "building society as he said in his preliminary examination. It "is unfortunate that Mr. Wintle was acting as solicitor for the "respondents in this case, as I think there is a conflict of interest "between him and the building society. He has had to admit "that he failed in his duty as a director of the building society "when this irregularity first came to his notice in October, 1953. "Then in March, 1954, when he knew of the serious deficiencies "on the bankrupt's clients' accounts, he persuaded the bankrupt "or agreed with the bankrupt to make this very substantial "payment with the object of concealing from the building society "the fact that the bankrupt had been guilty of irregularities and "so that he and the bankrupt should retain their directorships "and the firm should retain the building society as a valuable "client. In that they were successful to the extent that Mr. "Wintle is still a director and is also secretary and is still acting "as solicitor to the building society. Taking all these matters "into consideration, I have come to the conclusion that this "payment of £3,300 was made with the dominant intention of "preferring the building society to the exclusion of the general "body of creditors and there must be a declaration to that "effect."

To these conclusions it may be added that the judge had found as a fact that Mr. Wintle had in October, 1953, learnt of the fraud perpetrated upon the society and of the debtor's deficiencies on his clients' accounts. There is, however, no positive finding of what Mr. Wintle did or said, save that he forebore to inform the society (contrary to his duty to it) of the facts, and that he gave to the debtor six months' notice to

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determine his own employment with him. The judge found, further, that Mr. Wintle knew (as he clearly must have done) of the Law Society's investigations of the debtor's books and that the debtor knew in March, 1954, that he was insolvent.

The judge clearly rejected any suggestion that pressure had been brought to bear upon the debtor by the society, as such; but unfortunately he does not say in terms whether or not he accepted the evidence of pressure by Mr. Wintle, of threats by him to disclose to the society the true facts, unless he (the debtor) took immediate steps to repay to the society that of which he had wrongly possessed himself; or whether or not he accepted the evidence that the debtor had promised Mr. Wintle to make arrangements for such repayment. As regards these last-mentioned matters, it is important to note the period of some five months which elapsed between the date of the disclosure to Mr. Wintle of the debtor's defalcations and the repayment to the society of the £3,000 odd which he owed to them.

It must also be conceded that the conclusions of the judge, which I have quoted, disclose some inconsistencies. For it is said at one and the same time that the payment was made at Mr. Wintle's request and in order to preserve Mr. Wintle's position with the society (by which I understand to be meant, so that his, Mr. Wintle's, position with the society would not be imperilled by his neglect of his duty to report his knowledge of the debtor's defalcations); and also that the payment was made with the double object or intention of preventing discovery of his (the debtor's) " irregularities " by the society, and of enabling the *debtor and Wintle* to retain their directorships of the society. The judge then proceeds to state that the payment constituted a fraudulent preference within the meaning of the section, though (as it seems to me) it is by no means clear that such result would as a matter of law follow if the " object " or " intention " in making the payment was either of the last two alternatives which I have just cited.

Unless Mr. Wintle had threatened or was threatening to make disclosure, how would the payment, made when it was made, serve to prevent detection? If, in spite of appearances, the debtor after all managed to ride the storm, no question of discovery would presumably ever arise. On the other hand, if the debtor failed to survive, discovery was inevitable (as happened in fact) whether payment was made or not.

Then, what of the suggestion that the debtor though not under threats or pressure from the society itself was being threatened or pressed by Mr. Wintle? To this possibility of explanation I shall return. For the moment I confine myself to observing that, although there was undoubtedly evidence of such pressure given on the part of both the debtor and Mr. Wintle, the judge was not bound to accept that evidence and did not in terms do so, even though he did not in terms reject it; and to repeating that an interval of some five months elapsed

between the date when Mr. Wintle discovered the fraud and the date of payment. No doubt the payment would require some preparation, but there has been no suggestion that such preparation occupied anything like the period of five months.

Was the payment made or could it sensibly have been made with the object of gaining some present benefit for the debtor himself or of postponing the evil day? I have earlier stated that there is, in my judgment, no justification for supposing that the payment was insisted upon and made as a term of Mr. Wintle's entering into the agreement of April, 1954. Even, therefore, if the debtor still thought that he migh pull through (and optimism is notorious in persons in a like situation) it is difficult to see how the making of the payment, when it was made, could assist the debtor. Apart from Mr. Wintle and any threats on his part, there was no reason for the debtor to suppose, if he did survive, that the society would ever be the wiser. The Law Society had not in fact discovered the fraud. It is difficult to see how, by making the payment, the debtor helped himself in respect of the then immediate source of danger, namely the Disciplinary Committee of the Law Society; and equally difficult to see what present benefit in the circumstances the payment brought him—apart always from assisting Wintle. In any case the finding of the judge that the intended beneficiary was Mr. Wintle (in whose interest it clearly was in the circumstances that the payment should be made) appears to negative the conclusion that the debtor intended to benefit himself.

It is somewhat tempting to suppose that in October, 1953, the debtor made a promise to Mr. Wintle of which the payment was the fulfilment. But the evidence to this effect appears not to have been accepted by the judge; and once again the supposition is presented with the difficulty of the five months' delay and the absence of any suggestion that Mr. Wintle was calling upon the debtor to implement his promise.

In the circumstances, the analysis of the judgment, of the evidence, and of the possibilities, seems to me to resolve itself into this; was the debtor from October, 1953, acting throughout under some form of pressure or intimidation from Mr. Wintle so that his dominant object was to relieve that pressure and so that, in effect, the debtor's intention in making the payment, when it was made, was in truth the intention, not of the debtor but of Mr. Wintle? Or did the debtor, acting no doubt to some extent in collaboration with Mr. Wintle and, it may be also, in some degree under Mr. Wintle's influence, yet in substance voluntarily and deliberately make the payment in order to prefer and with the intention of preferring the society (that is of making to them preferential payment subject to which his other creditors would have to rank for such payment as they might get) and because, by so preferring the society, he would give an advantage to Mr. Wintle and perhaps even to some extent thereby to himself? In my judgment, the judge who heard the witnesses interpreted

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the transaction in the latter sense; and I think on the whole, as the judges in the Divisional Court thought, that he was entitled so to do. Furthermore, and if I am right so far, I think with the Divisional Court judges that the result was a fraudulent preference within the meaning of the section. The essential thing, as I construe the finding, was, for the debtor, that the society should be paid and paid in priority and preference to anyone else. Even if the debtor thought still that he might survive, the situation was desperate enough. He knew (as the judge found) that he was insolvent. He knew that the irregularities on his clients' accounts had been discovered and that proceedings had been initiated to have him struck off the roll of solicitors. If he had any hope of survival, it was with Mr. Wintle only that he could survive. If he did not survive, then Mr. Wintle was the man to help and the way to help Mr. Wintle was by preferring one particular creditor—the firm's best client of which Mr. Wintle was a director, and in the payment to whom Mr. Wintle was seriously implicated and interested. *In re M. Kushler* [4] seems to me to support the view that an intention to prefer a particular creditor is not negatived by the circumstance that the preference is the means of making provision also for a third party who is not himself a creditor and not, therefore, capable himself of being the subject of a preference.

For the reasons which I have tried to state I would dismiss the appeal.

JENKINS L.J. This is an appeal by the Bognor Mutual Building Society from an order of the Divisional Court in Bankruptcy (Harman and Upjohn JJ.) dated December 12, 1955, affirming an order made by His Honour Judge Dutton Briant Q.C. in the Brighton County Court and dated September 21, 1955, whereby it was declared that the payment by the bankrupt to the society of a sum of £3,303 7s. 9d. on March 12, 1954, was made by the bankrupt with intent to prefer the society, his creditor, at a time when he was unable to pay his debts as they fell due, and was void as against the applicant (now respondent) as his trustee in bankruptcy.

The county court judge's order was, as its terms sufficiently indicate, made under section 44 (1) of the Bankruptcy Act, 1914, which as amended by section 115 (3) of the Companies Act, 1947, provides as follows: "Every conveyance or transfer of property, "or charge thereon made, every payment made, every obligation "incurred, and every judicial proceeding taken or suffered by "any person unable to pay his debts as they become due from "his own money in favour of any creditor, or of any person in "trust for any creditor, with a view of giving such creditor, or "any surety or guarantor for the debt due to such creditor, a "preference over the other creditors, shall, if the person

[4] [1943] Ch. 248.

" making, taking, paying or suffering the same is adjudged bank-
" rupt on a bankruptcy petition presented within six months
" after the date of making, taking, paying or suffering the same,
" be deemed fraudulent and void as against the trustee in the
" bankruptcy."

The bankrupt presented his own petition in bankruptcy on September 6, 1954, and was on the same day adjudged bankrupt thereon, so that in point of time the disputed payment, made as it was on March 12, 1954, fell, albeit only by a matter of one week, within the statutory period of six months. Moreover, it is not in dispute that, at the date of such payment, the bankrupt was unable to pay his debts as they became due out of his own money. There remains the question whether the bankrupt made the payment to his creditor, the society, " with a view of giving " such creditor . . . a preference over the other creditors " within the meaning of section 44 (1).

It is well settled that in proceedings under section 44 (1) the onus is on the trustee to prove not only that a payment was made by the bankrupt within the statutory period to a particular creditor, and that such creditor was thereby given a preference over the other creditors, but also that the bankrupt made the payment with a view of giving such creditor a preference over them. See *Ex parte Taylor*[5]; *Sharp* v. *Jackson*.[6] The view attributed to a majority of this court in the headnote to the report of *In re Cohen*,[7] " that where a bankrupt in imminent " expectation of bankruptcy voluntarily pays a particular creditor " with the result of giving him a preference in fact, and the " reason for such payment is unexplained, a prima facie case of " fraudulent preference is established," is supported only by the judgment of Sargant L.J. and cannot be regarded as good law, having regard to the observations upon it made by Lord Tomlin (with whom the other Lords concurred) in his speech in the House of Lords in *Peat* v. *Gresham Trust Ltd.*[8] On the other hand, the explanation of Lord Tomlin's observations in the case just cited, given by this court in *In re M. Kushler Ltd.*,[9] shows that while the onus of proving not merely the fact of the payment and the resulting preference, but also the bankrupt's intent to prefer rests from first to last on the trustee, he need not, in order to discharge that onus, prove the bankrupt's intent to prefer by direct evidence or by circumstantial evidence of which such intent is the only possible explanation. It is enough if he proves facts of which the intent to prefer is so much the most probable of the possible explanations that the court can, on the ordinary principles governing the trial of an issue of fact, properly hold it to be the true explanation. As Lord Tomlin himself put it in *Peat* v. *Gresham Trust Ltd.*[10]: " The onus is only discharged

[5] (1886) 18 Q.B.D. 295; 3 T.L.R. 109.
[6] [1899] A.C. 419; 15 T.L.R. 418.
[7] [1924] 2 Ch. 515.
[8] [1934] A.C. 252, 262.
[9] [1943] Ch. 248.
[10] [1934] A.C. 252, 262.

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"when the court upon a review of all the circumstances is "satisfied that the dominant intent to prefer was present."

Lord Tomlin's reference to the "dominant" intent accords with earlier authority to the effect that it need not be shown that the payment was made with the sole view of giving a preference to the creditor, provided that the giving of such preference is shown to have been the dominant or substantial view. See *Ex parte Hill.*[11]

As to the substitution of "intent" for "view," which is the word actually used in section 44 (1), "object" and "motive" have sometimes been used as other equivalents for "view"; but I think "intent" or "intention" gives the meaning best, as the bankrupt might, for example, very well have deliberately intended to prefer one creditor over another, and made the payment with the view of producing that result, thus plainly bringing the case within the section, although his motive or ulterior object may not have been a desire to benefit the creditor preferred, but a hope or expectation that by showing favour to such creditor he might obtain by way of quid pro quo some advantage for himself. As to the distinction between "view" and "motive," see *per* Vaughan Williams J. in *In re Fletcher,*[12] where the bankrupt's intention was to prefer, but his motive might have been said to be a desire to do what he considered fair.

Lastly, it is clearly established by the authorities that, inasmuch as preference implies selection and selection implies freedom of choice, a payment must in order to constitute a preference be voluntarily made, and that a payment made under pressure, e.g., in the shape of proceedings actual or threatened by the creditor concerned, or fear of such proceedings, is not for this purpose a voluntary payment. See, e.g., *Ex parte Taylor,*[13] *Sharp* v. *Jackson*[14] and the same case in this court sub nom. *New Prance & Garrard's Trustee* v *Hunting.*[15]

In the present case, therefore, it was incumbent on the trustee to establish, either by direct evidence of the bankrupt's intention or by circumstantial evidence affording the degree of proof held to be requisite in *In re M. Kushler Ltd.*,[16] that the bankrupt paid the £3,303 7s. 9d. to the society voluntarily and with the dominant or substantial intention of giving the society a preference over his other creditors.

I now turn to the facts. The society was incorporated in 1909, one of the three original members being the bankrupt's father, who was a solicitor. Until his death in 1916 the bankrupt's father was a director of and solicitor to the society. The bankrupt, also a solicitor, succeeded his father as solicitor to the society and also in a considerable general practice as a solicitor

[11] (1883) 23 Ch.D. 695, 704, 705.
[12] (1891) 9 Morr. 8, 12; 8 T.L.R. 80.
[13] 18 Q.B.D. 295.
[14] [1899] A.C. 419.
[15] [1897] 2 Q.B. 19.
[16] [1943] Ch. 248.

in Bognor. Down to the year 1920, when he became a director of the society, the bankrupt also acted as its secretary.

The bankrupt employed in his office one Willmer as his cashier and general clerk. Willmer succeeded the bankrupt as secretary to the society in the year 1920 and continued in that capacity down to the latter part of the year 1954. The business of the society was chiefly conducted by the bankrupt and Willmer from the bankrupt's office. This arrangement gave the bankrupt as a director of and solicitor to the society, with the connivance of Willmer as its secretary, opportunities, of which he unfortunately availed himself, of using the society's funds for his own purposes. Apart from any collateral advantages, the conveyancing work arising in the course of the society's business formed an important part of the bankrupt's practice.

Also employed in the bankrupt's office was one Mr. Wintle, who joined the bankrupt in 1946 as a conveyancing and general clerk and thereafter served him successively as articled clerk and managing clerk and, from the date of his admission as a solicitor in June, 1950, as an assistant solicitor. In February, 1953, Mr. Wintle became a director of the society.

In the year 1950 the bankrupt borrowed a sum of £3,000 from the society on the security of a mortgage of a house belonging to him called "Greystones." In January or February, 1953, the bankrupt sold this house for £3,000, conveyed it to the purchaser free of the mortgage, handing over on completion a discharge executed by the society in escrow for delivery against payment of the mortgage money, and received the purchase price, which he did not pay over to the society but applied for his own purposes. This piece of flagrant dishonesty, the origin of the debt to which the present proceedings relate, which represented the amount of the mortgage debt with interest accrued down to the date of payment to the society, remained for the time being unknown to anyone save the bankrupt and Willmer.

The bankrupt was unfortunately no more scrupulous in his general practice as a solicitor than he had been in his dealings with the society, and by the autumn of 1953 there were serious deficiencies on his clients' accounts.

In October, 1953, Willmer told Mr. Wintle that the bankrupt had not paid over the mortgage money to the society, and also that there were deficiencies on clients' accounts.

According to his affidavit filed on behalf of the society, Mr. Wintle raised the matter of the mortgage debt with the bankrupt in November 1953, gave the bankrupt six months' notice to terminate his employment, and expressed the hope that the bankrupt would be able to repay the amount owing to the society on this account. Mr. Wintle apparently did not on this occasion raise with the bankrupt the matter of the clients' accounts, and it is clear that he did not report the matter of the mortgage money to the board of the society or take any steps to warn clients of the firm about the state of their accounts. As a director of the

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society he was clearly under a duty to report the matter of the mortgage debt to his co-directors. His proper course as regards the deficiencies on clients' accounts, of which he had been informed in general terms by Willmer, was I think more debatable. Be that as it may, he told nobody. He said in his affidavit that, in view of his association with the bankrupt, he felt he owed him a certain amount of loyalty. He was certainly in a serious predicament. His fortunes were to a great extent bound up with those of the bankrupt, and one can well understand that he was anxious to help the bankrupt to put his affairs in order so far as he properly could.

The matter of the clients' accounts was brought to a head on December 24, 1953, when the Law Society notified the bankrupt that they desired to inspect his books. The inspection began on December 31, 1953, and lasted a fortnight. It disclosed a state of affairs which led to an application dated March 5, 1954, to strike the bankrupt's name off the Roll of Solicitors. The bankrupt was duly served with this application, which set forth the allegations on which it was based. It is important to note that these allegations did not include the matter of the mortgage money, which apparently had not been brought to light by the inspection.

The bankrupt's son, who was in partnership with him, dissolved partnership on hearing of the Law Society's action.

Mr. Wintle's account of what passed between himself and the bankrupt from the beginning of 1954 onwards is best given by the following extracts from his affidavit: "The situation at the "beginning of 1954 was therefore as follows: the bankrupt was "in grave professional jeopardy. There were a number of miti- "gating factors, at least in my opinion, and I did not regard it as "certain that the bankrupt would be struck off the Roll of "Solicitors. I knew that the bankrupt had not repaid the "respondents the advance on the 'Greystones' transaction. No "other director of the respondents was aware of the fact so far "as I knew, and I did not inform the respondents of it at that "stage. I was not acting as solicitor for the respondents. The "bankrupt was anxious to safeguard himself, as much as possible, "so far as his professional future was concerned, and I felt that "I wanted to assist him, so far as was proper, to that end. The "bankrupt, from my conversations with him at this time, did not "seem to regard his situation as a hopeless one, but he wanted "my utmost assistance to put matters right, as far as they could "be before the Law Society hearing. He asked me if I could "assist him in any way and it was suggested that he should enter "into partnership with me, should the results of that hearing "still find him a solicitor. We had on previous occasions during "the years 1951, 1952 and the early part of 1953 been discussing "the question of partnership. I expressed my willingness to "consider this but took the firm attitude, which I communicated "to the bankrupt in the course of our conversation, that I would "not negotiate any agreement with him regarding the practice

" unless he first repaid the respondents the sum owing them on " ' Greystones ' transaction, which, when it was ultimately " repaid, amounted to £3,303 7s. 9d. I would emphasise that this " was my personal decision, and was not made on behalf of or " with the knowledge of the respondents, although I did very " seriously point out to the bankrupt that if the truth were com- " municated to the directors generally they could take and no " doubt would be compelled to take criminal proceedings against " him. . . . As a result of my discussions with the bankrupt, " he did on March 12, 1954, repay the respondents the sum due " to them as aforesaid, and thereafter, on April 3, 1954, the bank- " rupt still not having been summoned to the Disciplinary Com- " mittee of the Law Society, the agreement mentioned in para- " graph 7 of the applicant's said affidavit was entered into between " himself and the bankrupt. . . . The bankrupt paid the respon- " dents because I insisted that he should do so as the price of and " a condition precedent to my entering into negotiations with him " for the partnership in or sale of the practice and threatened him " with exposure if he did not. The bankrupt was in a situation " where he desperately needed my help, and where that help, and " any measure of restitution he could make, might (as he thought) " stand him in good stead with the Law Society before which he " was in grave peril. I myself was anxious for the respondents to " be repaid, and I was anxious to be of such assistance also as I " could to the bankrupt in his difficulties, and I used my position " of dominance, created by all the circumstances, and magnified " by the defection of the bankrupt's son, to compel that repay- " ment. . . . The bankrupt was intensely concerned with his " own position, not with the respondents' position, and I left him " with no alternative but to repay."

The sum of £3,303 7s. 9d. having on March 12, 1954, been repaid by the bankrupt to the society—or perhaps one should say having been made good to the society's funds, for no one except the bankrupt, Mr. Wintle and Willmer knew that it was owing—the bankrupt and Mr. Wintle entered into the agreement of April 3, 1954, referred to in Mr. Wintle's affidavit, the short effect of which was that, in the event of the then pending inquiries by the Law Society not resulting in the bankrupt being struck off the Roll of Solicitors or being suspended from practice, he and Mr. Wintle should go into partnership as solicitors as from April 1, 1954, on the terms of a draft Agreement attached thereto; that, in the event of the bankrupt being so suspended or struck off, or dying, he or his personal representatives should sell and Mr. Wintle should buy the bankrupt's practice; that as from April 1, 1954, until one or other of the two above-mentioned alternatives took effect Mr. Wintle should be paid a salary of £1,250 a year which was to be credited on account of drawings in the event of the proposed partnership being entered into; that in the event of the death of the bankrupt before the publication of the result of the said inquiries the purchase price of the goodwill of the said

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practice should be twice the yearly average of the profits for the three years ending March 31, 1954; and that this agreement was conditional on the bankrupt "making full revelation to Mr. "Wintle of the financial affairs of the said practice and continuing "to use his best endeavours to promote the interests of and "retain the clientele of the said practice." It will be observed that no price for the sale of the practice by the bankrupt to Mr. Wintle was specified, except in the event of the bankrupt's death before the publication of the result of the Law Society's inquiries.

The Disciplinary Committee of the Law Society met to consider the bankrupt's case on May 6 and 13, 1954, and by their findings and order dated June 24, 1954, they found that the allegations against the bankrupt had been substantiated and ordered that his name should be struck off the Roll of Solicitors.

I should next refer to the oral evidence given by Mr. Wintle and the bankrupt before the county court judge in the present proceedings.

Mr. Wintle said (inter alia) that he thought that the possibility of arrangements being made for payments in full would influence the Law Society; that he did not raise with the bankrupt the question of debit balances on clients' accounts in October (? November), 1953; that his reason for staying with the bankrupt was loyalty to the clients of the practice; that the bankrupt told him in February, 1954, that the Law Society had found deficiencies in his clients' accounts; that he did not tell the directors of the society about the £3,000 when he heard of it out of loyalty to the bankrupt; and that the society was a very valuable client of the practice and he (Wintle) was anxious to preserve the practice. Mr. Wintle also said that the price he was to pay for the practice was not inserted in the agreement of April 3, 1954, because it was not then agreed; but that he had since paid £4,600 for the practice in negotiation with the trustee in bankruptcy; and that he had paid £1,400 odd to the society, "in respect of Collis." That was a reference to another liability of the bankrupt to the society, the discharge of which had also been made the subject of a claim of fraudulent preference. That claim was, however, rejected by the county court judge and there has been no appeal in regard to it. The exact sum paid by Mr. Wintle was £1,456 18s. 4d., treated as representing part of the purchase price of the practice. The fact that this payment was made is not in dispute. Indeed, the trustee founded upon it the second, and now abandoned, claim of fraudulent preference. Mr. Wintle further said that he (i.e., Mr. Wintle personally) threatened criminal proceedings in the first case (which I take to mean the matter of the "Greystones" mortgage); that "we" (i.e., the society) threatened in the second case; and that the "force" (which I take to mean the power behind his demands that the bankrupt should pay) was his refusal to help the bankrupt (which I take to mean his refusal to help the bankrupt unless he paid). The last quotation I need make from Mr. Wintle's evidence is the statement noted by the

judge as being that he wanted the bankrupt to pay the society "so that they should know nothing wrong" which I take to mean "so that they should not know that anything was wrong."

The bankrupt said in his evidence (inter alia) that he did not pay over the purchase money received for "Greystones" to the society, and Mr. Wintle told him that if steps were not taken to repay it he would report him to the society; that he, the bankrupt, did know that Mr. Wintle had not mentioned the matter to the society. Then the bankrupt is noted by the judge as having said: "Primarily I paid because Mr. Wintle knew of the circumstances and had threatened disclosure." "The Law Society investigation had a great effect—I thought if I could put this right it would improve my position enormously." He is also noted as having said: "Payment would remove risk of disclosure which would finish everything." "I said" (this refers to his preliminary examination in bankruptcy) "payment to building society was at Mr. Wintle's suggestion to preserve his position as solicitor to the society." He also said that Mr. Wintle made it a condition of helping him that he (the bankrupt) should pay the society and that he (the bankrupt) intended to benefit himself by the payment. The last quotation I need make is this answer: "A partnership with or sale to Mr. Wintle were my only hope of preserving anything from the practice."

At this point I cannot avoid quoting, though it has been quoted before, the following passage from the judgment of the county court judge: "The case for the building society rests mainly on the evidence of Mr. Wintle and the bankrupt himself and it is submitted on the respondent's behalf that the bankrupt made the payment as the result of threats from Mr. Wintle to disclose the matter to the building society and that therefore it was not a voluntary payment and is protected. On behalf of the trustee it is submitted that no pressure was exercised upon the bankrupt by the building society. That the directors as such had no knowledge that the money was owing, and that Mr. Wintle and Cutts, who were both directors, concealed the matter from the rest of the board, and that in making the payment it was intended to prefer the building society at the expense of the other creditors. Having considered the whole of the evidence and seen both Mr. Wintle and the bankrupt in the witness-box, I am satisfied that the true position was that the bankrupt made the payment at the request of Mr. Wintle and to preserve his position with the building society as he said in his preliminary examination. It is unfortunate that Mr. Wintle was acting as solicitor for the respondents in this case, as I think there is a conflict of interest between him and the building society. He has had to admit that he failed in his duty as a director of the building society when this irregularity first came to his notice in October, 1953. Then, in March, 1954, when he knew of the serious deficiencies on the bankrupt's clients' accounts, he

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"persuaded the bankrupt or agreed with the bankrupt to make "this very substantial payment with the object of concealing "from the building society the fact that the bankrupt had been "guilty of irregularities, and so that he and Cutts should retain "their directorships and the firm should retain the building "society as a valuable client. In that they were successful to "the extent that Mr. Wintle is still a director and is also "secretary and is still acting as solicitor to the building society. "Taking all these matters into consideration, I have come to the "conclusion that this payment of £3,000 was made with the "dominant intention of preferring the building society to the "exclusion of the general body of creditors and there must be a "declaration to that effect."

Harman J., giving the judgment of the Divisional Court, observed, after quoting this passage, that it was a pity that the judge had not been more explicit as to the facts as he found them, an observation with which I fully agree; and continued: "As we understand his judgment, he impliedly negatived the "view that the payment was made as the result of the alleged "pressure or threats by Wintle. There was ample evidence "upon which he could come to that conclusion, for the evidence "was not consistent and, as he saw and heard the witnesses, we "think we ought not to disturb his conclusions. The payment "must therefore be treated as a voluntary payment made at the "request of Wintle to preserve the latter's position with the "building society, and also, we would add, because it gave the "bankrupt himself the best hope of retrieving his fortunes."

I agree with the Divisional Court's assessment of the findings of the county court judge as impliedly negativing the view that the payment was made as a result of the alleged pressure or threats by Mr. Wintle, and I also agree with them that his findings of fact should not be disturbed.

It remains to consider whether the county court judge's findings of fact sufficed to support his conclusion that the charge of fraudulent preference was made out.

His express findings, as I understand them, come to this, that the bankrupt paid the £3,303 7s. 9d. at the request and under the persuasion or advice of Mr. Wintle:—

(1) In order to preserve Mr. Wintle's position with the society, which I take to mean so as to make good to the society a sum out of which it had been cheated by the bankrupt before the society found out (a) that it had been so defrauded, and (b) that Mr. Wintle, after he became aware that the society had been so defrauded, had in breach of his duty as a director of the society failed to inform the society of the fraud, or, in other words, connived at the bankrupt's misconduct in the matter.

(2) In order that the fact that the bankrupt had been "guilty of irregularities" might remain concealed from the society. That is much the same object as the first, looked at from the bankrupt's point of view as well as Mr. Wintle's.

(3) In order that Mr. Wintle and the bankrupt might retain their directorships of the society, which they would certainly lose on the society discovering the bankrupt's fraud and Mr. Wintle's acquiescence in it.

(4) In order that the firm (i.e. the bankrupt and his prospective partner, Mr. Wintle) might keep the society as a valuable client, and a client they would certainly lose if the bankrupt's fraud and Mr. Wintle's acquiescence in it were discovered.

There is no direct evidence of an intention on the part of the bankrupt to give the society a preference over his other creditors, or (if it be material) of an intention on the part of Mr. Wintle to cause the bankrupt to give to the society such a preference. The direct evidence, for what it is worth, is all the other way. Confining myself strictly to the express findings of the judge, I find that the bankrupt paid to avoid being found out, and Mr. Wintle counselled him to pay because, if the bankrupt was found out, he (Mr. Wintle) knowing what he did would be involved in the same condemnation. This, as it seems to me, was self-preservation, not preference.

Thus the trustee, to put the matter in the most favourable way from his point of view, gets no assistance from the direct evidence, and apart from such inferences as can properly be drawn from the circumstances in which, according to the evidence the payment was made, has established nothing beyond the fact of the payment and the fact that it resulted in the society gaining priority over the other creditors. It is clear on the authorities to which I have referred that this is not enough. To say that, because the bankrupt's and Mr. Wintle's explanations of the reasons for making the payment, tending as they did to negative an intent to prefer, were not wholly accepted by the county court judge, therefore an intent to prefer must be inferred is to put the onus the wrong way round.

The inferences to be drawn from the circumstances in which, according to the evidence, the payment was made seem to me to negative rather than support an intention to prefer.

I have so far confined myself to the positive findings of the county court judge, as they appear in the passage from his judgment quoted above. But there is also the undisputed fact that on March 12, 1954, the date of the relevant payment, the bankrupt was faced with the prospect of being summoned before the Disciplinary Committee of the Law Society to meet the charges of professional misconduct, which had been made against him in the application of March 5, 1954. There is, moreover, the fact, accepted by the county court judge earlier in his judgment, that the application of March 5, 1954, made no mention of the sum owing by the bankrupt to the society in respect of the Greystones' mortgage, and that the Law Society had no knowledge of this matter. Surely, if the matter of the Greystones' mortgage, as yet unknown to the Law Society, were to be brought to light and raised against him before the Disciplinary

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Committee, such prospect as the bankrupt might otherwise have of lenient treatment would be fatally prejudiced. And surely the most effective way of securing that this matter should not be so brought to light and raised would be to make the money good to the society before the fraud was discovered. If it is asked why the bankrupt should attach such importance to preventing discovery of this particular fraud out of the many of which he had been guilty, the answer seems to me to be reasonably plain. This was a fraud as yet unknown to the Law Society. His frauds on his other clients had been laid bare, and he was already committed for better or for worse to facing and meeting as best he could the charges founded upon them; whereas this additional matter, not yet brought to light, might still pass unnoticed if the money was made good.

If it is asked why the bankrupt should feel that there was a particular risk of disclosure of the Greystones' transaction unless the money was made good, seeing that the debt in question had been outstanding since January or February, 1953, and that this was not the only fraud on the society which might be raised against him, the answer again seems to me to be reasonably plain. This particular transaction had become known to Mr. Wintle and it was Mr. Wintle's duty as a director to report it to the society. Even though Mr. Wintle did not actually threaten to report the matter, the bankrupt could hardly fail to appreciate that, unless the money was made good, Mr. Wintle might well feel obliged by conscience or interest to report it.

Finally, there is a matter to which the county court judge did not, I think, advert at all. The bankrupt had no chance of extricating himself without funds. Mr. Wintle, according to his evidence, expressed his willingness to provide what funds he could on condition that the bankrupt made good to the society the amount owing in respect of the Greystones' transaction. I see no sufficient reason for rejecting this part of Mr. Wintle's evidence, which is to some extent borne out by the fact that Mr. Wintle did pay the £1,456 to which I have already referred.

I find it impossible to hold in all the circumstances of this case that the trustee has discharged the onus which lies upon him of proving by direct or circumstantial evidence to the degree of proof stated earlier in this judgment that the bankrupt made this payment with the dominant, or any, intention of giving the society a preference over his other creditors, and, in my view, there was no sufficient evidence to support the county court judge's conclusion to the contrary.

The Divisional Court, after saying in the passage already quoted, that the payment must in view of the county court judge's findings be treated as a voluntary payment, and referring to *Sharp* v. *Jackson*,[17] continued: "that" (i.e., to prefer the society to the other creditors) "must have been the debtor's

[17] [1899] A.C. 419.

" paramount object, but need not have been his only object. " One of his objects may have been to preserve his own position, " another to help Mr. Wintle, but if these two objects could " only be achieved by putting the society first, it does not matter " that this preference did also achieve the other objects. The " society was, as we have said, the mainstay of the practice. " The bankrupt's connexion with it went back to its incorpora- " tion. It was not at all unnatural that Mr. Wintle and the " bankrupt, putting their heads together to find some way out of " the imbroglio which affected them both, should decide that the " society was the first dragon in the path and the first with whom " it was wise to make friends. Their motives no doubt were " mixed, but the upshot was that they put the society first. The " payment was therefore within the section as having been made " ' with a view to giving such creditor a preference over the other " ' creditors.' "

At the end of their judgment they said: " In this case no " pressure was exerted by any creditor. Indeed, neither the " society nor the clients were aware of their rights, but the " bankrupt chose to pay one creditor rather than the others, and, " once pressure was negatived upon the facts and the conclusion " is drawn that he did so because he saw in that course (or " thought he saw) an advantage to be gained for himself and " Mr. Wintle, in our judgment the judge was entitled to infer, " as he did, an intention to prefer the society, for the reasons " we have indicated. We therefore dismiss the appeal with " costs."

With respect to the Divisional Court, I do not think that it is enough for the present purpose to find that the motives of the bankrupt and Mr. Wintle were mixed " but the upshot was that " they put the society first," or legitimate to adduce from that finding the conclusion that the payment was therefore within the section as having been made with a view to giving the society a preference over the other creditors.

Nor do I think that the facts warrant the inference that the bankrupt chose to pay one creditor rather than the others because he saw in that course an advantage to himself and Mr. Wintle. To my mind the facts negative any intention on the part of the bankrupt to give the society a preference over the other creditors. I think the proper inference to be drawn from the whole of the facts and circumstances of the case is that the bankrupt made good the money of which he had defrauded the society, not with the intention of giving the society a preference and gaining from such preference an advantage for himself, but with the intention of thereby preventing discovery of the fraud, of which there was in view of Mr. Wintle's knowledge a serious risk, and avoiding the disagreeable consequences to himself which such discovery would involve, besides securing the co-operation of Mr. Wintle in saving the practice for the benefit of both of them, so far as it might be possible to do so.

C. A.
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CUTTS (A BANKRUPT), *In re.* *Ex parte* BOGNOR MUTUAL BUILDING SOCIETY *v.* TRUSTEE OF T. W. CUTTS.
Jenkins L.J.

The Divisional Court obviously attached great importance to the county court judge's implied finding that there was no pressure by Mr. Wintle, and adduced from that implied finding the conclusion that this must be treated as a voluntary payment. It is, of course, true that a payment cannot constitute a fraudulent preference unless it is voluntary, but it does not follow that every voluntary payment, which has the effect of giving the creditor paid a preference over the other creditors, is a fraudulent preference. The question still remains what was the view or intent.

Nor am I satisfied that this was for the present purpose a voluntary payment.

I accept the county court judge's implied finding to the effect that there were no actual threats of disclosure by Mr. Wintle, and, of course, there was no pressure by the society, which did not even know of the debt.

Nevertheless, the bankrupt was under a heavy pressure of circumstances, and in view of the obvious risk of disclosure by Mr. Wintle, and the fatal consequences such disclosure would involve, I think the bankrupt may well have considered that in his own interests he had no option but to make good to the society the money of which he had defrauded it in the Greystones transaction. For these reasons I would allow this appeal.

HODSON L.J. I share the difficulty felt by the Divisional Court in analysing the findings of the county court judge. These are set out in the passage from his judgment which has been read more than once.

The society has argued with some force that the conclusion that the payment of £3,303 7s. 9d. was made with the dominant intention of preferring the building society to the exclusion of the general body of creditors is a non sequitur having regard to the judge's previous findings which indicated: (1) that the bankrupt made the payment at the request of Mr. Wintle to preserve the latter's position with the building society; (2) that Mr. Wintle persuaded or agreed with the bankrupt to make the payment with the object of concealing from the building society the fact that the bankrupt had been guilty of irregularities and so that he and the bankrupt could retain their directorships and the firm should retain the building society as a valuable client.

I think the proper conclusion to be drawn from the findings is that the judge, as he said, had taken these two matters amongst others into consideration before arriving at his conclusion, but not that his conclusion followed from these matters, as indeed it could not.

The authorities show that the trustee has to prove the dominant intention to prefer and that there is a distinction between the intention and the motive for forming the intention. The existence of a dominant intention does not, however, exclude the existence of other objects.

The intention to prefer can be inferred from the payment and the circumstances in which the payment was made. See *In re Kushler Ltd.*,[18] where Lord Greene M.R. cited the passage from Lord Tomlin's speech in *Peat* v. *Gresham Trust Ltd.*,[19] which runs as follows: "The onus is only discharged when the court "upon a review of all the circumstances is satisfied that the "dominant intent to prefer was present."

I agree with the Divisional Court that one of the bankrupt's objects may have been to preserve his own position and another to help Mr. Wintle, but that if these objects could only be achieved by putting the society first, it does not matter that the preference did also achieve other objects.

The society's case was that the payments were made as a result of pressure by Mr. Wintle. In his affidavit the latter deposed to pressure and in their evidence both the bankrupt and Mr. Wintle swore that the payment was made under the threat of criminal proceedings.

This evidence must have been rejected by the judge when he reached the conclusion, as I understand his judgment, that the bankrupt and Mr. Wintle were acting in concert and that not only was there no pressure exercised by the creditor, namely, the society, but also no pressure was exercised by Mr. Wintle in the shape of a threat of criminal proceedings.

Indeed, no pressure was exercised by any creditor and the payment must, I think, be regarded as voluntary. The bankrupt knew he was insolvent and knew, also, that he was in grave difficulty with the Law Society, which had at the end of 1953 announced that it proposed to hold an examination of the bankrupt's books. This examination resulted in the disclosure of serious deficiencies in clients' accounts and ended by the bankrupt being struck off the roll pursuant to an application made on March 5, 1954, eight days before the payment was made to the society.

The bankrupt was beset by perils on every hand, the society was not the only victim of his fraud, and, again using the language of the Divisional Court, it was not unnatural that Mr. Wintle and the bankrupt, putting their heads together to find some way out of the imbroglio which affected them both, should decide that the society was the first dragon in the path and the first with whom it was wise to make friends.

Thus they put the society first, and in doing so were not, I think, acting with an intention different in kind from that of the debtor who, knowing himself to be insolvent, deliberately chooses to pay his old friend or near relative leaving the other creditors to suffer accordingly. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Denis Hayes; Tarry, Sherlock & King.*

B. A. B.

[18] [1943] Ch. 248, 253.

[19] [1934] A.C. 252.

[CHANCERY DIVISION.]

1956
May 7, 8.

Upjohn J.

* ASSOCIATED ARTISTS LTD. *v.* INLAND REVENUE COMMISSIONERS.

Charity—Education—Public taste—Non-profit-making theatrical company—Objects including presentation of "classical, artistic, cultural "and educational dramatic works . . ."—"To do all . . . things "as are incidental . . . to the attainment of any of the . . . "objects"—Not charitable body—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 448 (1) (*c*).

A non-profit-making theatrical association included the following objects in clause 3 of its memorandum of association: "(a) To "present classical, artistic, cultural and educational dramatic "works . . . (b) To foster, promote and increase the interest of "the public in the dramatic art and in the co-related arts . . . "(c) To encourage and promote the creation of, and to arrange "for the presentation of new dramatic works and to foster and "enhance the art of affording advanced students facilities for "training, and for gaining practical stage experience. . . . (j) To "establish, subsidise, promote, co-operate or federate with or become "affiliated to, or lend money or other assistance to any association ". . . whose objects are altogether similar to the objects of this "association, but so far that none of the funds of the association "shall be paid to any . . . association . . . which does not prohibit "the payment of dividends or profit to its members . . . (l) To "do all such other things as are incidental or which the association "may think conducive to the attainment of any of the above "objects."

The association, which was a company limited by guarantee, claimed exemption from income tax under section 448 (1) (*c*) of the Income Tax Act, 1952, on the ground that it was a body established for charitable purposes only, but its claim was disallowed by the Commissioners. On appeal from their decision:—

Held, (1) that subclause (a) must be read disjunctively, so that the company could put on a play which was classical or artistic or cultural or educational; but that no real charitable concept could be given to the word "artistic" in the context, which was too wide and vague to be charitable.

(2) That subclause (b) would be an excellent way of improving the taste of the public in the way laid down by Lord Greene M.R. in *Royal Choral Society* v. *Inland Revenue Commissioners* (1943) 25 T.C. 263, and was accordingly charitable.

(3) That subclause (c) alone would, having regard to the decision of *In re Shakespeare Memorial Theatre Trust* [1923] 2 Ch. 398; 39 T.L.R. 676 be charitable.

(4) That if the association were charitable, some other body whose objects were "altogether similar to the objects of this "association" would also be charitable, so that subclause (j) would not enable the association to promote some non-charitable society.

(5) That the powers in subclause (l) were independent of, and not ancillary to, the other objects, and that that clause was of itself sufficient to render the objects of the association non-charitable; since the court in deciding whether any activity of the association was ultra vires would have to decide whether the association thought that it was "conducive to the attainments" of the association, and what the association might think conducive would not necessarily be so.

Oxford Group v. *Inland Revenue Commissioners* [1949] 2 All E.R. 537; 31 T.C. 221 followed.

(6) That the association was not therefore a body established exclusively for charitable purposes, and the appeal should be dismissed.

APPEAL from the Special Commissioners for purposes of the Income Tax Acts.

The appellant company, Associated Artists Ltd., a non-profit-making theatrical association, claimed exemption from income tax under section 448 (1) (*c*) of the Income Tax Act, 1952, in respect of certain profits on the ground that it was a body established for exclusively charitable purposes. The Special Commissioners disallowed the claim, and found that the association, on the proper interpretation of its objects, was not such a body.

The objects of the association as defined in clause 3 of the memorandum of association were, so far as material, as follows: "The objects for which the association is established are: (a) To "present classical, artistic, cultural and educational dramatic "works in the United Kingdom of Great Britain and Northern "Ireland and elsewhere. (b) To foster, promote and increase the "interest of the public in the dramatic art and in the co-related "arts as well by the presentation of dramatic works as by other "means, such as giving of lectures, the institution of competi-"tions, the establishment of classes for instruction and study, "the offering of special terms of admission to the association's "performances or other privileges to educational establishments, "and by any other lawful means calculated to promote any of "the objects for which the association is established. (c) To "encourage and promote the creation of, and to arrange for the "presentation of new dramatic works and to foster and enhance "the art of affording advanced students facilities for training, and "for gaining practical stage experience. . . . (f) To enter into "agreements with authors composers playwrights and others for "the acquisition of any rights in any classical artistic cultural or "educational dramatic work or works and with artists actors "theatre managers and others for the presentation, production "and performance of any such work or works. . . . (j) To "establish, subsidise, promote, co-operate or federate with or "become affiliated to, or lend money or other assistance to any "association, society or other body corporate or unincorporate "whose objects are altogether similar to the objects of this "association, but so far that none of the funds of the association "shall be paid to any federated, affiliated or co-operating "association society or other body which does not prohibit the "payment of dividends or profit to its members to an extent at "least as great as is imposed on the association under or by "virtue of clause 4 hereof. (k) To establish and support or aid "in the establishment and support of any charitable associations "or institutions and to subscribe or guarantee money for charit-"able purposes in any way connected with the purposes of the

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" association or calculated to further any of its objects. (l) To " do all such other things as are incidental or which the associa- " tion may think conducive to the attainment of any of the above " objects."

Clause 4 provided: " The income and property of the associa- " tion . . . shall be applied solely towards the promotion of the " objects of the association as set forth in the memorandum of " association " and that no portion " should be paid or transferred " directly or indirectly by way of dividend bonus or otherwise " howsoever by way of profit to the members of the association." The association was limited by guarantee, the members undertaking to subscribe such amount as may be required not exceeding £5 in the event of a winding up. Clause 7 provided that on the dissolution of the association, the property and assets were to be transferred to institutions having objects similar to the objects of the association which would prohibit " the distribution of its " or their income and property among its or their members to an " extent at least as great as is imposed on the association under " or by virtue of clause 4 hereof." The clause further provided that the institutions might be selected by members of the association, and in default thereof by a " judge of the High Court of " Justice having jurisdiction in regard to charitable funds and if " and so far as effect cannot be given to such provisions, then to " some charitable object."

The following facts appear in the case stated: The appellant company was incorporated on January 23, 1946, as a company limited by guarantee. The idea of forming such a company was conceived by Mr. John Clements who, whilst playing in the commercial theatre, considered that there was a need for a non-profit-making organization with a policy of putting on plays of the highest standard both in London and in the provinces, with a bias towards classical plays. Such organization should provide opportunities for young players of ability to play in better class works. At the time there were few such opportunities for young players except at the Old Vic and the Stratford Memorial Theatre, which specialized mainly in Shakespeare's works. The Arts Council of Great Britain approved of Mr. Clements' idea and from its incorporation the company had worked very closely with the Arts Council. Mr. Clements had, in fact, produced and acted in all the plays put on by the company.

The objects for which the company was established were set out in clause 3 of its memorandum of association. The commissioners' attention had been drawn in particular to clause 3 (a) and (c) of the memorandum of association. The defined purpose of the Arts Council, as set out in its standard drama agreement, was " to extend the knowledge and practice of the arts, to make them " more accessible and to maintain the highest possible artistic " standards. The council hopes to enlist in this policy the " co-operation of theatre companies which have before them the " same ideals of service to the community; which are anxious to

" spread the knowledge and appreciation of all that is best in the " theatre, and thus to bring into being permanent educated " audiences all over the country." This agreement stipulated that " only properly constituted non-profit-sharing companies " and bodies functioning under charitable trusts are eligible for " association with the council."

The company entered into association with the Arts Council, and, in accordance with the obligations set out in the standard drama agreement, the drama director of the Arts Council acted as an assessor and approved of the activities of the company. The Arts Council provided an interest-free loan of £1,500 to the company. Mr. Clements provided £1,500 and two commercial theatrical enterprises each provided £3,000 as interest-free loans to the company.

The company produced the " Kingmaker " and " Marriage " à la Mode " in 1946. The former was the first and only new play produced by the company. It was chosen, because, besides having artistic merit and being historically accurate, it had 34 speaking parts. Such a production could not have been attempted in the commercial theatre. Neither of these plays was successful, and, in order to enable the company to continue, the Arts Council gave a further interest-free loan of £2,000 and Mr. Clements agreed to waive his salary as administrator of the company and also his fees as producer. At this time the British Council suggested that these two plays should be taken on a tour of the United States of America and Canada, but this proposal was turned down by the company with the approval of the Arts Council.

In 1947 rehearsals were started of " The Beaux Stratagem," but owing to the illness of the leading lady, Mr. Clements' wife, Miss Kay Hammond, its production was postponed. After touring the provinces for five months " The Beaux Stratagem " was produced in London in May, 1949. It started badly but the company considered it a good play and Mr. Clements again waived his salary as administrator and his fees as producer and also agreed to take only half his salary as an actor. The company made further borrowings to meet current expenses, and subsequently the play was very successful and resulted in a profit of £26,000.

In 1951 the company produced " Man and Superman " during the Festival of Britain and included the " Don Juan in Hell " scene; although this was acclaimed as a great artistic success, it resulted in a financial loss. This was the last play produced in association with the Arts Council because earlier in 1951 the Arts Council had decided to dissociate itself from certain London companies, of which this company was one.

In November, 1953, the company produced " Pygmalion," which also resulted in a financial loss. Much emphasis had been placed on the historical accuracy of the setting of this play. Since that time no plays had been produced, but the company

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had acquired the rights in "The Wit to Woo," a new play. Except for "The Beaux Stratagem" all the plays produced by the company had resulted in losses. The company had been granted exemption from entertainments tax for all its productions.

The company had not arranged any formal lectures or classes for instruction and study of dramatic art, but during all productions informal instruction had been given to members of the casts in the arts connected with the theatre. Sir Kenneth Barnes, who was familiar with all the productions of the company, was of the opinion that such productions had undoubtedly done much to advance the theatre and dramatic taste.

When the Arts Council decided to dissociate itself from the company in 1951 the future dispositions of the funds of the company in accordance with the Arts Council's standard drama agreement required to be considered. The Arts Council was informed that the company intended to continue its previous policy and that there would be no lowering of the standard of the plays that it produced. The Arts Council accordingly agreed that the company should retain all its funds.

The Special Commissioners gave their decision in writing on September 7, 1955, as follows: "1. The question for determina-" tion in this claim made under section 450, Income Tax Act, " 1952, is whether or not the appellant company is entitled to " exemption from income tax under Schedule D for the years " 1950–1951 to 1953–1954 inclusive by virtue of the provisions of " section 448 (1) (*c*), Income Tax Act, 1952. It is not disputed " that the activities carried on by the company, if carried on " under different objects might be charitable but it is contended " for the Crown that the objects are not restricted to charitable " purposes only. 2. Object 3 (a) in the company's memorandum " of association is 'to present classical, artistic, cultural and " 'educational dramatic works in the United Kingdom of Great " 'Britain and Northern Ireland and elsewhere.' We think that " in order for this object to be considered to be wholly charitable " the words 'classical, artistic, cultural' must be governed by " the word 'educational' or be synonymous with it. We do not " think, upon the true construction of the clause, that these words " are governed by 'educational,' but that they must be read dis-" junctively, and we think also that these words have a wider " meaning than 'educational,' so that we find that the effect of " the inclusion of these words allows the company to present " plays that are not wholly educational and therefore not charit-" able. We are confirmed in this view by the words of Viscount " Simonds L.C.,[1] in the House of Lords in *Inland Revenue* " *Commissioners* v. *Baddeley*[2]: 'The short answer appears to me " 'to be that, regarded as a whole, the sum of the activities per-" 'missible under the deed can only be regarded as educational

[1] [1955] A.C. at p. 585.

[2] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525; sub nom. *Baddeley (Newtown Trustees)* v. *Inland Revenue Commissioners*, 35 T.C. 661.

" ' in the sort of loose sense in which all experience may be said " ' to be educative, and that, if such activities are examined one " ' by one, it would be impossible to regard many of them as in " ' even the loosest sense educational.' "

" We hold that the company is not established for charitable " purposes only and that the claim accordingly fails."

The company appealed to the court from that decision.

G. G. Honeyman Q.C. and *David Wilson* for the appellant company.

Sir Lynn Ungoed-Thomas Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* for the Crown.

Cases cited in argument not referred to in the judgment: *Crystal Palace Trustees* v. *Minister of Town and Country Planning* *; *Abbey Malvern Wells Ltd.* v. *Ministry of Local Government and Planning* †; *In re Shaw's Will Trusts.* ‡

UPJOHN J., having stated the facts, continued: No question arises that in fact all the productions, which I do not propose to describe in detail as they are fully set out in the case stated, have in fact had a charitable object, but that is not the point before me. The only question is whether the company is incorporated for the purpose of carrying out exclusively charitable objects, and the whole question depends on the proper interpretation of the memorandum of association of the company.

The Special Commissioners decided that it was not incorporated exclusively for charitable objects, and that the opening words in clause 2 (3) (a) of the memorandum must be read disjunctively, and the words had a wider meaning than " educational." They said: " We find that the effect of the inclusion of these words " allows the company to present plays that are not wholly " educational, and, therefore, not charitable." They quote then an extract from the speech of Lord Simonds in *Inland Revenue Commissioners* v. *Baddeley.*[1]

Before me the argument has taken rather a different course. Sir Lynn Ungoed-Thomas, for the Crown, attacks clause 3 (a) in this way: having regard to *In re Shakespeare Memorial Trust* [2] and *Royal Choral Society* v. *Inland Revenue Commissioners*,[3] he does not challenge the view that if the objects were to present " classical, cultural and educational dramatic works," taking the clause by itself, that would be a good charitable object even if the words be read disjunctively. His main attack relates to the word " artistic."

The first matter to be considered is whether this phrase " to

* [1951] Ch. 132; 66 T.L.R. (Pt. 2) 753; [1950] 2 All E.R. 857n.

† [1951] Ch. 728; [1951] 1 T.L.R. 1050; [1951] 2 All E.R. 154.

‡ [1952] Ch. 163; [1951] 2 T.L.R. 1249; [1952] 1 All E.R. 49.

[1] [1955] A.C. 572, 585; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525; 35 T.C. 661.

[2] [1923] 2 Ch. 398; 39 T.L.R. 676.

[3] (1943) 25 T.C. 263.

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"present classical, artistic, cultural and educational dramatic "works" is to be read conjunctively so that the dramatic works must all be classical and artistic and cultural and educational, or whether it can be read disjunctively. I have been referred to some observations of Andrews C.J. in the Irish case of the *Trustees of the Londonderry Presbyterian Church House* v. *Inland Revenue Commissioners*[4] on this question of reading clauses conjunctively and disjunctively, and also to those of Hodson L.J. in *Baddeley* v. *Inland Revenue Commissioners*,[5] where he did not agree with the views of Andrews C.J.[6]

But it is in each case a pure question of construction, and neither of those cases lays down any principle except this, that the words must be read grammatically. I observe that there are commas after the words "classical, artistic," and that is not unimportant. I bear in mind, also, that in subclause (f) the disjunctive "or" appears. The company can enter into agreements with authors, and others "for the acquisition of any rights "in any classical, artistic, cultural or educational dramatic work "or works."

This must also be remembered: the object here is not in terms to promote some charitable object, but to present plays. Further, I have to construe the memorandum of association to see whether it would be ultra vires for the company to put on a production which, for example, was classical and artistic, but not cultural and educational. I think that on the whole the only way to read the words of subclause (a) is disjunctively, and that the company could put on a classical play, an artistic play, a cultural play, or an educational play.

Sir Lynn and Sir Reginald Hills have submitted that presenting an artistic dramatic work is so wide and vague a phrase that one could put on almost any type of play, and certainly a play which would not in any ordinary concept of the word be charitable in the sense that it would improve the public's taste in the theatre and advance the dramatic art in the theatre. I have the greatest difficulty in this context in understanding exactly what is meant by "artistic." Lord Greene, in *Royal Choral Society* v. *Inland Revenue Commissioners*,[7] said[8]: "In the "case of artistic taste, one of the best ways of training it is by "presenting works of high class, and gradually training people "to like them in preference to works of an inferior class." But this memorandum does not in terms state that the object is to promote artistic taste; it is to present artistic plays. As I have said, I find it difficult to attach any real charitable concept to an artistic dramatic work; it is too wide and too vague, and, therefore, is not charitable.

However, the matter does not end there. Sir Lynn attacked subclause (b), and he said that the words "To foster, promote,

[4] (1946) 27 T.C. 431.
[5] [1953] Ch. 504; [1953] 3 W.L.R. 135; [1953] 2 All E.R. 233.
[6] [1953] Ch. 544.
[7] 25 T.C. 263.
[8] Ibid. 273.

" and increase the interest of the public in the dramatic art and " in the co-related arts as well by the presentation of dramatic " works as by other means " are of themselves too vague. I do not agree with that. It seems to me that if the object be to foster, promote and increase the interest of the public in the dramatic art, that is an excellent way of increasing the artistic taste of the public in the way Lord Greene mentioned.

With regard to subclause (c), that seems to me, taken by itself, to be covered by the *Shakespeare Memorial Theatre* case.[9]

The next attack is made upon subclause (j), and it is said that the object " To establish, subsidise, promote, co-operate or " federate with " others having objects which are altogether similar is too vague and will enable the society, assuming it to have otherwise good charitable objects, to promote some non-charitable society; for example, to expend funds on the promotion of a play to be given by members of some works' theatrical society in their canteen. I do not agree with that. If you find aliunde that the company is incorporated for a charitable purpose, it seems to me that the objects of any other body which are to be altogether similar must themselves be charitable.

Finally, the attack is made upon subclause (l): " To do all " such other things as are incidental or which the association may " think conducive to the attainment of any of the above objects." On this matter I have the assistance of authority in *Oxford Group* v. *Inland Revenue Commissioners*.[10] The memorandum of association is set out in the headnote and clause 3 (c), para. (9), reads: " To establish and support or aid in the establishment " and support of any charitable or benevolent associations or " institutions and to subscribe or guarantee money for charitable " or benevolent purposes in any way connected with the purposes " of the association or calculated to further its objects. (10) To " do all such other things as are incidental, or the association may " think conducive, to the attainment of the above objects or any " of them."

It is to be observed that there is a complete contrast between paragraph (9) in the *Oxford Group* case[11] (which was in itself plainly non-charitable) and subclause (k) in this case which taken by itself is plainly charitable, in that the company could only support charitable associations or institutions or subscribe to or guarantee money for charitable purposes. On the other hand, save for immaterial verbal differences, there is no difference between paragraph (10) in the *Oxford Group* case[11] and subclause (l) in this case.

The headnote continues so far as relevant[12]: " The objects " set forth in clause 3 (c), paragraphs (9), (10), of the memo- " randum of association were not merely ancillary to the main " objects expressed in sub-clauses (a) and (b), but themselves

[9] [1923] 2 Ch. 398.
[10] [1949] 2 All E.R. 537; 31 T.C. 221.
[11] [1949] 2 All E.R. 537.
[12] Ibid. 538.

1956

ASSOCIATED ARTISTS LTD. v. INLAND REVENUE COMMISSIONERS.

Upjohn J.

" conferred powers on the company which were so wide that they " could not be regarded as charitable."

It is clear that the judgment of Croom-Johnson J. in that case proceeded upon the footing [13] that paragraph (9) was plainly bad because it permitted contributions to non-charitable institutions, and, therefore, paragraph (10) enabled the company to do that which was most conducive to attain any such objects, and also necessarily meant that the company could apply its funds to the non-charitable purposes of paragraph (9).

However, when the matter came to the Court of Appeal, it seems to me that in the judgment of Cohen L.J. these paragraphs were considered independently. Having considered paragraph (9), he said [14]: " Then, again, under paragraph (10) of subclause (c), " the association is empowered to do, not merely things which " are incidental or conducive to the attainment of the main " object, but also such things as the association may think con- " ducive to it. In other words, the question which the court " would have to decide, if any activity of the association was " being challenged as being ultra vires, would be not whether, " in the opinion of the court, the activity was conducive to the " main object, but whether the association, in undertaking it, " had thought it conducive. It seems to me that in this case the " observations of Lawrence L.J. in the *Keren Kayemeth* case [15] " are directly in point." Then he quoted from the judgment of Lawrence L.J.[16]: " ' The company can exercise any or all of " ' these powers whenever in its opinion such an exercise would " ' be conducive to the attainment of the so-called primary " ' object, which from a practical point of view means that it can " ' exercise them whenever it is minded to do so, and whether " ' such exercise is in fact conducive to the attainment of that " ' object or not, as neither the court nor anyone else can control " ' the company's opinion or otherwise interfere with the manner " ' in which it chooses to carry out its objects. It would be " ' difficult in any case to determine whether any particular " ' enterprise undertaken by the company under its wide powers " ' was or was not in fact conducive to the attainment of the " ' primary object, but when the question whether it is or is not " ' so conducive is left to the decision of the company itself I " ' cannot avoid the conclusion that the objects mentioned in " ' subclauses 2 to 22 can be carried out by the company just " ' as freely as the object mentioned in subclause 1, and that " ' there is no substantial difference in degree between them.' " Cohen L.J. continued [17]: " The decision of the Privy Council in " *Dunne* v. *Byrne* [18] reinforces my opinion that the inclusion of " paragraph (10) of subclause (c) makes it impossible to hold " that the association was established for charitable purposes

[13] 31 T.C. 241, 242.
[14] [1949] 2 All E.R. 544.
[15] [1931] 2 K.B. 465; 47 T.L.R. 461.
[16] [1931] 2 K.B. 482.
[17] [1949] 2 All E.R. 545.
[18] [1912] A.C. 407; 28 T.L.R. 257.

" only. In that case a testator had bequeathed a legacy ' to the " ' Roman Catholic Archbishop of Brisbane and his successors " ' to be used and expended wholly or in part as such Archbishop " ' may judge most conducive to the good of religion in this " ' diocese.' The Board held the gift to be invalid. Lord " Macnaghten, in giving the opinion of the Board, said [19]: ' It " ' can hardly be disputed that a thing may be " conducive," " ' and in particular circumstances " most conducive," to the " ' good of religion in a particular diocese or in a particular " ' district without being charitable in the sense which the court " ' attaches to the word, and indeed, without being in itself in " ' any sense religious.' " Cohen L.J., having quoted from Lord Tomlin's speech in the *Keren Kayemeth* case,[20] finally pointed out [21] that in his view the powers given by the memorandum were independent, and that he could not hold paragraphs (9) and (10) were merely ancillary to the main objects.

It seems to me that the *Oxford Group* case [22] decided two things. First, it is a matter of construction in each case whether (to return momentarily to this case) subclauses (a) and (l) are ancillary or independent; consistently with that case, however, I must hold them to be independent. Secondly, it is clear that the *Oxford Group* case [22] decided that paragraph (10) there taken by itself would render the objects of the society non-charitable even had paragraph (9) been charitable. As I have said, Cohen L.J. dealt with paragraphs (9) and (10) quite independently. That decision binds me. It seems to me that according to that decision and the authorities quoted by Cohen L.J. the presence of clause (l) in this case is in itself and by itself sufficient to render this company non-charitable. I should add that this point, for some reason, was not taken before the Special Commissioners.

Accordingly, I agree, although for rather different reasons, with the commissioners, and I must dismiss the appeal.

Appeal dismissed.

Solicitors: *Campbell, Hooper & Todd and Fournier & Roberts; Solicitor of Inland Revenue.*

I. G. R. M.

[19] [1912] A.C. 410.
[20] [1932] A.C. 650, 658; 48 T.L.R. 450.
[21] [1949] 2 All E.R. 546.
[22] [1949] 2 All E.R. 537.

[PROBATE, ETC., DIVISION.]

1956
May 2.

Karminski J.

* *In the Estate of* TAME, DECD. TYLER *v.* SWEETLOVE. TAME AND TAME.

Probate — Practice — Compromise of action — All parties concerned informed of terms—Terms signed by all parties cited except one—Refusal by that party cited to sign — Rights or claims however specifically waived—Power of court to order he be bound by terms —R.S.C., Ord. 16, *r.* 9A.

A probate action was settled on certain terms and all those persons interested either under the will or on an intestacy were either parties to the action or had been cited to see the proceedings. The terms of compromise were agreed and signed by all except one party cited, who refused to sign the terms but wrote to say that he waived any rights or claims he might have. The terms did not provide for the terms of compromise being made a rule of court:—

Held, (1) that the court had power, under R.S.C., Ord. 16, r. 9A, to make an order whereby terms of compromise would be binding upon a person who had not signed them and that such power should be exercised in the present case.

(2) That when terms of compromise did not provide that they be filed and made a rule of court the discretionary power of the court to make that direction should be sparingly exercised and that in the present case, in which not all the parties had had the benefit of advice, such a direction should not be made.

SHORT CAUSE.

The plaintiff, a nephew of the deceased, was the executor and sole beneficiary named in a will alleged to be the true last will of the deceased and dated May 12, 1953. The deceased died on May 5, 1954, but the will itself could not be found, nor was the box in which it was believed to have been kept, although a completed copy was in existence and was annexed to the affidavit of scripts. The plaintiff asked the court to pronounce for the will of May 12, 1953, in solemn form of law and decree probate of the contents as contained in the completed copy. The defendants, the deceased's sister and two nephews, were among those entitled to the estate in the event of an intestacy. They put the plaintiff to proof of due execution and relied on the presumption of law that the alleged will had been destroyed by the deceased, or at his direction, animo revocandi. All those other than the defendants who were interested in the event of an intestacy were cited to see the proceedings, and duly served; but none of them entered an appearance.

Terms of compromise were agreed between the parties under which, inter alia, the will of May 5, 1953, as contained in the completed copy, was pronounced for. The defendants and all parties cited to see the proceedings, with the exception of one C. W. Tyler, signed the terms of compromise.

C. W. Tyler, who had been served with the citation and informed by the plaintiff's solicitors of the proposed terms of

compromise (which included a small payment to him out of the estate), returned the form of consent with the remark upon it "Insufficient information." He asked for a representative of the plaintiff's solicitors to call on him personally, and when it was suggested to him that in order to save expense he might either put such questions as he wished in writing, discuss the matter on the telephone, or call on the solicitors himself, replied on March 18, 1956, that his time also was important and observed that he had previously refrained from writing to them or taking any part in "this affair."

He continued: "Also sir, it is my wish not to have any part "in this unhappy affair. Do please note. I waive any rights or "claims I may have had to this estate of Mr. James Tame. "Please remove my name from all documents relating to the "estate. I do not want any further communication in regards "to this matter."

He was informed in reply that the contents of his letter had been noted and that the case had been set down for trial in London as a short cause and would be heard on May 2, 1956.

The terms of compromise made no provision that the terms be filed and made a rule of court; and the plaintiffs received no request for the inclusion of that provision from the defendants or the parties cited.

At the hearing, at which only counsel for the plaintiff appeared, the court was prepared upon the evidence to pronounce for the will of May 12, 1953, as contained in the completed copy. But the question arose whether C. W. Tyler would be bound by the terms of compromise since he had not signed them.

A. T. Hoolahan for the plaintiff. The authorities upon which is founded the proposition in Mortimer on Probate Law and Practice, 2nd ed., at p. 611, and Tristram and Coote's Probate Practice, 20th ed., at p. 546, that a party cited should not be bound by terms of compromise if he has not signed them, or if he was not in court at the hearing, is founded all deal with cases in which the party cited was ignorant of the compromise.

In the present case the party cited knew of the compromise and of the terms but had refused to sign them, and by his letter he had waived all claims. It would be inequitable in such circumstances for him to be allowed subsequently to set the terms aside or put the parties, after the agreement had been reached, to the expense of a full action.

In *In re Wrigglesworth, Wilkinson* v. *Wrigglesworth* [1] terms of settlement had been agreed in an action against the executor of a will by certain legatees whereby the plaintiffs claimed a declaration that a certain sum formed part of the estate of the testatrix and asked for administration, so far as necessary, of the personal estate, while the defendant alleged that the whole of

[1] [1901] W.N. 172.

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the sum belonged to him absolutely. Of the seven residuary legatees, among all of whom a certain sum was to be equally divided, three had not been made parties to the action and were believed to be in America. Farwell J. had made an order in the terms of the compromise under R.S.C., Ord. 16, r. 9A, and provided that those terms, which were for the benefit of all concerned, should be binding upon the three absent parties. If the parties in that case, who had not been informed of the terms and were outside the jurisdiction, could properly be bound by the terms, a fortiori the party cited in the present case, who knew of the terms but had refused to sign them, should be bound by the terms of compromise.

The court has jurisdiction to make such an order under R.S.C., Ord. 16, r. 9A,[2] for the persons concerned (all of whom are sui juris) are all persons "in the same interest," and by R.S.C., Ord. 16, r. 10, the rules in probate actions as to parties in use in the Court of Probate immediately before November 1, 1875, continue in force *subject to* the provisions of the Act and the Rules of the Supreme Court.

The defendants did not appear and were not represented.

KARMINSKI J. I pronounce for the will as contained in the completed draft. It has been submitted that an order can be made, under R.S.C., Ord. 16, r. 9A, that the compromise entered into between the parties should be binding on C. W. Tyler. The application has the merit of being novel, so far as I know, and so far as the registrar knows; but I have been persuaded that this is a proper case for such an order.

Having regard to the particular circumstances of this case, and, in particular, to the terms of Tyler's letter of March 18, 1956, in which, amongst other things, he says: "I waive any "rights or claims I may have had to this estate of James Tame," I think that I should be justified in using the powers under R.S.C. Ord. 16, r. 9A, to order that the compromise should be binding upon C. W. Tyler, and I make an order accordingly.

The terms of compromise are not expressed that the court should be asked to file them and to make them a rule of court.

[2] R.S.C., Ord. 16, r. 9A: "Where, in any proceedings concerning (*a*) the estate of a deceased "person, (*b*) property subject to a "trust, or (*c*) the construction of a "written instrument, a compromise "is proposed and some of the persons "who are interested in or who may be "affected by the compromise are not "parties to the proceedings (including "unborn or unascertained persons), "but:—(i) there is some other person "in the same interest before the court "who assents to the compromise or "on whose behalf the court sanctions "the compromise; or (ii) the absent "persons are represented by a person "appointed under Ord. 16, r. 32, who "so assents; the court or judge, if "satisfied that the compromise will "be for the benefit of the absent "persons and that it is expedient to "exercise this power, may approve "the compromise and order that the "same be binding on the absent "persons, and they shall be bound "accordingly except where the order "has been obtained by fraud or non-"disclosure of material facts."

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I think that I have power to do so. [His Lordship referred to a direction of Lord Merrivale P.[1]] Is there any letter from the solicitors on the other side, in which they say that they are willing to have them made a rule of court?

Hoolahan. No; they have not referred to that matter.

KARMINSKI J. The defendants obviously had the benefit of advice; did the other people who signed the terms of compromise have that benefit?

Hoolahan. Some had, and some had not.

KARMINSKI J. That is what worries me a little. I think that when the terms do not provide that the compromise should be filed and made a rule of court, discretion should be rather sparingly exercised, although quite often a reference to that matter is left out per incuriam.

Hoolahan. So far as the plaintiff is concerned, it is fair to say that he does not mind, in the sense that he will carry out the terms of the compromise; and it is something which would be to the benefit of the defendants rather than the plaintiff.

KARMINSKI J. I do not think that I shall direct that the terms be filed and made a rule of court.

Order accordingly.

Solicitors: *G. Houghton & Son.*

J. B. G.

[1] May 18, 1931: see Tristram and Coote's Probate Practice, 20th ed., at p. 548: "Except by special direction "of the judge recited in the decree, "terms of compromise will not be "made a rule of court unless the "signed terms provide for this."

[CHANCERY DIVISION.]

* *In re* 20 EXCHANGE STREET, MANCHESTER. AUSTIN REED LTD. *v.* ROYAL INSURANCE CO. LTD.

1956
May 7, 8.

Danckwerts J.

[1956 A. 223.]

Court of Appeal—Time for appeal—Whether power to abridge time—R.S.C., Ord. 58, *rr.* 4 (1) (*c*), 14 (*substituted by the Rules of the Supreme Court* (*Appeals*) (*S.I.* 1955, *No.* 1885)).

The court has no power to reduce the time in which a party may appeal, which by R.S.C., Ord. 58, r. 4 (1) (*c*),[1] is limited to six weeks, to any shorter period.

[1] R.S.C., Ord. 58 (which came into force on April 10, 1956), r. 4: "(1) Subject to the provisions of this "rule, every notice of appeal shall "be served under paragraph (5) of "rule 3 of this order within the "following period (calculated from "the date on which the judgment or

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ADJOURNED SUMMONS.

By a lease dated February 1, 1952, the Royal Insurance Co. Ltd. (the landlords) demised premises consisting of a shop at 20, Exchange Street, Manchester, to Austin Reed Ltd. (the tenants) for a term of three years commencing from January 1, 1952, at a rent of £3,400 per annum. On October 7, 1955, the landlords served a notice pursuant to section 25 of the Landlord and Tenant Act, 1954, on the tenants terminating the tenancy on April 14, 1956. The notice stated that the landlords would oppose an application for a new tenancy under the provisions of section 30 (1) (*f*) of the Act on the ground that on the termination of the current tenancy the landlords intended to demolish or reconstruct the premises comprised in the holding and could not reasonably do so without obtaining possession. On November 15, 1955, the tenants, pursuant to the provisions of the Act, served a notice on the landlords stating that they were not willing to give up possession of the premises on the date specified in the landlords' notice. On February 3, 1956, the tenants took out a summons applying for the grant of a new tenancy under Part II of the Act for a period until November 30, 1956, at the same rent.

Danckwerts J. refused that application, and, thereupon, counsel for the landlords applied for an order abridging the time in which the tenants were allowed to appeal from six weeks to one week.

This report concerns only the application in regard to the time for appealing.

Charles Russell Q.C. and *Michael Browne* for the landlords. The tenants have six weeks from the date of the dismissal of their application in which to decide whether or not to appeal. Under section 64 of the Landlord and Tenant Act, 1954: "(1) In any "case where—(*a*) a notice to terminate a tenancy has been given "under Part I or Part II of this Act . . . and . . . (*c*) apart from "this section the effect of the notice or request would be to "terminate the tenancy before the expiration of the period of "three months beginning with the date on which the application "is finally disposed of, the effect of the notice or request shall "be to terminate the tenancy at the expiration of the said period "of three months and not at any other time. (2) The reference "in paragraph (*c*) of subsection (1) of this section to the date

"order of the court below was "signed, entered or otherwise per- "fected), that is to say:—(*a*) in the "case of an appeal from an inter- "locutory order (not being such an "order as is mentioned in the next "following sub-paragraph), 14 days; "(*b*) in the case of an appeal from an "order or decision made or given in "the matter of the winding up of a "company, or in the matter of any "bankruptcy, 21 days; (*c*) in any "other case, 6 weeks."

R. 14: "Without prejudice to the "power of the Court of Appeal under "rule 7 of Ord. 64 to enlarge the time "prescribed by any provision of this "order, the period for serving notice "of appeal under rule 4 of this order "or for making application *ex parte* "under paragraph (3) of rule 13 of "this order may be extended by the "court below upon application made "before the expiration of that "period."

" on which an application is finally disposed of shall be construed " as a reference to the earliest date by which the proceedings on " the application (including any proceedings on or in consequence " of an appeal) have been determined and any time for appealing " or further appealing has expired. . . ." The effect of those provisions is that if the tenants decide to appeal they might do so towards the end of the six-week period, with the result that the landlords might not obtain possession until some time in October. Accordingly, the court is asked to make an order abridging the time in which the tenants can appeal from six weeks to one week.

[DANCKWERTS J. Where is my power to do that?]

The relevant provision as to the time for appeal is contained in the new R.S.C., Ord. 58, r. 4 (1) (*c*): " in any other case, " 6 weeks." That means six weeks from the time of entry and perfection of the order. Ord. 64, r. 7, is perfectly general in its terms: " A court or a judge shall have power to enlarge or " abridge the time appointed by the rules, or fixed by an order " enlarging time, for doing any act or taking any proceeding, " upon such terms (if any) as the justice of the case may require, " and any such enlargement may be ordered although the applica- " tion for the same is not made until after the expiration of the " time appointed or allowed. Provided that when the time for " delivering any pleading or document or filing any affidavit, " answer or document, or doing any act is or has been fixed or " limited by any of these rules or by any direction on or under " the summons for directions or by any order of the court or a " judge the costs of any application to extend such time and of " any order made thereon shall be borne by the party making " such application. . . ."

Accordingly, there is power to abridge the time, including the time for appeal. It is conceded, however, that it is a power which is very rarely exercised, and then normally only by consent, so that it is necessary to consider briefly what is the compelling reason for exercising the power in this case. [There followed an argument on the merits of the application in relation to the facts of the present case.]

Roy Wilson Q.C. and *Adrian Hamilton* for the tenants. It is submitted that the court has no power to grant any such abridgment. [Counsel then submitted reasons why the order sought should not be granted, even if the court had power so to do, and continued:] Ord. 64, r. 7, is a general provision as to the extension of time or the abridging of time fixed for doing any act or taking any proceedings. In respect, however, of the actual time for appealing, there is a notable difference between the provisions of the old Ord. 58, r. 15, and the new Ord. 58, rr. 4 and 14. The old R.S.C. Ord. 58, r. 15 (1), provided: " Except with " the leave of the court or judge by whom the judgment or order " appealed from was given or made, or of the Court of Appeal, " no appeal from any interlocutory order shall be brought after

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" the expiration of fourteen days, and no other appeal shall be " brought after the expiration of six weeks, from the date on " which the judgment or order was signed. . . ."

If one turns to the new order, there is no inclusion of the words " except with the leave of a court or judge by whom the " judgment or order appealed from was given or made." Rule 4 (1) of the new Ord. 58 provides: " Subject to the provisions of " this rule, every notice of appeal shall be served under para- " graph 5 of rule 3 of this Order within the following period. . . ." The appropriate sub-paragraph, it is agreed, is (*c*): " in any other " case, 6 weeks." Rule 14 of the new Ord. 58 provides: " With- " out prejudice to the power of the Court of Appeal under rule 7 " of Order 64 to enlarge the time prescribed by any provision " of this order, the period for serving notice of appeal under " rule 4 of this order or for making application *ex parte* under rule " 13 (3) of this order may be extended by the court below upon " application made before the expiration of that period." Thus, it is obvious that there is a quite specific difference in the wording of the new Ord. 58 which makes it clear that, whereas, formerly, the time for appealing was subject to the general power either to extend or abridge, under the new order the time for appealing is subject only to the power of the Court of Appeal under Ord. 64, r. 7, to enlarge the time. Therefore, unless the Court of Appeal under Ord. 64, r. 7, enlarges the time, the time for appealing shall be the time laid down in r. 4 of Ord. 58.

[DANCKWERTS J. There is no reference to abridgment in r. 14, is there?]

No. That is a matter of significance because, under the old Ord. 58, r. 5 (1), there was the general reference to the leave of the court or a judge, which would bring in Ord. 64, r. 7.

[DANCKWERTS J. The old Ord. 58, r. 15 (1), stated that no appeal should be brought after a particular time. Now it is put in quite a different way.]

Yes. Therefore, it is submitted that for some reason or other the Rule Committee of the Supreme Court have thought fit to deprive the court of the jurisdiction to abridge the time.

DANCKWERTS J. It appears to me that under the new Rules of the Supreme Court in regard to appeals I have not any power to abridge the time for an appeal. I would like to add that, if I had any such power under R.S.C., Ord. 64, r. 7, I doubt whether I should exercise it in a case of this kind. The possible hardships to which counsel for the landlord has referred seem to me to be hardships created by the Landlord and Tenant Act, 1954, and by matters with which I ought not to interfere, since the legislature has thought fit to provide for certain consequences in cases of this kind.

Application refused.

Solicitors: *Linklaters & Paines for Laces & Co., Manchester; Underwood & Co.*

J. A. G.

[PROBATE, ETC., DIVISION.]

* PRACTICE NOTE (PROBATE).

1956 *May* 17.

Probate—Practice—Resealing—Resealing English grants in Northern Ireland.

Section 27 of the Administration of Estates Act (Northern Ireland), 1955, has made it possible for the Northern Irish Court to reseal an English grant of administration without requiring a fresh bond, subject to the production of an official certificate that the bond given in England covers the Northern Irish estate.

Practitioners wishing to make use of this provision should include in the administrator's oath statements as to the domicile of the deceased and the total value of any real and personal estate in Northern Ireland, and should increase the normal penalty in the bond by twice this amount. The necessary certificate under the hand of a registrar may then be obtained after the issue of the grant from the notation department of the Principal Probate Registry or from the district registry, as the case may be.

B. LONG,
Senior Registrar.

May 17, 1956.

[QUEEN'S BENCH DIVISION.]

* DAVIES *v.* BRITISH GEON LTD.

1956 *May* 7.

Pearson J.

[1956 D. No. 214.]

Practice and Procedure—Appearance—Company—Principal office in London — Factory in Wales — Writ against company issued in Cardiff Registry—Appearance entered in London—Application to set aside appearance — Whether company can reside or carry on business in more than one place — "Resides" — "Carries on "business"—R.S.C., Ord. 12, *rr.* 4, 5 (1), (2).
Residence—Company.

A manufacturing company had its principal and registered office in London, where the directors had their offices and held their board meetings, where the company's policy was framed, contracts for the purchase of raw materials entered into and the prices of the products fixed. Its products were manufactured at its factory near Cardiff, which was controlled by an officer of the company responsible to the directors in London and who had nothing to do with sales or financial policy. Only lower paid staff were engaged by the personnel officer at the factory, higher paid staff being engaged by the secretary in London.

A labourer employed by the company at the factory contracted dermatitis and issued a writ against the company in the Cardiff Registry stating, in compliance with R.S.C., Ord. 12, r. 4, that

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the company resided or carried on business within the district of that registry. Appearance was entered in London on behalf of the company, the memorandum stating that the company did not reside or carry on business within the district of the Cardiff Registry. An application made by the plaintiff to the master for an order setting aside the appearance was refused. On appeal:—

Held, (1) that there was no distinction in meaning between the word "resides" and the words "carries on business" in R.S.C., Ord. 12, rr. 4 and 5 (1) and (2), when used in relation to a corporation.

Taylor v. *Crowland Gas & Coke Co.* (1855) 11 Exch. 1 applied.

(2) That for the purposes of the rules a corporation carried on business at only one place, i.e., the place where its principal business was transacted and, on the facts, the defendant company carried on business in London, where its principal office was situated, and not at its factory and, accordingly, the appeal failed.

Adams v. *Great Western Railway Co.* (1861) 30 L.J.Ex. 124; *Shiels* v. *Great Northern Railway Co.* (1861) 30 L.J.Q.B. 331; *Keynsham Blue Lias Lime Co. Ltd.* v. *Baker* (1863) 33 L.J.Ex. 41 and *Aberystwith Promenade Pier Co. Ltd.* v. *Cooper* (1865) 35 L.J.Q.B. 44 applied.

APPEAL from Master Lawrence.

On February 2, 1956, the plaintiff, David William Davies, issued a writ against his employers, British Geon Ltd., the defendant company, in the Cardiff District Registry, alleging that he had contracted dermatitis owing to their fault while he was working at their factory at Barry, which was within the district of the Cardiff District Registry. Service was accepted by the defendants' solicitors in Cardiff but on February 9 their London agents entered an appearance in the Central Office in London. The memorandum of appearance stated, in compliance with R.S.C., Ord. 12, r. 5 (2), that the defendant company neither resided nor carried on business within the Cardiff district. Application was made to Master Lawrence, on behalf of the plaintiff, for an order setting aside the appearance on the ground that the defendant company carried on business within the Cardiff district and that the appearance should have been entered in the Cardiff Registry in accordance with R.S.C., Ord. 12, r. 4.[1] Master Lawrence refused to make the order, whereupon the plaintiff appealed against his refusal to the judge in chambers. Pearson J. heard the appeal in open court.

It appeared from an affidavit submitted by the secretary of the defendant company that the company's registered office and its head office were situated in London, that the prices of its

[1] R.S.C., Ord. 12, r. 4: "If any "defendant to a writ issued in a "district registry resides or carries on "business within the district, he shall "appear in the District Registry."

R. 5: "(1) If any defendant neither "resides nor carries on business in "the district, he may appear either "in the district registry or at the "Central Office.

"(2) If an appearance is entered in "London by or on behalf of a defendant to a writ issued in a District "Registry, the memorandum of "appearance required by Rules 8 and "8A of this Order shall contain a "statement that such defendant "neither resides nor carries on business within the district of that "District Registry."

products were fixed in London, that the whole of the company's policy was framed in London, and that its final trading accounts were prepared in London. All board meetings of the directors and meetings of the company's shareholders were held in London. The purpose of the company was to manufacture raw materials and, in particular, polyvinylchloride, which was manufactured at the factory at Barry. There was a branch sales office in Manchester. The executive officers, namely, the chairman, acting managing director and sales director, all had their offices in London, as did the secretary of the company. The director in charge of research had his office at the factory. The general administration of the factory was under the control of an officer of the company at Barry, but that officer was subject to the control of the directors and officers in London, was not a director, and had nothing to do with either the sales or financial policy of the company. The contracts for the purchase of the two basic raw materials required for the manufacture of the company's products at Barry were entered into in London. The products of the factory were sold all over England and between 20 and 25 per cent. of them was exported. The responsibility for the sale of the products lay with the sales director in London. No employee or officer of the company at Barry had anything to do with the sale of the products. The secretary of the company in London was responsible for engaging staff whose basic wage was over £650 per annum and the personnel officer at Barry was responsible for engaging staff whose basic wage was less than that figure.

H. W. J. Ap Robert for the plaintiff.
Lionel Read for the defendant company.

The cases cited in argument are referred to in the judgment.

PEARSON J. This is a chambers appeal which has been adjourned into open court because of the question of law raised as to the meaning of the expression "resides or carries on "business" in R.S.C., Ord. 12, rr. 4 and 5.

[His Lordship stated the facts, read Ord. 12, rr. 4 and 5 (1) and (2), and continued:] On merely looking at the words of the rules without guidance from authority I should have been inclined to say (1) that different meanings should be given to the expression "resides" and the expression "carries on business"; (2) that, as a defendant might be either a natural person or a corporation, the two expressions probably have their different meanings both in relation to a natural person and in relation to a corporation; (3) that a corporation, no less than a natural person, may be carrying on business in several places; and (4) that manufacturing in a large factory constitutes carrying on business. But one has to consider what the authorities are, and to trace them historically. In the notes to Order 12, r. 4, in the Annual

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Practice, 1956 ed., p. 134, under the heading "Resides or Carries "on Business" it is stated: "See Chitty, Archbold, 253, where "the cases on similar words in other Acts are collected." The present Rules of the Supreme Court in their original form were issued in 1883 and were called the Rules of the Supreme Court, 1883. The provisions of Order 12, r. 4 and r. 5, para. (1), can be traced further back to the Supreme Court of Judicature Act (1873) Amendment Act, 1875. Section 16 of that Act gives effect to the Rules of Court set out in the First Schedule, and in those Rules of Court Order 12, rr. 2 and 3, are similar to the present Order 12, r. 4 and r. 5 (1). Therefore in the present rules one has a form of words first used in 1875 and repeated in 1883 and still in force. The question arises: "What was that form of "words intended to mean in 1875 and in 1883?" That is what gives importance to the cases decided before 1875 and before 1883, and to what is said in Chitty's Archbold, 14th ed., which was issued in 1885.

For understanding the earliest cases one needs to bear in mind the material provisions of the County Courts Act, 1846. Section 60 provides that "such summons may issue in any "district in which the defendant or one of the defendants shall "dwell or carry on his business at the time of the action "brought; . . ." Section 128 provides that ". . . all actions "and proceedings which before the passing of this Act might "have been brought in any of His Majesty's superior courts of "record where the plaintiff dwells more than 20 miles from the "defendant, or where the cause of action did not arise wholly "or in some material point within the jurisdiction of the court "within which the defendant dwells or carries on his business "at the time of the action brought . . . may be brought and "determined in any such superior court, at the election of the "party suing or proceeding, as if this Act had not been passed." Section 129 provides that ". . . if any action shall be com-"menced after the passing of this Act in any of His Majesty's "superior courts of record, for any cause other than those lastly "hereinbefore specified, for which a plaint might have been "entered in any court holden under this Act, and a verdict shall "be found for the plaintiff for a sum less than £20, if the said "action is founded on contract, or less than £5 if it be founded "on tort, the said plaintiff shall have judgment to recover such "sum only, and no costs."

The first case to be mentioned is *Taylor* v. *Crowland Gas & Coke Co.*,[1] decided in the year 1855 with reference to section 128 of the County Courts Act, 1846. It was there held that a corporation is to be considered as dwelling at the place where it carries on its business. That view is amply confirmed by later cases, and therefore one has to accept the proposition, though it seems artificial, that in relation to a corporation the expression

[1] (1855) 11 Exch. 1.

"dwells" and the expression "carries on business" have only one meaning and not two separate meanings.

In *Adams* v. *Great Western Railway Co.*,[2] which was decided in 1861 under section 128 of the Act of 1846, the decision was that a railway company dwells, for these purposes, only at its principal office and not at every station on the line. In that case the plaintiff, who dwelt and carried on his business in Worcestershire, not far from Birmingham, lost his luggage on a journey between Oswestry and Chester. The Great Western Railway Company's principal office was at Paddington Station. The question arose whether costs could be recovered, and the plaintiff said that he was entitled to bring his action in the High Court because he dwelt more than 20 miles from the defendants' dwelling, which was at Paddington. That was held to be right on the ground that the railway company's dwelling was at its head office, Paddington.

It is interesting to see how that decision was arrived at. Martin B. said[3]: "I think the case of *Taylor* v. *Crowland Gas & Coke Co.*[4] has decided that a railway company can 'dwell' within the meaning of the [County Courts Act, 1846, s. 128]. I think it is a dwelling analogous to that of an individual, and that any other interpretation of the Act would be an unfair one, and would lead to inconvenient practical results. It is clear to me that the place where the business was carried on was the place where the officer was authorized and competent to give an opinion upon such subjects as the present action is to be found, which is at Paddington, and there alone."

That was a decision only on the one word "dwells" in the first part of section 128 of the Act of 1846. But in the same year there was a decision in the Queen's Bench Division, in *Shiels* v. *Great Northern Railway Co.*,[5] in which a long and careful judgment was given by Hill J., who was adjudicating upon section 60, where the wording is "dwells or carries on his business." In that case the plaintiff, who alleged that his horse had been injured in Newark, sought to sue the railway company in the Lincoln district county court. The Lincoln district county court judge declined to hear the case because he held that he had no jurisdiction. That was disputed, but the judge's view was upheld in the judgment of Hill J., who said[6]: "It is true that, in a certain sense, a railway company carries on its business at every station in the kingdom where it makes contracts for the conveyance of, and receives, passengers or goods to be conveyed; and if the words in section 60 are to be taken in their most extended import, then a railway company against whom a cause of action, within the jurisdiction of the County Courts Act, arose, might be sued in any county court in the kingdom, at the option of the plaintiff, provided the company

[2] (1861) 30 L.J.Ex. 124.
[3] Ibid. 127.
[4] 11 Exch. 1.
[5] (1861) 30 L.J.Q.B. 331.
[6] Ibid. 332.

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" had a station within the district of such county court; without " any regard to the place where the cause of action arose, or to " the fact that the officers or the servants of the company at such " last-mentioned station knew nothing, and had nothing to say " to the affairs or business of the company, other than obeying " the instructions of the directors, and acting in conformity with " the regulations of the company at the particular station where " they were employed. Such a manifest inconvenience and " injustice could not have been intended by the legislature; and " if the words used are capable of a construction which will give " full effect thereto, without occasioning such inconvenience and " working such injustice, I think a court of law is bound so to " interpret the enactment. Many illustrations might be put to " show that the words ' carry on his business,' in section 60, must " receive some limitation, even in the case of private individuals.

There was also *Brown* v. *London and North Western Railway Co.*[7] in 1863. The headnote reads: " A railway company ' carries " ' on its business ' within the meaning of the 9 & 10 Vict. c. 95, " s. 60, only at the principal station where the general superinten- " dence of the whole concern is centred; and not at any station, " however large, where the local management of any portions of " the line is conducted subject to the supervision of the general " manager at the principal station. Affirming *Shiels* v. *Great* " *Northern Railway Co.*" [8] That was a strong court in which Cockburn C.J., Wightman, Crompton and Blackburn JJ. were participating. They upheld the decision.

Keynsham Blue Lias Lime Co. Ltd. v. *Baker*[9] is to some extent on the other side. That was a case in 1863 in which Keynsham Blue Lias Lime Co. Ltd., a limited company, had carried on business at their factory within the jurisdiction of the Bristol County Court. It was there that they manufactured and sold and delivered their products. It so happened that the defendant in the case bought a small quantity of goods from the company, and he was being sued for the price of the goods which had been sold and delivered to him at the works of the company situated in Somersetshire. The company went into liquidation. The liquidator carried on business in London, and the head office of the company had been in London. The liquidator brought his action in the High Court in London and succeeded. The question arose whether under sections 128 and 129 of the County Courts Act, 1846, he should be allowed any costs. It was held that it was not right for him to bring his action there, and that he should have brought it in either the Bristol or the Somersetshire County Court.

Pollock C.B. said[10]: " The authorities cited in reference to " railway companies appear to me to be inapplicable. There may " be some difficulty in applying the Act to such cases, and, in

[7] (1863) 32 L.J.Q.B. 318.
[8] 30 L.J.Q.B. 331.
[9] (1863) 33 L.J.Ex. 41.
[10] 33 L.J.Ex. 41, 42.

"all probability, when the Act passed such a case as a railway "company having a multitude of stations in all directions, some "of them many hundred miles from others, was not contem- "plated; the courts have done the best they could under the "circumstances. But that furnishes, in my judgment, no rule "whatever, for the plain case of a company having one place of "business where they find the material and manufacture it, and "where they sell it and deliver it to those who come to buy, "as the company in this case did in the neighbourhood of Bristol. "Is a man who has so dealt with them there, and bought a few "shillings' worth of a certain article, to be told, 'Now you are to "'be sued in the Courts of Westminster Hall, because the "'business was not carried on in the country, for the directors "'meet in Great Winchester Street, London'? It seems to "me there is no ground whatever for holding that there is "concurrent jurisdiction, where the subject-matter is between a "tradesman at Bristol and a company at Keynsham, where alone "the article is sold."

Bramwell B. said [11]: "I am of the same opinion. The "question here is, whether the plaintiffs dwell more than 20 "miles from the defendant. The plaintiffs are a corporation, "and it appears that word has been applied to corporations, by "saying they dwell where they carry on their business. The "question is, where did this corporation carry on its business? "It seems preposterous to suppose they carried it on elsewhere "than where they made and sold the article for the price of "which the action is brought, and that is at Keynsham. I think "London was merely the place where the directors met, but not "where the business was carried on. Then, it is said, that the "present plaintiff, the liquidator, is now the plaintiff, and that "he lives and carried on his business in London: but the plain- "tiffs on the record are a company, and I do not know that they "are not carrying on the business in the same way as they were "before."

Channell B. was of the same opinion. He said [12]: "I think "the decisions as to railways are not applicable to the present "case, on the ground stated by the Lord Chief Baron." Pigott B.'s judgment is interesting. He said [13]: "I am of the "same opinion. Hill J., in delivering the judgment of the court "in *Shiels* v. *Great Northern Railway Co.*,[14] used the expression "with respect to a railway company, that in a certain sense it "carries on its business at every station; but this company "carried on their business, in every sense, at Keynsham, and, "I think, they carry it on nowhere else."

It was quite rightly pointed out that the reasoning by which the decision was arrived at in the *Keynsham* case [15] is consistent with the assumption that a corporation carries on business in

[11] 33 L.J.Ex. 41, 42.
[12] Ibid.
[13] Ibid. 43.
[14] 30 L.J.Q.B. 331.
[15] 33 L.J.Ex. 41.

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one place only. It will have to be considered at a later stage, if it is right to say, for the purposes of the rule at present under consideration, that a corporation carries on business only in one place, which place that would be in the case of the present defendants. I want to mention here another decided case. In 1865 there was *Aberystwith Promenade Pier Co. Ltd.* v. *Cooper*.[16] The interest of that case is that the principle of the railway company cases is applied on rather striking facts to another company which was not a railway company, but was a promenade pier company. According to the headnote its objects were the erection and maintenance of a pier and the reception of tolls thereon at Aberystwith, but its registered offices were at Westminster, where the substantial business of the company and their negotiations were carried on. That company was held to "dwell" at Westminster, and not at Aberystwith. In the argument reference was made to *Keynsham Blue Lias Lime Co. Ltd.* v. *Baker*[17] and the other cases which I have cited.

In the course of his judgment Cockburn C.J. said[18]: "The "affidavit of the plaintiffs states that the only office is in West- "minster, and the affidavit on the other side only says that in "the belief of the deponent they had no other business than "maintaining and keeping in repair the pier, and receiving the "tolls in respect thereof at Aberystwith. I think that the "company dwell where its representatives are to be found."

Mellor J. said[18]: ". . . where the substantial business of "the company is done, and its negotiations entered into, there, "I think, the company dwells," and Shee J. and Lush J. concurred.

It was after those decisions that the rules under the Act of 1875 were made, and the draftsman chose to use the phrase "resides or carries on business" in regard to the entry of appearance. Shortly afterwards, in 1877, there was a decision in *Le Tailleur* v. *South Eastern Railway Co.*,[19] and the headnote gives the effect of the decision: "The South Eastern Railway Com- "pany have a station in Cannon Street, City, where a consider- "able portion of their business is transacted. Their principal "station, where the meetings of the directors are held and the "general and substantial business of the company is conducted, "is without the city:—*Held*, that the company do not 'carry on "'business' within the jurisdiction of the Mayor's Court, within "the meaning of section 12 of the Mayor's Court Extension Act, "1857. *Brown* v. *London and North Western Railway Co.*[20] "followed."

A footnote sets out the provisions of section 12 of the Mayor's Court Extension Act, 1857, which was being construed, which provides that in certain events "no plea to the jurisdiction shall "be allowed, provided the defendant or one of the defendants

[16] (1865) 35 L.J.Q.B. 44.
[17] 33 L.J.Ex. 41.
[18] Ibid. 45.
[19] (1877) 3 C.P.D. 18.
[20] 32 L.J.Q.B. 318.

" shall dwell or carry on business within the city of London or " the liberties thereof . . ." That case, therefore, raised, in principle, the same issue as before, that is to say, whether the South Eastern Railway Co. dwelt and carried on business within the City of London by virtue of its activities at Cannon Street Station, or whether it dwelt and carried on its business outside the City of London at London Bridge Station, and it was held that it carried on business at London Bridge Station and not at Cannon Street.

Grove J. said [21]: " I can see no distinction between *Brown* " v. *London and North Western Railway Co.*[22] and the present " case. The words in both statutes are precisely the same, so " far as this question is concerned, and must receive the same " construction in both . . . I feel bound by that case, and I " think the decision the Court of Queen's Bench came to there " was quite right."

Lindley J. concurred. He said [23]: " The very same phrase, " it seems, was used in an Act of a substantially similar kind, " and the conclusion come to was that such a carrying on " business as is here described was not within the section. It " was there said that business must mean the general, or as it is " sometimes called, the administrative, business carried on at " the chief or principal station. Here the general business of the " company is not carried on within the city. There being no " material distinction between the case cited and the present, " the result must be the same."

After that decision came the Rules of the Supreme Court of 1883, and in 1885 Chitty's Archbold's Practice of the Queen's Bench Division of the High Court of Justice, 14th ed. In Volume 1 at p. 252 the provisions of rules 4 and 5 of Ord. 12 are set out. Then it is stated: " There does not appear to have " been any reported decision as to what is ' residing or carrying " ' on business ' within the meaning of these rules; but it may " be useful to refer to the cases decided on similar words, " ' dwelling or carrying on business,' contained in several other " statutes." The passage then refers to statutes, including section 128 of the County Courts Act, 1846, and section 12 of the Mayor's Court Act, 1857, mentions matters concerning various individuals, and goes on to say: " A distinction is established by the cases between the ' carrying on " ' business ' by a corporation or company and by an individual. " A corporation can only ' carry on business ' in one place, and " that place is, the place where its *principal business* is trans- " acted. In the case of a railway company, such place is that " where the general business of the line is carried on, and not " necessarily the terminal station. Other companies ' carry on " ' business ' not necessarily at their registered office, even " though the directors meet there, but at their chief place of

[21] 3 C.P.D. 19.
[22] 32 L.J.Q.B. 318.
[23] 3 C.P.D. 18, 20.

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" carrying on their business, whatever it may be." That is the view expressed in a textbook issued only two years after the Rules of 1883. Moreover, it is reasonable to suppose that the draftsman in 1875 and again in 1883, when using the words " resides or carries on business," had in mind the meaning given in decided cases to similar words in the previous Acts. The previous Acts and these Rules are in pari materia. The relevant provisions of the previous Acts were determining in which county court an action should be brought or whether in a county court rather than the High Court. These Rules determine where appearance is to be entered in an action and thereby where the interlocutory proceedings are to be carried on.

What is there on the other side? A number of decided cases has been cited showing that for some purposes a corporation can have more than one residence and can be considered as carrying on business in more than one place. There are cases which apparently show that under the County Courts Acts an individual or firm can be considered as carrying on business in more than one place, though a corporation cannot: *Mitchell* v. *Hender*[24]; *Weatherley* v. *Calder & Co.*[25]; *Baillie* v. *Goodwin & Co.*[26]; *Dunlop Pneumatic Tyre Co.* v. *Actiongesselschaft, etc., vorm Cudell & Co.*[27]; *Newby* v. *Van Oppen & Colt's Patent Firearms Manufacturing Co.*[28]; *Swedish Central Railway Co.* v. *Thompson*[29]; *New York Life Assurance Co.* v. *Public Trustee.*[30]

Moreover a reasonable and convenient effect could be given to the Rules in question if the expression " carries on business " were understood according to its ordinary meaning, so that, if a company, though its principal office was elsewhere, had an establishment and carried on one of its principal activities in the area of a district registry, it could be sued in that district registry and would then have to enter its appearance there and the interlocutory proceedings would be conducted there, except that in a case of hardship an application could be made under Order 35, r. 16, to have the case transferred to the Central Office. In industrial accident cases I think there would normally be a saving of expense if the interlocutory proceedings were conducted in the district registry of the area in which the accident occurred.

Nevertheless, for the reasons which I have given above in treating the question historically, I feel overborne by the ancient decided cases and the ancient textbook, the 14th edition of Chitty's Archbold, and therefore compelled to decide that for the purposes of Order 12, r. 4 and r. 5, para. (1), a corporation carries on business at only one place, that is at its principal place of business.

There remains the question of fact as to where on that view

[24] (1854) 23 L.J.Q.B. 273.
[25] (1889) 61 L.T. 508.
[26] (1886) 33 Ch.D. 604.
[27] [1902] 1 K.B. 342.
[28] (1872) L.R. 7 Q.B. 293.
[29] [1925] A.C. 495; 41 T.L.R. 385.
[30] [1924] 2 Ch. 101; 40 T.L.R. 430.

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of the law this defendant company carries on business. [His Lordship read the affidavits submitted by the plaintiff and the defendant company, and continued:] Those are the facts, and, having regard to the railway cases, the *Keynsham* case,[31] and the *Aberystwith Promenade Pier Co.* case,[32] I find that for the purposes of these rules the defendant company carries on business at its head office in Piccadilly, London, and does not carry on business in the area of the Cardiff District Registry. The appeal therefore fails.

Appeal dismissed.
Leave to appeal.

Solicitors: *Manser, Phillips & Co. for Myer Cohen & Co., Barry; Rhys Roberts & Co. for C. J. Hardwicke & Co., Cardiff.*

E. M. W.

[31] 33 L.J.Ex. 41; 2 H. & C. 729. [32] 35 L.J.Q.B. 44.

[QUEEN'S BENCH DIVISION.]

*BALFOUR *v.* BARTY-KING AND ANOTHER. HYDER & SONS (BUILDERS) LTD., THIRD PARTIES.

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Apr. 27, 30; *May* 8.

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[1955 B. 2137.]

Negligence — Fire — Escape of — Fire due to negligence of workmen employed by occupier of premises—Liability of occupier for spread of fire to adjoining premises — Extra-hazardous acts — Need for special precautions—Effect of employing independent contractor.
Rylands v. *Fletcher—Fire—Escape to adjoining premises—Fire caused by use of blowlamp to defreeze pipes in roof—Lagging and straw in roof ignited—Whether blowlamp Rylands* v. *Fletcher object.*

A firm of builders, having been requested by the defendants to thaw out some frozen pipes in the roof of the defendants' premises, instructed two of their employees to do the work. The workmen were taken up into the roof by one of the defendants and, while using a blowlamp, negligently set fire to the premises by allowing the flame of the blowlamp to come into contact with some lagging or straw which was in the roof. The fire spread to the plaintiff's house, which was contiguous to that of the defendants, and caused damage. In a claim by the plaintiff against the defendants:—

Held, (1) that the fire having, due to negligence, begun on the defendants' premises and escaped to the plaintiff's land, the defendants were liable for the negligent acts which led to the fire of all persons except strangers; that the workmen being on the premises at the invitation of the defendants and acting as their agents were not strangers and the defendants were liable to the plaintiff for their negligence.

Turberville v. *Stampe* (1697) 1 Ld.Raym. 264 and *Mulholland & Tedd Ltd.* v. *Baker* [1939] 3 All E.R. 253 applied.

(2) That, apart from negligence, to use the blowlamp in the roof was, in the circumstances, a non-natural user of it and the

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blowlamp was an object of the class to which the rule in *Rylands* v. *Fletcher* applied, and even though the plaintiff had not proved that the defendants knew that the workmen were bringing the blowlamp on to the premises, the plaintiff was entitled to succeed against the defendants on this ground also.

Rylands v. *Fletcher* (1868) L.R. 3 H.L. 330; *West* v. *Bristol Tramways Co.* [1908] 2 K.B. 14; 24 T.L.R. 478; *Musgrove* v. *Pandelis* [1919] 2 K.B. 43; 35 T.L.R. 299 and dictum of Lord Porter in *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156, 176; 62 T.L.R. 646; [1946] 2 All E.R. 471 applied.

Per curiam. The plaintiff might also have relied on the principle that, in the case of extra-hazardous acts, i.e., acts which from their nature involve in the eyes of the law special danger to others, an obligation is imposed on the ultimate employers to take special precautions which they cannot delegate by having the work carried out by independent contractors.

ACTION.

The plaintiff, Elliott Archibald Balfour, sued Hugh David Barty-King and his wife Jennifer Barty-King for damages in respect of damage done to his premises known as White Cottage, Bitchett Wood, Sevenoaks, by a fire which originated on the defendants' premises and spread to the plaintiff's premises, which were contiguous thereto. By his statement of claim, the plaintiff claimed that on January 29, 1954, Mrs. Barty-King, on behalf of herself and her husband, invited two men named Rogers and Brown upon her premises, known as Tudor Wing, Bitchett Wood, and requested them to thaw out some frozen pipes which were in the attic of her premises. Around the pipes there were quantities of dry lagging, while between the rafters of the premises and the roof there were packed quantities of dry straw. The plaintiff alleged that at the express or implied request of the defendants Rogers and Brown applied the naked flame of a blowlamp to the pipes, thereby igniting the lagging or straw and causing the fire. The plaintiff claimed the agreed sum of £3,140 5s. The defendants did not admit that they were responsible for Rogers and Brown who, they alleged, were the servants or agents of Hyder & Sons (Builders) Ltd., who were independent contractors. They denied that they were guilty of negligence, and brought in Hyder & Sons (Builders) Ltd. as third parties, alleging that the fire was caused by the negligence of the third parties, their servants or agents. The defendants claimed from Lloyd's underwriters, under a policy of insurance in respect of the damage to their premises, and the underwriters paid them a total sum of £5,875, and they accordingly claimed against the third parties on behalf of the underwriters that sum, and in addition a declaration that they were entitled to be indemnified by the third parties. The third parties denied that Rogers and Brown were thawing out the pipes as their servants or agents. Alternatively, if they were they denied that their servants or agents were negligent, or that their negligence was the cause of the fire.

Brown in evidence, which was substantially confirmed by Rogers, stated that they were in the general employment of the third parties. Brown stated that on the afternoon of January 29, 1954, having received some instructions from the general foreman to thaw out the pipes, he was admitted to Tudor Wing by Mrs. Barty-King, who supplied them with an electric hand-lamp. He and Rogers then proceeded to trace the pipe, in order to discover the part which was frozen. The particular part of the pipe upon which he was proposing to use the flame of the blowlamp was not lagged. The rafters of the roof were covered with under-felt, and there were pieces of straw all over the roof space. Rogers held the electric lamp and Brown applied the flame to different parts of the pipe, and as he did so the flame touched the lagging which immediately burst into flame. Both Rogers and he tried to beat it out with their hands but it just spread. He stated that there was a steady draught all the time in the loft which caused the sparks to fly as he and Rogers beat it. In about thirty seconds the fire was beyond control.

Havers J. found that the fire did not begin accidentally within the meaning of the Fires Prevention (Metropolis) Act, 1774, but was due to the negligent use of the blowlamp by Brown in his capacity as servant of the third parties; that it was negligent to use the blowlamp in the roof in the condition in which it was; that the defendants gave an order to the foreman of the third parties to attend to the pipes and that the foreman accepted that order on behalf of the third parties and instructed Rogers and Brown to do the work; that Rogers and Brown were on the premises at the invitation of the defendants as occupiers; that the third parties were vicariously responsible to the defendants for the negligence of Brown, and that they themselves were negligent in that their foreman knew or ought to have known of the inflammable nature of the roof and nevertheless caused Rogers and Brown to use the blowlamp in it.

John Thompson Q.C. and *Bernard Caulfield* for the plaintiff. *Melford Stevenson Q.C.* and *G. H. Crispin* for the defendants. *Leslie Scarman* and *Alan Orr* for the third parties.

Cur. adv. vult.

May 8. HAVERS J. stated the facts and continued: On those facts I have now to consider the law. The plaintiff put his case before me on three alternative bases: first, on the basis that the fire which caused the damage to his premises negligently originated on the defendants' premises by the conduct of persons who were there at the invitation of the defendants, and that that fire subsequently escaped to his premises; secondly, on the basis of the rule in *Rylands* v. *Fletcher* [1]; and, thirdly, on the general principle which is expressed in the maxim sic utere tuo ut alienum

[1] (1868) L.R. 3 H.L. 330.

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non laedas, as particularly exemplified in the decision of the Court of Appeal in *Honeywill and Stein, Ltd.* v. *Larkin Brothers, Ltd.*[2] The principle is that if a man does work on or near another's property which involves danger to the property, unless proper care is taken, he is liable to the owners of the property for damage resulting to it from his failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether as agent, servant or otherwise, to do it for him.

I deal first with the first head of liability, upon which I refer to *Musgrove* v. *Pandelis*.[3] There Bankes L.J., who gave the leading judgment in the Court of Appeal, said[4]: "Section 86, of "this Act [Fires Prevention (Metropolis) Act, 1774], was passed "to take the place of a section in almost the same words of "the Act of 6 Ann, c. 31, section 6. In order to see what "alteration these statutes effected it is material to consider the "state of the law before the earlier statute was passed. A man "was liable at common law for damage done by fire originating "on his own property (1) for the mere escape of the fire; (2) if "the fire was caused by the negligence of himself or his servants, "or by his own wilful act; (3) upon the principle of *Rylands* v. "*Fletcher*.[5] This principle was not then known by that name, "because *Rylands* v. *Fletcher*[5] was not then decided; but it was "an existing principle of the common law as I shall show "presently. The alteration which those statutes effected was to "give protection in cases falling under the first heading of liability "mentioned above. It is thus stated by Lord Denman C.J. in "*Filliter* v. *Phippard*[6]: 'The ancient law, or rather custom of "'England, appears to have been, that a person in whose house "'a fire originated, which afterwards spread to his neighbour's "'property and destroyed it, must make good the loss.' That "was the principle of the common law to which the statutes "were directed. They altered the law so as to exclude the "liability of a 'person in whose house, chamber, stable, barn, "'or other building, or on whose estate any fire shall . . . "'accidentally begin.' It is plain that the statutes did not touch "the other heads of liability at common law."

This was followed by Asquith J. in *Mulholland & Tedd, Ltd.* v. *Baker*.[7] Asquith J. said[8]: "The plaintiffs put their claim "originally on three alternative bases, (i) on the basis that the "defendant negligently permitted fire to escape on to his "premises, (ii) on the basis of nuisance, or (iii) on the basis of "the rule in *Rylands* v. *Fletcher*.[9] During the hearing, counsel "for the plaintiffs abandoned the second ground and relied only "on the first and third. As to the first ground, at common

[2] [1934] 1 K.B. 191; 50 T.L.R. 56.
[3] [1919] 2 K.B. 43; 35 T.L.R. 299.
[4] [1919] 2 K.B. 43, 46.
[5] L.R. 3 H.L. 330.
[6] (1847) 11 Q.B. 347.
[7] [1939] 3 All E.R. 253.
[8] Ibid. 255.
[9] L.R. 3 H.L. 330.

" law the liability for injury done to a neighbour by fire escaping " from one's own premises was a strict liability, independent of " negligence. However, by reason of the Fires Prevention " (Metropolis) Act, 1774, which exempts the defendant in the " case of a fire beginning on his premises ' accidentally ' (a " term which has been construed to mean ' without negligence '), " a plaintiff must now establish negligence."

I have found that the fire, which originated on the defendants' premises, did not begin accidentally within the meaning of that Act, but was due to negligence on the part of Brown, a servant of the third parties, who was in these premises under a contract between the defendant and the third parties. Mr. Thompson, on behalf of the plaintiff, contended that on these facts the defendants were liable, and that it was not necessary for him to prove that the negligence was the personal negligence of the defendants or their servants. He contended that the defendants were liable unless they could prove that the fire was due to the act of a stranger, or could bring themselves within one or other of the recognized exceptions to the rule in *Rylands* v. *Fletcher*.[10] In *Turberville* v. *Stampe* [11] Holt C.J. said [12]: " if a stranger set fire " to my house, and it burns my neighbour's house, no action will " lie against me "; but a man is responsible for the fault of his servant, his wife, his guest, or one entering his house with his leave or assent.

I was referred to a number of passages in Salmond on Torts, 11th ed., for clarification of " a stranger " within the meaning of this rule. At p. 135 the learned author says, under the heading of " Cases of absolute or strict liability ": " Where the act " which the contractor is employed to do is one of the kind which " the employer does at his own peril—so that the existence of " negligence is immaterial—it is no defence that the cause of the " mischief was the negligence of an independent contractor by " whose agency the act was done. Thus where the owner of a " factory is under an absolute statutory duty to supply certain " safeguards for his workmen—e.g., to guard dangerous machinery " —he is equally liable whether the failure to perform this duty " is the act of himself or his servants or is the act of an indepen- " dent contractor to whom the duty was delegated by him. On " the same principle a person from whose land a destructive fire " spreads to the land of his neighbour cannot defend himself by " the plea that the direct cause of the mischief was the negligence " of his agents." Then at p. 640 there appears this passage: " the question arises: For whose negligence in the matter of " fire is the occupier of the land responsible; only for his own, " or also vicariously for that of other persons? This question is " left open by *Filliter* v. *Phippard*,[13], but receives a partial " answer in the case of *Black* v. *Christchurch Finance Co.*,[14]

[10] L.R. 3 H.L. 330.
[11] (1697) 1 Ld.Raym. 264.
[12] Ibid.
[13] 11 Q.B. 347.
[14] [1894] A.C. 48.

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" in which the occupier was held liable for the act of an indepen-
" dent contractor who negligently and in disregard of his instruc-
" tions lit a fire on the defendant's property at a dangerous and
" improper season of the year. There seems no reason for
" supposing that the liability of an occupier for damage by fire
" is any more restricted than his liability for the escape of any
" other dangerous substance." At p. 641 there appears this passage: " The present law is a rule of vicarious liability for the
" negligent acts of all persons except mere strangers—not a rule
" of absolute liability for accidents for which no one is to blame."

Mr. Melford Stevenson, for the defendants, contended before me on these facts that the defendants were not liable to the plaintiff, and he referred me to some authorities which he said illustrated the standard of care which it was essential to take in certain operations. One of these authorities was *Honeywill and Stein, Ltd.* v. *Larkin Brothers, Ltd.*,[15] to which I have already referred. The head-note to that case reads: " Where a
" person employs an independent contractor to do work which
" involves special danger to another's premises, he must take
" reasonable precautions to see that the work does not cause
" damage to the premises. Where, therefore, the plaintiffs had
" procured the defendants, as independent contractors, to take
" photographs of the interior of a cinematograph theatre, and
" owing to the defendants' negligence the premises were damaged
" by fire:—*Held*, reversing the judgment of Bennett J., that the
" plaintiffs were liable to the owners of the theatre for the damage
" caused by the negligence of the defendants, and therefore were
" entitled to recover damages from the defendants for breach of
" contract or negligence in taking the photographs." Slesser L.J., reading the judgment of the court, said [16]: " It is well estab-
" lished as a general rule of English law that an employer is not
" liable for the acts of his independent contractor in the same way
" as he is for the acts of his servants or agents, even though
" these acts are done in carrying out the work for his benefit under
" the contract. The determination whether the actual wrong-
" doer is a servant or agent on the one hand or an independent
" contractor on the other depends on whether or not the employer
" not only determines what is to be done, but retains the control
" of the actual performance, in which case the doer is a servant
" or agent; but if the employer, while prescribing the work to be
" done, leaves the manner of doing it to the control of the doer,
" the latter is an independent contractor. Cases like *Laugher* v.
" *Pointer* [17] and *Reedie* v. *London & North Western Railway*
" *Co.*[18] state the general rule of law that the ultimate employer is
" not responsible for the negligence of the independent contractor
" or his men. It was said by Lord Blackburn in *Dalton* v.
" *Angus* [19]: 'Ever since *Quarman* v. *Burnett* [20] it has been

[15] [1934] 1 K.B. 191.
[16] Ibid. 196, 197.
[17] (1826) 5 B. & C. 547.
[18] (1849) 4 Ex. 244.
[19] (1881) 6 App.Cas. 740, 829.
[20] (1840) 6 M. & W. 499.

" ' considered settled law that one employing another is not liable " ' for his collateral negligence unless the relation of master and " ' servant existed between them. So that a person employing a " ' contractor to do work is not liable for the negligence of that " ' contractor or his servants. On the other hand, a person caus- " ' ing something to be done, the doing of which casts on him a " ' duty, cannot escape from the responsibility attaching on him " ' of seeing that duty performed by delegating it to a contractor. " ' He may bargain with the contractor that he shall perform the " ' duty and stipulate for an indemnity from him if it is not " ' performed, but he cannot thereby relieve himself from liability " ' to those injured by the failure to perform it: *Hole* v. *Sitting-* " ' *bourne and Sheerness Ry. Co.*[21]; *Pickard* v. *Smith*[22]; *Tarry* " ' v. *Ashton.*[23] ' But there are exceptions to this rule; it may " be that, as in other cases of vicarious liability, the tendency of " the English law, as it has developed since the dates of the cases " just mentioned, has been rather to enlarge the scope of these " exceptions, but the development has followed certain broad " lines. It is clear that the ultimate employer is not responsible " for the acts of an independent contractor merely because what " is to be done will involve danger to others if negligently done. " The incidence of this liability is limited to certain defined " classes, and for the purpose of this case it is only necessary to " consider that part of this rule of liability which has reference " to extra-hazardous acts, that is, acts which, in their very nature, " involve in the eyes of the law special danger to others; of such " acts the causing of fire and explosion are obvious and estab- " lished instances."

Later Slesser L.J. said[24]: " The decision in this case, in our " judgment, does not depend merely on the fact that the defen- " dants were doing work on the highway, but primarily on its " dangerous character, which imposes on the ultimate employers " an obligation to take special precautions, and they cannot " delegate this obligation by having the work carried out by " independent contractors." He finished up in this way[25]: " The learned judge has found for the respondents because he " has held (founding himself on the words of Lord Watson in " *Dalton* v. *Angus*[26]) that the work to be done by the respondents " for the appellants ' was not necessarily attended with risk. It " ' was work which, as a general rule, would seem to be of quite " ' a harmless nature.' But, with respect, he is ignoring the " special rules which apply to extra-hazardous or dangerous " operations. Even of these it may be predicated that if care- " fully and skilfully performed, no harm will follow: as instances " of such operations may be given those of removing support " from adjoining houses, doing dangerous work on the highway, " or creating fire or explosion: hence it may be said, in one sense,

[21] (1861) 6 H. & N. 488.
[22] (1861) 10 C.B.(N.S.) 470.
[23] (1876) 1 Q.B.D. 314.
[24] [1934] 1 K.B. 191, 199.
[25] Ibid. 200.
[26] 6 App.Cas. 740, 831.

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" that such operations are not necessarily attended with risk. But " the rule of liability for independent contractors' acts attaches to " these operations, because they are inherently dangerous, and " hence are done at the principal employer's peril."

Mr. Melford Stevenson contended before me that in the light of this authority an order to a contractor to thaw out frozen pipes is not an operation from which in the natural course of things injurious consequences can be expected to flow. In support of his argument he also cited the judgment of Atkinson J. in *Spicer* v. *Smee*.[27] The only passage to which I need refer is[28]: " usually a man is not liable for the default of an indepen- " dent contractor, but in the law of nuisance an exception " exists. I have already referred to what was said by " Scrutton L.J. in *Job Edwards, Ltd.* v. *Birmingham Navi-* " *gations*.[29] Winfield on Torts also deals with this contention and " states that it does not apply in the case of nuisance. The " principle which governs these cases is that which was laid down " in *Bower* v. *Peate*[30] by Cockburn C.J. Having explained that " normally a man is not liable for the negligence of the contractor, " Cockburn C.J. goes on to say[31] that ' this reasoning cannot pre- " ' vail ' where: ' . . . he directs an act to be done from which " ' injurious consequences will result unless means are taken to " ' prevent them in the shape of additional work, but omits to " ' direct the latter to be done as part of the work to be executed, " ' contenting himself with securing to himself a pecuniary indem- " ' nity in the event of any claim arising from damage to the " ' adjoining property. He is, therefore, not in the position of a " ' man who has simply authorised and contracted for the execu- " ' tion of a work from which, if executed with due care, no injury " ' can arise, and who is, therefore, not to be held responsible if, " ' while the work is going on, injury arises from the negligence of " ' the contractor or his servants. The answer to the defendant's " ' contention may, however, as it appears to us, be placed on a " ' broader ground, namely, that a man who orders a work to be " ' executed, from which, in the natural course of things, injurious " ' consequences to his neighbour must be expected to arise, " ' unless means are adopted by which such consequences may be " ' prevented, is bound to see to the doing of that which is neces- " ' sary to prevent the mischief, and cannot relieve himself of his " ' responsibility by employing some one else—whether it be the " ' contractor employed to do the work from which the danger " ' arises or some independent person—to do what is necessary to " ' prevent the act he has ordered to be done from becoming " ' wrongful.' I think that is the broad principle, which was " approved by Lord Blackburn in *Dalton* v. *Angus*[32] and in " *Penny* v. *Wimbledon Urban Council*[33] that, where danger is

[27] [1946] 1 All E.R. 489.
[28] Ibid. 495.
[29] [1924] 1 K.B. 341.
[30] (1876) 1 Q.B.D. 321.
[31] Ibid. 325, 326.
[32] 6 App.Cas. 740.
[33] [1899] 2 Q.B. 72.

"likely to arise unless work is properly done, there is a duty to "see that it is properly done."

Professor Winfield at one time, in his well-known book on Torts, regarded this as a separate tort, which he described as the tort of dangerous operations. There has, however, since been some criticism of that theory. The principle seems to be that, in the case of extra-hazardous acts, that is, acts which from their nature involve in the eyes of the law special danger to others, an obligation is imposed upon the ultimate employers to take special precautions which they cannot delegate by having the work carried out by independent contractors. Now, a plaintiff whose house has been damaged by an escape of fire from a neighbouring house may in some cases be able to invoke this principle. For instance, in *The Pass of Ballater* [34] one finds this passage in the judgment of Langton J.[35]: "where the "introduction of implements or substances dangerous in them-"selves, such as flame-bearing instruments or explosives, are "necessarily incidental to the work to be performed, a contractor "is equally bound by an unescapable duty. The point may "perhaps be crystallized by saying that he has not merely a "duty to take care but a duty to provide that care is taken."

The plaintiff did rely on this principle as the third basis of liability, but he is not bound to do so, and, in my view, if he proves that the fire which began on the defendants' premises or land and escaped to his own land began negligently, the defendants are liable for the negligent acts of all persons except strangers, and, in my view, Brown and Rogers, who were there at the invitation of Mrs. Barty-King, and acted as agents on behalf of herself and her husband, were not strangers within the meaning of this rule. On this ground, therefore, I hold that the plaintiff is entitled to succeed against the defendants on the first basis of liability.

The second basis of liability upon which the plaintiff put his claim was that a spreading fire is in itself a *Rylands* v. *Fletcher* [36] object, but if it has its source in something which is also itself a *Rylands* v. *Fletcher* [36] object, then the statute to which I have referred does not afford a good defence, and it is not necessary for the plaintiff, it is said, to prove that the fire was not accidental. For this proposition *Musgrove* v. *Pandelis* [37] was cited as the authority. Bankes L.J., after the passage to which I have already referred, said [38]: "It "is plain that the statutes did not touch the other heads of "liability at common law" (which were (2) if the fire was caused by the negligence of himself or his servants, or by his own wilful acts; (3) upon the principle of *Rylands* v. *Fletcher*). "The second head is not within the protection; that was decided

[34] [1942] P. 112; 58 T.L.R. 221; [1942] 2 All E.R. 79.
[35] [1942] P. 112, 117.
[36] L.R. 3 H.L. 330.
[37] [1919] 2 K.B. 43.
[38] Ibid. 47.

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"by *Filliter* v. *Phippard*,[39] where it was held that the Act of "George III did not apply to a fire which was caused either "deliberately or negligently. Why, if that is the law as to the "second head of liability, should it be otherwise as to the third "head, the liability on the principle of *Rylands* v. *Fletcher*? "If that liability existed, there is no reason why the statute "should alter it and yet leave untouched the liability for fire "caused by negligence or design. That the principle of *Rylands* "v. *Fletcher* existed long before that case was decided is plain. "In *Vaughan* v. *Menlove*[40] Tindal C.J. says: 'There is a rule "'of law which says you must so enjoy your own property as "'not to injure that of another.' Park J. says: 'Although the "'facts in this case are new in specie, they fall within a principle "'long established, that a man must so use his own property "'as not to injure that of others.' *Rylands* v. *Fletcher* is merely "an illustration of that old principle, and in my opinion Lush J. "was right in saying that this case, if it falls within that principle, "is not within the protection of the statute."

Warrington L.J., after citing *Turberville* v. *Stampe*,[41] to which I have already referred, said[42]: "The Act of George III is "no protection against that liability." Duke L.J. said[43]: "I "agree. I do not see how this case can be taken out of the "principle of *Rylands* v. *Fletcher*,[44] which was thus stated by "Lord Cairns L.C. in the very words of Blackburn J.[45]," and then he sets out the classic passage. He then said[46]: "That "was no new principle. It is summed up in the maxim usually "expressed in Latin, but found in *Filliter* v. *Phippard*[47] and "*Vaughan* v. *Menlove*,[48] that a man must so use his own "property that he does not hurt the property of his neighbour."

That decision was followed also by Asquith J. in *Mulholland & Tedd Ltd.* v. *Baker*,[49] in which he said: "If I am wrong in "finding that the fire was caused by the negligence of the defen- "dant, I still think that the plaintiffs are in this case entitled to "succeed on the principle of *Rylands* v. *Fletcher*.[50] The Fires "Prevention (Metropolis) Act, 1774, which in effect provides that "negligence is a condition of liability in the case of a fire "spreading from a defendant's premises to a plaintiff's, has "been held not to apply in cases in which the defendant has "brought on his premises an object likely to do damage if it is "not kept under control and that object catches fire or causes a "fire: *Musgrove* v. *Pandelis*.[51] In that case, it was held that "a motor car containing petrol and ready to start was such an "object. Fire originated somehow in the carburettor, without "negligence, and spread to a whole garage, including the part

[39] 11 Q.B. 347.
[40] (1837) 3 Bing.N.C. 468.
[41] (1698) 1 Salk. 13.
[42] [1919] 2 K.B. 49.
[43] Ibid. 50.
[44] L.R. 3 H.L. 330.
[45] Ibid. 339.
[46] [1919] 2 K.B. 51.
[47] 11 Q.B. 347.
[48] 3 Bing.N.C. 468.
[49] [1939] 3 All E.R. 253, 256.
[50] L.R. 3 H.L. 330.
[51] [1919] 2 K.B. 43.

"occupied by the plaintiff, who sued and recovered. Paraffin "is no doubt considerably less inflammable than petrol, yet it "seems to me that 20 gallons of paraffin collected in a drum on "the defendant's premises constituted a thing likely to do "damage unless kept under proper control, and that the rule of "strict liability laid down in *Rylands* v. *Fletcher* applies."

Mr. Melford Stevenson called my attention to a passage in the judgment of Romer L.J. in *Collingwood* v. *Home & Colonial Stores Ltd.*,[52] where he said: "I only desire to add this. I "think at some time it will be desirable if the House of Lords "would consider the case of *Musgrove* v. *Pandelis*,[53] so far as "the decision in that case was based upon *Rylands* v. *Fletcher*.[54] "Of course the rule in *Rylands* v. *Fletcher*, as is well known, "is a rule which relates to the escape from somebody's premises "of a dangerous animal or thing brought by the owner upon "those premises, and does not relate to a case like the present, "or a case like the Court of Appeal had to deal with in *Musgrove* "v. *Pandelis*,[55] where there had been an escape of nothing from "the defendant's premises. But the rule in *Rylands* v. *Fletcher*, "as has frequently been pointed out, is based upon a much "wider principle, namely, the principle 'Sic utere tuo ut "'alienum non laedas,' and there is no doubt in *Musgrove's* "case the Court of Appeal were referring to *Rylands* v. *Fletcher* "as being based upon that wider principle. But what will have "to be considered is whether *Musgrove* v. *Pandelis*, so far as "it purports to be based on that larger principle, can be sup-"ported seeing that the decision involves these two propositions, "(i) that a motor car is—I am quoting from the judgment of "Bankes, L.J., a dangerous thing to bring into a garage, and "(ii) that the use of one's land for the purpose of erecting a "garage and keeping a motor car there, is not an ordinary and "proper user of the land—two propositions which, but for that "authority, I should myself respectfully have doubted."

However, in a recent case in the Court of Appeal—*Perry* v. *Kendricks Transport Ltd.*[56]—Parker L.J. said[57]: "I agree, and "I would only add a word in deference to Mr. King-Hamilton's "argument on his submission in regard to the rule in *Rylands* v. "*Fletcher*.[58] Though the decision in *Musgrove* v. *Pandelis*[59] has "been the subject of some criticism (see the speech of Lord Porter "in *Read* v. *J. Lyons & Co. Ltd.*[60]), it is still binding upon this "court. Accordingly, I feel bound to approach the matter upon "the basis that the facts here bring the case within the rule in "*Rylands* v. *Fletcher*: nor do I think it is open to this court "to hold that the rule only applies to damage to adjoining land

[52] [1936] 3 All E.R. 200, 208.
[53] [1919] 2 K.B. 43.
[54] L.R. 3 H.L. 330.
[55] [1919] 2 K.B. 43.
[56] [1956] 1 W.L.R. 85; [1956] 1 All E.R. 154.
[57] Ibid. 92.
[58] L.R. 3 H.L. 330.
[59] [1919] 2 K.B. 43.
[60] [1947] A.C. 156.

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" or to a proprietary interest in land and not to personal injury. " It is true that in *Read* v. *J. Lyons & Co. Ltd.*[60] Lord Mac- " millan, Lord Porter and Lord Simonds all doubted whether the " rule extended to cover personal injuries, but the final decision " in the matter was expressly left over and, as the matter stands " at present, I think we are bound to hold that the defendants " are liable in this case, quite apart from negligence, unless they " can bring themselves within one of the well-known exceptions " to the rule."

As Parker L.J. pointed out, *Musgrove* v. *Pandelis*[61] is binding upon the Court of Appeal, and, of course, it is binding upon me.

The next point taken by Mr. Melford Stevenson was that a blowlamp, and a fortiori an unlighted blowlamp, is not an object of the class to which the rule in *Rylands* v. *Fletcher* applies, that is to say, a dangerous thing, so that the defendants were not—at least, so Mr. Melford Stevenson contends—under an obligation under this rule to prevent it or the dangerous element in it from escaping onto a neighbour's land and doing damage there. The classic passage from the judgment of Blackburn J., cited and approved in the speech of Lord Cairns L.C., was in these terms[62]: " We think that the true rule of law is, that the " person who, for his own purposes, brings on his land and " collects and keeps there anything likely to do mischief if it " escapes, must keep it in at his peril; and if he does not do so, " is *prima facie* answerable for all the damage which is the natural " consequence of its escape."

The question I have to consider, therefore, is: is a blowlamp —and for this purpose I have to consider an ignited blowlamp— an object of the class to which the rule in *Rylands* v. *Fletcher* applies? There are some helpful observations in the speech of Lord Porter in *Read* v. *J. Lyons & Co. Ltd.*[63] He said[64]: " To " make the rule [in *Rylands* v. *Fletcher*] applicable it is at least " necessary for the person whom it is sought to hold liable to " have brought on to his premises or at any rate to some place " over which he has a measure of control, something which is " dangerous in the sense that, if it escapes, it will do damage. " Possibly a further requisite is that to bring the thing to the " position in which it is found is to make a non-natural use of that " place. Such at any rate appears to have been the opinion of " Lord Cairns L.C. and this limitation has more than once been " repeated and approved—see *Rickards* v. *Lothian*,[65] per Lord " Moulton. Manifestly these requirements must give rise to " difficulty in applying the rule in individual cases and necessitate " at least a decision as to what can be dangerous and what is a " non-natural use. Indeed, there is a considerable body of case " law dealing with these questions and a series of findings or " assumptions as to what is sufficient to establish their existence.

[60] [1947] A.C. 156.
[61] [1919] 2 K.B. 43.
[62] L.R. 3 H.L. 330, 339.
[63] [1947] A.C. 156.
[64] Ibid. 175, 176.
[65] [1913] A.C. 263, 280.

"Amongst dangerous objects have been held to be included, "gas, explosive substances, electricity, oil, fumes, rusty wire, "poisonous vegetation, vibrations, a flagpole and even dwellers "in caravans. Furthermore, in *Musgrove* v. *Pandelis* [66] it was "held that a motor car brought into a garage with full tanks was "a dangerous object, a conclusion, which as Romer L.J. pointed "out in *Collingwood* v. *Home & Colonial Stores Ltd.*,[67] involves "the propositions '(1) that a motor car is . . . a dangerous "'thing to bring into a garage, and (2) that the use of one's "'land for the purpose of erecting a garage and keeping a motor "'car there is not an ordinary or proper user of the land.' My "Lords, if these questions ever come directly before this House "it may become necessary to lay down principles for their "determination. For the present I need only say that each "seems to be a question of fact subject to a ruling of the judge "as to whether the particular object can be dangerous or the "particular use can be non-natural, and in deciding this question "I think that all the circumstances of the time and place and "practice of mankind must be taken into consideration so that "what might be regarded as dangerous or non-natural may vary "according to those circumstances."

I apply, therefore, the rule which Lord Porter suggests as the appropriate test for a judge to make, that is, to have regard to all the circumstances of the time and place and practice of mankind.

It appears that the user of a blowlamp for the purpose of thawing out a pipe is a recognized method of thawing out a pipe in an appropriate place and appropriate circumstances, but in other places it is not only not a recognized practice, but it is an extremely dangerous practice, and one which no prudent workman or contractor would have adopted. I have to have regard to all the circumstances of time and place and the practice of the trade, and, applying that test, I feel constrained to come to the conclusion that the user of the blowlamp in these particular circumstances in this loft, so close to all this combustible material, did constitute the blowlamp an object of the class to which the rule in *Rylands* v. *Fletcher* [68] applies. I hold, therefore, in so far as it is a question of law for me, that the user of the blowlamp in this place by Brown under these circumstances was dangerous, and that it was likely to do mischief if the dangerous element in it, that is to say, the fire, escaped. I also hold, if it is a necessary requisite for the application of the rule in *Rylands* v. *Fletcher* [68] to this case, that to bring the blowlamp to this position in which it was ignited and used was to make a non-natural user of that place. It was a special user, bringing with it increased danger to others, and was not merely the ordinary user of the land. I hold, therefore, that the blowlamp was, in the circumstances, an object of the class to which the rule in *Rylands* v. *Fletcher* [68] applies.

[66] [1919] 2 K.B. 43.
[67] [1936] 3 All E.R. 200, 208.
[68] L.R. 3 H.L. 330.

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HAVERS J.

The next point taken by Mr. Melford Stevenson was that there was an onus upon the plaintiff to prove that the defendants knew that Brown and Rogers were bringing the blowlamp onto their premises, and that, as this was not proved, the rule in *Rylands* v. *Fletcher* [68] had no application. The evidence was conflicting with regard to the facts upon this issue. There was some conflict as to whether or not one of the two men, Brown and Rogers, had a blowlamp in his hand when he came into the defendants' premises or whether they had a bag with them, and, if so, whether the blowlamp was in the bag. Mrs. Barty-King's recollection was that they had tools with them. She said that one of them had a bag-like thing with the tools, so far as she could remember, but she did not know if one of them had a blowlamp in his hand. Brown said they did have tools with them, a blowlamp, lagging and wire. The tools were loose, and he thought it was obvious to Mrs. Barty-King what they had with them. He was not certain that he had the bag and he did not know whether he carried the blowlamp in his bag or in his hand. Mr. Rogers said: "We only had a blowlamp with "us," and he was quite certain that they did not have a bag of tools.

One cannot, of course, criticize any of these witnesses for not having a clear recollection of details such as these of an event which happened some two years or so ago. Unfortunately, neither Brown nor Mrs. Barty-King had a clear recollection whether the men did have a bag with them or whether the blowlamp was carried in the hand of one of them. Rogers was the only one who was certain they did not have a bag with them. Though one would rather expect that they would have had a bag with them, as neither Brown nor Mrs. Barty-King has a clear recollection about it and Rogers has, I think I ought to accept his evidence on that point, unless I have reason to doubt him as a witness, and I do not think I have on this point. If so, one of these two men, and I think clearly Brown, must have had a blowlamp in his hand when he came to Mrs. Barty-King's house. I think this rather gains support from the fact that according to Brown he had filled it up in the yard between Mrs. Bolton's house and Mrs. Barty-King's house.

It is clear from the evidence of Mrs. Barty-King, which I accept, that she left it to the third parties to decide how the pipes were to be thawed. She did not know that they had not got a hot brick with them. She said she did not know how they were going to thaw the pipes, and she may well not have appreciated that they were going to use a blowlamp. I do not think that she consciously directed her mind to the question at all, but she left it to the persons whom she considered the proper persons to do it, and she really was not concerned with the particular way of setting about it.

[68] L.R. 3 H.L. 330.

In those circumstances, I have some sympathy with the argument of Mr. Melford Stevenson upon this point, but it would seem to me that I am constrained by authority to find against him. The point arose in *West* v. *Bristol Tramways Co.*[69] The headnote to that case reads: "The defendants, a tramway "company, who were by their special Act under an obligation "to pave certain parts of a road, on which their tramway "was laid, with wood paving, used for that purpose wood "blocks coated with creosote. The fumes given off by the "creosote injured plants and shrubs belonging to the plaintiff, "a market gardener, whose premises were near the road. There "was another kind of wood paving in use which the defendants "might have used, and which could not have caused injury to "the plaintiff's plants and shrubs. In an action by the plaintiff "in respect of the damage caused as above mentioned, the jury "found that it was reasonably necessary for the defendants to "pave the road as they did according to their knowledge at the "time, but that in the light of the evidence given at the trial it "was not reasonably necessary:—*Held* (affirming the decision "of a Divisional Court), that the defendants were not authorized "by their special Act to use the particular kind of wood paving "which they had used, and that, although they did not know "that the use of creosoted wood might cause damage, and were "not guilty of negligence, they were, upon the principle laid "down in *Fletcher* v. *Rylands*, liable to the plaintiff in respect "of the damage sustained by him."

The judgment of Phillimore J., who gave the leading judgment in the Divisional Court, appears in the footnote.[70] He said: "In "these circumstances the onus is on the defendants to justify the "use of this particular kind of wood pavement; but, where a man "uses his land or his chattel in such a way as to injure his neigh-"bour's property, it is not a justification to say that he had no "intention of causing the injury complained of, or that he did not "know, or even that there was no reason why he should know, "that the injury would be caused."

Lord Alverstone, who gave the leading judgment in the Court of Appeal, cites the following passage in Garrett on Nuisances[71]: "'Where the owner of land uses his land for any purpose for "'which it may in the ordinary course of enjoyment of land be "'used, he will not, in the absence of negligence on his part, be "'liable, though damage result to his neighbour in the ordinary "'enjoyment by the latter of his property; for it lies with the "'latter to protect himself from the operation of natural laws. "'But, if the owner of land uses it for any purpose which from "'its character may be called non-natural or extraordinary user, "'such as, for example, the introduction on to the land of some-"'thing which in the natural condition of the land is not upon it, "'he does so at his peril, and is liable if sensible damage results to

[69] [1908] 2 K.B. 14; 24 T.L.R. 478.

[70] [1908] 2 K.B. 14, 16.

[71] Ibid. 19.

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Havers J.

" ' his neighbour's land from its escape, or if the latter's legiti-
" ' mate enjoyment of his land is thereby materially curtailed.'
" If the contention of the defendants' counsel in this case is
" correct, this last proposition is stated much too widely; for they
" contend that the owner of land who has so acted has not done
" so at his peril, and is not liable, unless the plaintiff shews that
" the thing introduced on to the land was, to the knowledge of the
" defendant, likely to escape and cause damage. The authorities
" do not, in my opinion, support the suggestion that this onus is
" cast on the party injured."

In those circumstances, I find myself unable to accept the argument of Mr. Melford Stevenson, and I hold that the plaintiff is entitled to succeed also upon the basis of the rule in *Rylands* v. *Fletcher*. It is not, therefore, necessary for me to determine the third basis upon which the plaintiff put his case, which was upon the broad maxim, sic utere tuo ut alienum non laedas, as exemplified in *Honeywill and Stein, Ltd.* v. *Larkin Brothers, Ltd.*,[72] and also in *Hughes* v. *Percival*.[73] It follows, therefore, that the plaintiff is entitled to judgment against the defendants for the agreed sum of £3,140 5s. It follows also that the defendants are entitled to judgment against the third parties for £5,875 and £3,140 5s.

Judgment for the plaintiff against the defendants for £3,140 5s.

Judgment for the defendants against the third parties for £9,015 5s.

Solicitors: *Barlow, Lyde & Gilbert; Boodle, Hatfield & Co.; Oswald Hickson, Collier & Co. for Bracher, Son & Miskin, Maidstone.*

J. D. P.

[72] [1934] 1 K.B. 191. [73] (1883) 8 App.Cas. 443.

[CHANCERY DIVISION.]

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Apr. 26, 27; *May* 1, 18.

Upjohn J.

*EVANS MEDICAL SUPPLIES LTD. *v.* MORIARTY (INSPECTOR OF TAXES).

Revenue—Income tax—Capital or income receipt—Sale of "know-how" by manufacturing chemists to Burmese Government—To aid establishment of pharmaceutical industry in Burma—Not a trade receipt—Receipt from sale of capital asset—Depreciation of capital asset—Meaning of "know how"—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 123 (*Sch. D, Case I*).

A company which carried on the business of manufacturing chemists and wholesale druggists entered into an agreement with the Government of Burma, by which the company agreed to assist the Government in the establishment of a pharmaceutical industry. Under the terms of the agreement the company was to supply

technical data and designs for the erection of the factory and the installation of machinery required for the manufacture of the pharmaceutical products. They were also to disclose to the Government the secret processes used by them in the preparation, storage and packaging of the various pharmaceutical products, which were of great value to the company, the products themselves being of known composition. These processes had never been disclosed before to anyone else, and during the seven years' currency of the agreement the company agreed not to disclose them to anyone else in Burma. The company was permitted to continue its agency in Burma, but that agency would become of less value as the Burmese Government established their own industry. The consideration for the agreement included a lump sum payment of £100,000.

Held, (1) that on the evidence this was not a sum received by the company from the exploitation of its trade, and the company was not chargeable to tax on it as part of its annual profits or gains from any trading carried on by it.

(2) That the company, by the sale of its "know-how" to the Burmese Government, had parted for ever with a valuable asset, and this was, accordingly, a payment for the sale of a capital asset which was not chargeable to tax as an income receipt.

Withers v. *Nethersole*, 64 T.L.R. 157; [1948] 1 All E.R. 400; sub nom. *Nethersole* v. *Withers* (1946) 28 T.C. 501, 515, applied.

Semble, that the sale had resulted in the depreciation of a capital asset by enabling the Burmese to set up an industry in competition with the company, although depreciation of the asset was not a necessary ingredient to support the sale of a capital asset.

APPEAL from the Special Commissioners for the purposes of the Income Tax Acts.

The assessment to income tax of the appellant company, Evans Medical Supplies Ltd., under Case I of Schedule D for the year 1954–1955 included in the computation of the company's profits for the purpose of the said assessment a sum of £100,000 paid to the company by the Government of Burma under an agreement dated October 20, 1953.

The following facts appeared from paragraphs 3 to 12 inclusive and paragraph 15 of the case stated:

3. The company was incorporated on November 24, 1925, "to "carry on business as manufacturing chemists, wholesale "druggists, drug grinders, importers, exporters, and manu- "facturers of pharmaceutical, medicinal, bacteriological and "chemical preparations and articles." The company took over a business which began in the year 1809, and was one of the leading pharmaceutical manufacturers, with a world-wide trade.

4. The company carried on its trade abroad, in some cases by means of subsidiary companies in various countries, in other cases by means of foreign agencies, and for a considerable period prior to the year 1953 it had an agency in Burma. In the year 1953 the Burmese Government decided to build a factory and laboratories in Burma for the purpose of establishing an industry there for the production of pharmaceutical and other products. Accordingly, the Burmese Government despatched a trade mission to Europe, with a view to inducing some leading

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firm of manufacturing chemists to advise as to the erection of such a factory, the supply of equipment for manufacture, and to impart to them the processes, formulae, and knowledge necessary to the production and manufacture of pharmaceutical products in Burma.

5. The trade mission got into touch with firms of wholesale manufacturing chemists on the continent of Europe, and, also, through the medium of United Kingdom Government departments, with the Association of the British Pharmaceutical Industry and finally treated with three leading firms of manufacturing chemists in the United Kingdom of which the company was one. There was keen competition with several continental firms and the British Government was anxious that a British firm should, if possible, come to terms with the Burmese Government. Negotiations were opened between the company and the trade mission on behalf of the Burmese Government, and the company at first suggested a lump sum of £350,000 for the sale of drawings, designs, plans, and technical and other data, and "know-how" necessary for the establishment, erection and installation of the factory and the commencement of production, and for management services for a period of years. The Burmese Government were unwilling to agree upon a single lump sum, but desired that part of the consideration should take the form of fees based on production. The company then made fresh proposals, which were accepted on behalf of the Burmese Government and embodied in the agreement of October 20, 1953.

6. The agreement, which was in five parts with a schedule, provided under Part I that the company should provide the knowledge which would make large scale manufacture of medical products possible in Burma. The said facilities were to be exclusive to the Burmese Government and were not during the currency of the agreement, which was a period of seven years subject to renewal, to be furnished to any other person or corporation in Burma.

The consideration for the foregoing was described in Part I as "a capital sum of £100,000 . . . payable in the United "Kingdom free from any deduction whatsoever."

7. Under Part II of the agreement, the company agreed to act as purchasing agent for all plant and equipment; to advise on the selection of architects and consulting engineers and on the design and lay-out of a factory on a site chosen by the Burmese Government; to train Burmese nationals in the United Kingdom and in Burma for all technical and administrative positions; to provide experienced European staff in the interim period; and to manage the factory for an initial period of seven years. The remuneration for the said services was to be an annual fee, during the currency of the agreement, of five per cent. of the value of all products produced at the factory or the sum of £25,000, whichever sum was the greater. Under paragraph 6, Part II,

the company was also entitled to be reimbursed for moneys expended on behalf of the Burmese Government and to remuneration of the company's directors and employees who proceeded to Burma.

8. Under paragraph 2, Part IV, the Burmese Government agreed not to export, without prior assent of the company, to any other country any of the goods manufactured under the agreement. But, in the event of the consent of the company to the export of goods from Burma being given, there was provision for a royalty upon such goods to be mutually agreed or, failing agreement, to be paid at a rate not exceeding ten per cent. of the sales value.

9. (i) Under Part V, the Burmese Government undertook not to divulge to any other Government, person, body or corporation, information conveyed to them by the company without written consent of the company.

(ii) Under Paragraph 2, Part V, it was stated to be "the "desire and intention of the parties to this agreement to enter "into similar agreements in respect of other pharmaceutical and "similar products":—viz. products additional to those specified in the schedule.

10. (i) The schedule referred to, forming part of the said agreement specified two main classes of biological products (A) and (B) and a number of pharmaceutical products enumerated under a few broad descriptions (C), (D) and (E). All the products referred to were general types and did not include any of the company's proprietary products. By far the most valuable from the company's point of view were the secret processes involved in the preparation, storage, and packaging of certain human and veterinary anti-toxins, sera and vaccines.

(ii) The secret processes referred to in sub-paragraph (i) above had been evolved at great cost in several fields over a period of 50 years and the company considered that such secret processes were superior to those evolved by other companies. At least two other companies in the United Kingdom, and firms in Western Germany and Holland had the necessary knowledge to prepare such products and did, in fact, prepare them. The company had, however, over a number of years experimented and perfected its own methods of preparing and conserving these products and had never, until it entered into this agreement with the Burmese Government, communicated these methods to any other person or corporation.

(iii) The pharmaceutical products, as broadly classified in the schedule to the agreement, numbered about 3,500 out of 6,500 such products, actually manufactured by the company. Here again, there was no secret as to the composition of the various ointments, pastes, tablets and capsules. The ingredients were set out in the British Pharmacopoeia, and similar products were manufactured by other British and foreign manufacturing chemists. The secret processes consisted in the actual methods

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of preparation of the products and, also, in the method of storing and packaging. For example, a special type of ampoule, was used by the company for certain of its products, and the company, by its agreement, undertook to impart its own methods of manufacture and packing to the Burmese Government.

(iv) The processes referred to in sub-paragraphs (i), (ii) and (iii) above, could not be learned by the study of textbooks. Knowledge of these processes was in some cases imparted by the company to the Burmese Government by training suitable Burmese or European staff for employment in the factory in Burma. In other cases the knowledge was being imparted by the direct communication of written information.

11. The company might have erected its own factory in Burma, but its directors were convinced that the Burmese Government was determined to have its own chemical industry in Burma and that several continental firms were willing and able to provide the Burmese Government with the means to do so. In entering into the agreement, the company chose the method of developing its business which seemed to its directors to be the best available in the circumstances. No similar agreement with any other foreign government or any other party had been made by the company. Since entering into the agreement, the company had retained its agency in Burma and had continued to supply this agency with its own products. The company's Burmese agency would become progressively less important as the government factory in Burma came into production. At the time of the hearing of this appeal (February, 1955) the factory was not completed but, as provided by the agreement, the minimum sum of £25,000 was being paid as from October 20, 1953.

It was common ground between the parties in this appeal that the annual sum of £25,000 was a receipt of the company's trade as wholesale druggists, to be brought into account in computing its profits for purposes of the said assessment to Income Tax for the year 1954–1955. The sole issue before the Commissioners was as to the sum of £100,000, described in Part I of the agreement as the capital sum of £100,000.

12. For international reasons the company desired not to disclose in its published accounts the said sum of £100,000. Accordingly, with the approval of the Board of Trade, only general reference was made in the chairman's report for the year ended December 31, 1953, and in the supplement to the report. The actual sum was included in the balance sheet and profit and loss accounts, with other figures not material to this case, under the headings "Undistributed profits including "reserves"; "Tax refund for exceptional depreciation, tax pro- "vision no longer required and a capital receipt." "Transfer "from profit and loss appropriation account." It was common ground between the parties to this appeal that this method of accounting for the said sum of £100,000 was not material to the

question whether such sum was properly to be included in computing the profits of the company's trade for the said year 1954–1955.

15. The Commissioners who heard the appeal held: (i) that it was not possible, on the evidence set out above, to consider each part of the agreement of October 20, 1953, separately. While the factory was in course of erection; while the training of staff was proceeding; and while plant and machinery were being obtained, payments, which the company admitted to be of an income nature, were being made, and they were unable to take the view that the said sum of £100,000 was paid simply for the sale or assignment to the Burmese Government of secret processes analogous to patents.

(ii) Even if the view was taken that the main part of the consideration of £100,000 was received by the company for imparting these secret processes to the Burmese Government, they were still of opinion that the company had not sold or assigned any property. For example, other British and continental firms admittedly had the knowledge and did prepare antitoxins, and the company after the signing of the agreement, as much as before, was still in a position to prepare such products according to the formulae and methods which it had perfected, which remained secret, except to the extent that some of them had been imparted to the Burmese Government.

(iii) Considering as they did that the whole agreement had to be read together, they thought that it was one for the provision of services. The provision by the company under Part I of the agreement of what, in clause (D) of that part, were called "facilities" was not in their opinion the sale or assignment of a capital asset in consideration of a capital price, nor was it the grant of a licence in consideration of a capital payment.

(iv) They also rejected the company's alternative contention that the said sum did not arise to the company as a receipt of its trade as wholesale druggists because it had never previously entered into such an agreement. On the contrary, they held that the company had, on the evidence in this case, chosen the method which appeared to its directors to be the best means of exploiting its business as wholesale druggists in Burma, such method being in their opinion clearly within the powers taken by the company in its memorandum of association. They, therefore, held that the sum of £100,000 arose to the company either in the course of the trade which it had hitherto carried on or in the course of a new trade which it commenced to carry on on October 20, 1953, and that in either event the said sum was properly included in the computation for income tax purposes of the company's profits as wholesale druggists for the said year 1954–1955.

(v) Accordingly, they dismissed the company's appeal and adjourned it for agreement of figures in accordance with their decision in principle.

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John Senter Q.C. and *Anthony Barber* for Evans Medical Supplies Ltd.

Sir Frank Soskice Q.C. and *Sir Reginald Hills* for the Crown.

Cases cited in the argument not referred to in the judgment: *Margerison* v. *Tyresoles Ltd.**; *British Dyestuffs Corporation (Blackley) Ltd.* v. *Inland Revenue Commissioners*†; *Bennett* v. *Marshall*‡; *Glenboig Union Fireclay Co. Ltd.* v. *Inland Revenue Commissioners*§; *Wiseburgh* v. *Domville.*‖

Cur. adv. vult.

May 18. UPJOHN J., having stated the facts, read the following judgment.

The contract is contained in the agreement which is dated October 20, 1953. It is in five parts and is annexed to the case stated, and its relevant provisions are fully summarized in paragraphs 6 to 10 thereof. I do not propose, therefore, to read any part of it except the recitals which are not set out in the case stated, but which I think are important. They are as follows:

"Whereas:—(1) The Government of the Union of Burma "propose to build in Burma a factory and laboratories (herein- "after together referred to as 'the factory') for the purpose of "establishing an industry there for the production of pharma- "ceutical and other products. (2) Evans Medical has developed "and own processes formulae and knowledge relating to the "manufacture of pharmaceutical products and to the use of "machinery plant appliances and devices used in such manufac- "ture. (3) For facilitating the building and running of such "factory Evans Medical propose to supply the Government of "the Union of Burma with information and to organize the "factory in the manner hereinafter mentioned."

Part I of the agreement sets out the obligations of the company in consideration of the payment to the company of "the capital "sum of £100,000." The use of the word "capital" is of little import in such an agreement; "is a mere label attached to "the [£100,000] with an eye, no doubt, to tax considerations" (see Lord Greene M.R. in *Rustproof Metal Window Company* v. *Inland Revenue Commissioners*[1]). It was suggested, though faintly, that the agreement did not provide for the disposal to the Burmese Government of the company's secret processes and it was said that "know-how" was not appropriate to describe a secret process. True, Lord Evershed, in *Stevenson Jordan and Harrison* v. *Macdonald & Evans*,[2] said[3] "'Know-how'

* (1942) 25 T.C. 59.

† (1924) 12 T.C. 586.

‡ [1937] 3 All E.R. 208; *affd.* [1938] 1 K.B. 591; 54 T.L.R. 320; [1938] 1 All E.R. 93; 22 T.C. 73 (C.A.).

§ 1921 S.C. 400; 1922 S.C.(H.L.) 112; 12 T.C. 427.

‖ [1956] 1 W.L.R. 312; [1956] 1 All E.R. 754.

[1] [1947] 2 All E.R. 454, 460; 29 T.C. 243, 271.

[2] [1952] 1 T.L.R. 101.

[3] Ibid. 104.

"seems to me to indicate something essentially different from "secret and confidential information. It indicates the way in "which a skilled man does his job, and is an expression of his "individual skill and experience." But the word "know-how" is a modern and very useful colloquial expression of no precise meaning and, when used in the agreement in the context of the recitals and not in relation to the expertise of an individual workman, is very apt and appropriate to include the company's knowledge of processes of preparation, packing and preservation of their products, especially having regard to the importance of such matters in tropical countries.

Two questions arise. The first, logically, is whether apart altogether from the true construction of the agreement the receipt of the £100,000 falls to be brought in as a trading receipt as part of the company's annual profits or gains from any trade carried on by it whether in the United Kingdom or elsewhere.

Secondly, whether even if the company is not carrying on such a trade the receipt is, upon the true construction of the agreement, capital or income.

Upon the first question, Sir Frank Soskice, for the Crown, concedes that to come within section 123 of the Income Tax Act, 1952, one must find not only a receipt as a result of a trading operation, but it must be a profit arising from the carrying on of a trade. Upon that matter he has a conclusion of the Special Commissioners in his favour in these terms: [His Lordship read paragraph 15 (4) of the case stated and continued:]

Had there been any evidence that the company was starting a new trade in the sense that it was going to exploit its secret processes by disclosing them to chosen instruments in other countries, that would be a very different matter, but there was no finding of fact in paragraphs 3–12 of the case stated (where the facts are set out) that any such new trade began on October 20, 1953, and Sir Frank rightly abandoned any reliance upon a new trade. Further, he very properly told me that the Commissioners were in error in stating in paragraph 14 (iv) that the Crown ever suggested there was a new trade. Apparently, all that the representative of the Crown suggested was that when the company entered into the agreement it extended an existing trade which he (Sir Frank) concedes carried the matter no further. I would also point out that a finding that the receipt of the sum was "in course of the trade," to use the Commissioners' own language, does not carry the matter home, but I will assume that the Commissioners intended to mean that the said receipt was a trading receipt in the course of carrying on the trade.

I was referred to three cases on this point—*Californian Copper Syndicate Limited and Reduced* v. *Harris*,[4] *Rees Roturbo Development Syndicate Ltd.* v. *Ducker*[5] and *J. Gliksten & Son*

[4] (1904) 6 F. 894; 5 T.C. 159.

[5] [1928] 1 K.B. 506; 43 T.L.R. 796; [1928] A.C. 132; 44 T.L.R. 307; 13 T.C. 366.

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Ltd. v. *Green* [6]—but the question is essentially a question of fact and those cases do not really assist me on the facts of this case. For myself, I do not see how the receipt of £100,000 under the agreement can be said to be part of the profits or gains of the company in their trade of wholesale druggists. With all respect to the Special Commissioners, the company was not "exploiting" its business in the only sense in which that word is relevant, that is, of carrying on its trade of wholesale druggists in Burma, but in and by the agreement it entered into the entirely new activity of acting as adviser of the Burmese Government by assisting to set up a completely new industry there, which involved the disclosure to the Government of secrets never disclosed to anyone before, and also involved the gradual cessation of its wholesale trading activities, for it was found as a fact that "the company's "Burmese agency will become progressively less important as the "Government factory in Burma comes into production."

I am content to rest my judgment on this part of the case by saying that, in my view, there was no evidence to support the Commissioners' determination or in Lord Radcliffe's words, in *Edwards* v. *Bairstow & Harrison*,[7] "the true and only reason-"able conclusion contradicts the determination."

I turn, then, to the second question, namely, assuming the transaction carried out by the agreement not to be a transaction giving rise per se to a trading receipt, ought, nevertheless, the receipt of £100,000 to be regarded as a receipt for the purpose of income tax of an income nature or of a capital nature?

I was referred to many cases on the point, but most of them are only illustrations of the broad principles laid down by Lord Greene in *Nethersole* v. *Withers*.[8] In that case Miss Nethersole, a celebrated actress, had obtained from the late Mr. Rudyard Kipling the right to dramatize his book The Light that Failed. She was found as a fact not to be carrying on a profession or vocation in respect of dramatic and film rights of that book, and the question was whether a lump sum payment that she received in respect of the assignment to a film company of the sole sound and film rights for a period of ten years was capital or income for tax purposes.

Lord Greene, after reviewing *Constantinesco* v. *The King* [9] and *Desoutter Bros. Ltd.* v. *Hanger & Co. Ltd.*[10] and *Inland Revenue Commissioners* v. *British Salmson Aero Engines Ltd.*,[11] said, in reference to the last-mentioned case [12]: "This decision "is a clear authority, so far as this court is concerned, that a "lump sum payment received for the grant of a patent licence "for a term of years may be a capital and not a revenue receipt;

[6] [1929] A.C. 381; 45 T.L.R. 274; 14 T.C. 364.

[7] [1956] A.C. 14; [1955] 3 W.L.R 410, 423; [1955] 3 All E.R. 48; 36 T.C. 207.

[8] (1946) 28 T.C. 501.

[9] (1927) 43 T.L.R. 727; 11 T.C. 730.

[10] [1936] 1 All E.R. 535.

[11] [1938] 2 K.B. 482; [1938] 3 All E.R. 283; 54 T.L.R. 904; 22 T.C. 29 (C.A.).

[12] 28 T.C. 512.

" whether or not it is so must depend on any particular facts " which, in the particular case, may throw light upon its real " character, including, of course, the terms of the agreement " under which the licence is granted. If the lump sum is arrived " at by reference to some anticipated quantum of user it will, we " think, normally be income in the hands of the recipient. If it is " not, and if there is nothing else in the case which points to an " income character, it must, in our opinion, be regarded as " capital. This distinction is in some respects analogous to the " familiar and perhaps equally fine distinction between payments " of a purchase price by instalments and payment of a purchase " price by way of an annuity over a period of years.

" In the present case, whether the agreement operates (as " we think) as an assignment, or as a licence, the result is, in " our opinion, the same. But, as we have indicated, there are " other circumstances which in any event make it impossible to " regard this sum as a revenue receipt. In addition to the " assignment or licence, whichever it may be, the agreement " operates as a partial realisation by Miss Nethersole of her " capital asset, viz., the copyright in the play. She confers " rights upon the company which, as we have pointed out, " cannot, if exercised, fail to affect injuriously the value of her " copyright. Any consideration referable to this could not, we " think, in any view be anything but capital. It is obviously " impossible to split the sum received, and the Crown cannot in " any event point to any part of that sum as being revenue."

That case went to the House of Lords,[13] where Lord Simon said[14]: " The judgment of Lord Greene, M.R., in the present " case seems to me to summarize very accurately the effect of " the earlier decisions, and I would in particular adopt his " observation that ' a lump sum payment received for the grant " ' of a patent licence for a term of years may be a capital and " ' not a revenue receipt; whether or not it is so must depend " ' on any particular facts which, in the particular case, may " ' throw light upon its real character, including, of course, the " ' terms of the agreement under which the licence is granted.' "

In the subsequent case of *Rustproof Metal Window Company* v. *Inland Revenue Commissioners*[15] Lord Greene quoted the passage I have already read down to the sentence which reads[16]: " If it is not, and if there is nothing else in the case which points " to an income character, it must, in our opinion, be regarded " as capital," and added[17]: " If I have any comment to make " on this language, it is that the concluding sentence possibly " puts the point too high in favour of capital. It is, however, " qualified by the crucial words ' if there is nothing else in the " ' case which points to an income character.' "

[13] (1948) 64 T.L.R. 157; (1946) 28 T.C. 515.

[14] 64 T.L.R. 159.

[15] [1947] 2 All E.R. 454; 29 T.C. 243.

[16] 28 T.C. 512.

[17] [1947] 2 All E.R. 455, 458.

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That was a clear case where the consideration was made in reference to the anticipated quantum of user, for it licensed the manufacture of 75,000 ammunition boxes and provided for repayment of part of the consideration if the contract was determined before the manufacture of the whole of them had been completed.

Those cases and the cases to which Lord Greene referred were cases of patents or copyrights, conferring protection against all the world in territories where the patent or copyright ran, and I do not forget Lord Porter's solemn warning in the *Nethersole* case [18] that copyright occupies a position and character of its own dependent on the Copyright Act.

Nevertheless, secret processes bear a marked analogy to patent rights and copyright.

In *Handley Page* v. *Butterworth* [19] Romer L.J. pointed out that a patentee has a monopoly which is a capital asset in his hands and he can prevent others from utilizing it; he can exploit it in a variety of ways; by exercising the invention himself, by granting licences in consideration of royalty payments which will be taxable notwithstanding that the capital asset is yearly diminishing in value, or by selling it or surrendering it. Romer L.J. continued [20]: "The owner of a secret process, such as was "possessed by Mr. Handley Page, stands in a very analogous "position; he has not a monopoly at law, but he has a monopoly "in fact—a monopoly in fact arising from the possession by him "of the secret knowledge of the process that he is carrying on. "That secret knowledge is as much his capital asset as is the "patent monopoly the capital asset of the patentee, and, like the "patent, he can use that capital asset in either or both of the "following ways: he can himself carry on the secret process or "he may—it is very seldom done owing to the obvious danger "involved—grant a licence to a third person to carry on the secret "process, securing himself against his secret process being "divulged by that third party to others. In both these cases the "profits he derives from carrying on the secret process himself "and the royalty he might derive from the licensee would be "annual profits or gains within the meaning of Schedule D. "But, supposing he sells his secret process, or supposing, as "here, he surrenders his *quasi* monopoly by making it public to "the world, then I say that, if he gets paid for doing either one "or the other of those things, the money he receives in payment "is a capital asset."

Sir Frank Soskice conceded that the authorities established that if a grantor disposes of a capital asset in a monopoly or secret process for a lump sum consideration, that consideration will be a capital receipt. The same, he says, is true if the grantor grants an exclusive licence which precludes the grantor from himself exercising his monopoly or secret process in the area the subject-matter of the grant, but it is otherwise, he says, if the

[18] 64 T.L.R. 157.
[19] (1935) 19 T.C. 328.
[20] Ibid. 359.

grantor grants either a non-exclusive licence or an exclusive licence which, however, permits the grantor to continue his own activities in the area. In those last-mentioned cases, he says, the grantor has not disposed of a capital asset and what he receives, even if it be a lump sum payment, is a revenue payment for a licence or services rendered. Further, he submitted that in order to support a payment as a capital payment, you must show some dissipation of an asset (see Lord Hanworth in the *Handley Page* case [21]), and here, he said, you are not dissipating it, but exploiting it.

The propositions so propounded, in relation to the grant of a non-exclusive licence or an exclusive licence not excluding the grantor himself, seem to me to conflict with the statement of the law enunciated by Lord Greene in the *Nethersole* case [22] and, in particular, that part of his statement approved by Lord Simon,[23] and also with the decision of *Desoutter Bros.* v. *Hanger & Co.*,[24] which was mentioned without any disapproval by Lord Greene in the *Nethersole* case.[25] In the *Desoutter* case [26] the grantor granted a licence to use a patented invention for five years in consideration of a lump sum payment payable by instalments. It was held that the payment was capital notwithstanding that the licence was not stated to be exclusive and there was no dissipation but rather exploitation of the patent.

I approach the consideration of this contract, therefore, in the light of the broad principles laid down by Lord Greene.

The effect of the contract was this: the company parted with its secret processes to the Burmese Government for ever, but upon the terms that the Government would not without the consent of the company impart such information to another, such consent not to be unreasonably withheld. The company remained at liberty to carry on its wholesale trade there, and, in legal theory, could no doubt have thereafter set up a competing factory in Burma. In addition, the company was to supply technical data, drawings, designs and plans for the erection of a factory and of the installation of machinery appropriate and suitable for the manufacture of these known pharmaceutical products and for their processing by these secret processes. After the expiry of the contract (but not before), the company was at liberty to impart its "know-how" in relation to these matters to others in Burma.

In Part II of the agreement, in consideration of an annual fee admittedly subject to tax, the company undertook to train personnel and also to act as purchasing agent of the Burmese Government.

The Commissioners' conclusions on this part of the case are set out in paragraph 15 (i) to (ii), and may be summarized in this way: (i) That each part of the agreement could not be

[21] 19 T.C. 359.
[22] 28 T.C. 501.
[23] 64 T.L.R. 159.
[24] [1936] 1 All E.R. 535.
[25] 28 T.C. 501.
[26] [1936] 1 All E.R. 535.

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considered separately, and that £100,000 was not paid simply for the sale or assignment to the Burmese Government of secret processes. (ii) That the company had not sold or assigned any property. (iii) Reading the agreement as a whole together, the agreement was one for the provision of services.

These contentions were naturally supported by Sir Frank Soskice, who compared the services to be rendered by the company to the services rendered by a barrister, an architect or accountant, and he put in the forefront of his argument that this was no real sale by the company of its secret processes, but the provision of confidential information rather on the lines of *Exchange Telegraph Co. Ltd.* v. *Gregory & Co.*[27]

In my judgment, the Commissioners have misunderstood and misconstrued the agreement. While the agreement must be read as a whole, the question to be asked is, what, upon the proper construction of the agreement, was the quid pro quo for payment of the £100,000? I cannot see that it bears any relationship to the services rendered by a professional man in the course of carrying on his profession. I have already pointed out that the company was not carrying on a trade in providing the services.

In consideration of this payment the company was bound to provide its expert knowledge, its "know-how" in the manufacture of pharmaceutical products, in the erection of a suitable factory and the provision of proper machinery in order to enable the Burmese Government to set up a new industry once and for all in Burma; the recitals are all important. Looking at the agreement as a whole, in my judgment, payment of the sum of £100,000 is what it is described to be: a "capital payment."

Furthermore, the company was, in fact, parting for ever with its secret information in its methods of preparation, packing and preservation to the Burmese Government; that may not in law amount to an assignment of all its rights in Burma, for the company in legal theory, though possibly not in practical Burmese politics, remained at liberty to use the processes itself in Burma. Of course, it also remained at liberty to carry on its business of wholesale druggists there by selling its products made in this country, in Burma through its usual agents.

But it was parting for ever with part of a valuable asset, and was doing so to enable an entirely new and competing industry to be set up there. That industry established by the skill and "know-how" of the company, could embark on an export trade which could compete with the company's own products in other countries. In that sense the company was dissipating its asset, and it must be remembered that a secret process once communicated to another is in jeopardy; if it gets into the wrong hands, the grantor has no protection.

Even if it be a necessary ingredient to support a capital payment to show some dissipation of a capital asset (which, in

[27] [1896] 1 Q.B. 147; 12 T.L.R. 18.

my judgment, it is not), that element seems to me to be present here.

I allow the appeal. The matter must be remitted to the Commissioners to adjust the figures on that footing.

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Appeal allowed.
Case remitted to Commissioners.

Solicitors: *Whitfield, Byrne & Dean for Whitley & Co., Liverpool; Solicitor of Inland Revenue.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

* BEACH *v.* REED CORRUGATED CASES LTD.

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May 7, 8, 9, 10, 11, 18.

Pilcher J.

Damages—Tax element—Wrongful dismissal—Loss of salary as managing director—Large unearned income—Whether that should be taken into account for tax purposes in assessing general damages.

By service agreements dated December 21, 1950, and August 17, 1951, the defendants agreed that the plaintiff should act as their managing director and general manager for 15 years at a salary of £5,000 a year. On August 26, 1954, the defendants terminated the agreements. In an action for breach and repudiation in which the defendants admitted liability the plaintiff claimed damages, inter alia, for the period from April 6, 1956, until he reached the age of 65 on December 9, 1966. The plaintiff possessed a private fortune of half a million pounds and had a gross income from invested funds of over £20,000 a year, a substantial portion of which he was in the habit of covenanting to relatives and friends. The plaintiff would have suffered a gross loss of salary, including directors' fees, of £48,000 from April 6, 1956, until December 9, 1966. If the whole of his income, earned and unearned, were taken into account and tax deducted accordingly, his loss would have been about £4,650. On the question of the amount to be awarded in general damages for loss of salary from April 6, 1956, to December 9, 1966, having regard to the tax position:—

Held, that there was no difference in principle between damages to be awarded in a case of personal injury founded on tort and in an action for wrongful dismissal founded on breach of contract; that since a large proportion of the plaintiff's private income consisted of investments which might be disposed of at any time, comparatively little regard should be had to his private income when arriving at the amount by which gross damages should be diminished owing to tax considerations; and that a reasonable sum to award as general damages would be £18,000.

Dictum of Lord Goddard in *British Transport Commission* v. *Gourley* [1956] 2 W.L.R. 41, 53; [1955] 3 All E.R. 796 applied.

ACTION.

The plaintiff, Kenneth Newton Beach, in 1940 became managing director of a private company, Thompson & Norris Manufacturing Co. Ltd., which name was subsequently changed to Reed Corrugated Cases Ltd. In 1945 the company became a

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public company. On December 21, 1950, the plaintiff entered into a service agreement with the Thompson & Norris Manufacturing Co. Ltd. whereby he was appointed managing director and general manager of the company for a period of 15 years. The agreement provided, inter alia: (a) That the plaintiff should hold the offices of managing director and general manager (subject as provided in the agreement) for a term of 15 years from December 21, 1950, provided that if he should at any time cease to be a director of the defendants he should ipso facto cease to be a managing director thereof, but should continue as general manager of the group. (b) That the plaintiff on his attaining the age of 55 years or at any time thereafter might on giving three months' written notice to the defendants resign from his offices of managing director and general manager (or if he should at such date be no longer managing director, from his office as general manager) and thereupon the defendants would appoint him and he would act as technical adviser to the defendants and the defendants would pay him therefore, during the period which but for his resignation the agreement would have remained in force, remuneration at the rate of £2,500 per annum. (c) That the defendants would pay to the plaintiff as remuneration for his services as general manager a salary which should be deemed to accrue from day to day at the rate of £5,000 per annum. (d) That in the event of the plaintiff becoming owing to ill-health prevented from performing his duties under the said agreement he should be entitled to be appointed and to serve the defendants as technical adviser under the provisions set out in subparagraph (b) hereof whether or not he should have attained the age of 55 years.

By a supplemental agreement dated August 13, 1951, it was provided, inter alia, (a) That in the event of the plaintiff becoming entitled under the agreement to be appointed technical adviser to the defendants, the defendants would appoint him and he would serve the defendants as a director of and as technical adviser to the defendants until he should attain the age of 65 years. (b) That as remuneration for his services under the supplemental agreement the defendants would pay him a yearly salary equivalent to two-thirds of the salary received by him under the agreement immediately before his appointment as technical adviser.

In addition to his salary as general manager and managing director the plaintiff was also entitled to receive such directors' fees in respect of his directorship of the defendants' companies as were from time to time determined by appropriate resolution. In the material years the directors' fees in fact received by the plaintiff amounted to £578 per annum.

On December 17, 1953, an offer by A. E. Reed & Co. to purchase the Thompson & Norris Manufacturing Co. Ltd. was finalised and by August, 1954, A. E. Reed & Co. had acquired in substance the whole share capital of the Thompson & Norris

Manufacturing Co. Ltd. together with the control of the company's affairs. By a letter dated August 26, 1954, Thompson & Norris Manufacturing Co. Ltd.'s solicitors notified the plaintiff's solicitors by letter that the company was, as from that day, terminating the plaintiff's contract of service.

The plaintiff claimed damages against the defendants, the Thompson & Norris Manufacturing Co. Ltd. (now the Reed Corrugated Cases Co. Ltd.), in respect of their alleged breach and repudiation of the two service agreements.

By their defence the defendants alleged that the plaintiff orally agreed to cancel his agreements and to relinquish without compensation all his rights under the agreements.

During the hearing of the action liability was admitted, and the only matter left for the determination of the court was the amount of damages which the plaintiff was in the circumstances entitled to recover.

The facts relevant to the question of damages are set out in the judgment.

Gilbert Paull Q.C. and *Helenus Milmo* for the plaintiff.
John Megaw Q.C. and *L. G. Scarman* for the defendants.

Cur. adv. vult.

May 18. PILCHER J., reading his judgment, stated the facts and continued: The task of assessing damages is never an easy one. Normally the assessment of damages in a case of wrongful dismissal is perhaps less troublesome than it is in some other types of action. The present case, however, presents a number of unusual features, not the least material of which is that the plaintiff is at present possessed of a fortune of upwards of half a million pounds, and has a gross income from invested funds of something over £20,000 per annum. He has, moreover, been in the habit for many years of covenanting a substantial portion of his gross income to relatives and old friends who are not so fortunately placed financially as he is himself. In this way the plaintiff has perfectly legitimately materially diminished his taxable income.

I have to approach the assessment of damages in this case in the light of the recent decision of the House of Lords in *British Transport Commission* v. *Gourley*.[1] Liability having been admitted by the defendants, it is not necessary that I should go in any detail into the matters which led up to the present proceedings. [His Lordship referred to the service agreements and continued:] I approach the question of damages on the basis that, for the purpose of this case at least, the defendants admit that they have wrongfully terminated the plaintiff's service agreements and have thereby deprived him of the benefits attached to such agreements.

[1] [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

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The damages claimed by the plaintiff fall under three heads: (1) Damages from the date of the breach, namely, August 26, 1954, to April 5, 1956, which for the sake of convenience, being the end of the fiscal year, was taken as the date of the trial. (2) Damages from April 6, 1956, until the plaintiff reached the age of 65 on December 9, 1966. (3) Loss of benefit under the retirement benefit scheme for directors.

As to (1), no difficulty arises. During the fiscal years 1954–1955 and 1955–1956 the plaintiff had a large unearned income which was subject to tax, and it has been agreed between the parties that his ascertained net loss after payment of income tax and surtax up to April 6, 1956, is represented by the sum of £1,375.

The plaintiff's claim under (2) is by no means easy to assess. It is clear that for many years the plaintiff had been in the habit of covenanting by deed very large sums to a number of relatives and friends. By his first marriage, which was dissolved in 1938, his ex-wife being now 45 years of age, he has two sons aged 26 and 22 respectively; the elder of these sons has recently married. Apparently no order for alimony or maintenance has been obtained by his ex-wife but the plaintiff has bound himself by deed to pay her a sum amounting to £900 per annum net for her life. He has moreover supplemented this sum substantially from time to time under deed of covenant. The plaintiff informed me, and I accept his evidence, that he intends further to increase this sum covenanted to his ex-wife if necessary, his intention being that this lady shall enjoy in the future the same standard of comfort to which she has been used in the past. In the year ending April, 1953, the plaintiff was paying under covenants made on different dates a total gross sum of over £12,000 per annum. In the year ending April, 1954, this sum had been reduced to £9,600, in the year ending April, 1955, to about £6,000, and in the year ending April, 1956, to about £4,900.

The plaintiff said in evidence, and again I accept his statement, that he intends in the near future to hand over substantial sums of capital to each of his sons by his first marriage. The plaintiff has married again and has two adopted daughters aged 10 and 6 years. He told me that it was also his intention to hand over capital to each of these children. To what extent by so doing he will be able to escape tax liability for the income on the capital so transferred to these children during their minority may be an interesting question. The plaintiff is no doubt an astute business man. He told me that when he judges it prudent he keeps substantial sums of money either on deposit or on his current account at the bank. His present gross income from investments is upwards of £20,000 per annum. His obligations under deeds of covenant have, as I have pointed out, been reduced from over £12,000 per annum for the year ended April, 1953, to about £4,900 in the year ending April, 1956. This, he says, reflects the difficult period through which the defendant

company passed in 1951–1953. The plaintiff, however, said that he intends in the future to increase his covenanted payments now that these difficulties have been surmounted.

Since the plaintiff ceased to have any connexion with the Thompson & Norris Manufacturing Co. he has invested money in two other businesses which are at present in low water, but which he hopes to work up into profitable concerns. It is not, I think, in dispute that he now draws from these two businesses about £1,000 per annum gross. The plaintiff says, and again I accept his evidence, that he does not intend to draw more than approximately the sum of £1,000 per annum from these two businesses for a number of years, preferring to plough back profits until the businesses are firmly established.

The general conclusion to be drawn from the foregoing summary is that the plaintiff from April, 1956, to December, 1966, would, had he lived and remained in good health, have received from the defendant company by way of salary a yearly sum of £5,000 gross under the service agreement. There was a provision in the agreement that his salary might be increased, but I do not propose to take any account of that fact in arriving at my assessment of damages. If the plaintiff had suffered from ill-health or tendered his resignation as general manager and managing director of the Thompson & Norris Manufacturing Co. during the currency of his service agreement he would have been entitled to receive two-thirds of his salary, namely £3,333 as technical adviser to the company until he reached the age of 65. As from the year ending April 5, 1958, he anticipates earning a gross sum of £1,000 per annum from the two new businesses in which he has interested himself. On the basis that he would have received his salary of £5,000 per annum and directors' fees of £578 per annum during the remaining currency of the agreement of December 21, 1950, and thereafter two-thirds of his salary until he attained his 65th birthday, he would, after giving credit for the £1,000 per annum earned as from April, 1958, have suffered a gross loss of over £48,000. If tax is deducted from the annual sums which make up this gross loss of £48,000 on the assumption that these sums alone would be subject to tax (that is, ignoring any additional tax liability arising from any unearned income of the plaintiff and assuming that any sums payable under covenants will be covered by such unearned income), the plaintiff's loss arrived at for the same period and upon the same basis would have been over £22,000. The plaintiff is said to be in good health and in neither of these computations is any allowance made for the fact that he might die before attaining his 65th birthday, or be compelled to accept this lower salary of £3,333 owing to ill-health.

The defendants have also prepared an elaborate schedule which is agreed not to be completely accurate in certain small matters of detail which I propose to ignore. It is based upon the assumption that the plaintiff's gross unearned income would remain at

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just over £18,000 per annum until he reached the age of 65. It also assumes that the sums at present paid under covenant would diminish through the years, thus increasing the plaintiff's liability to surtax. It also assumes that the plaintiff does not make any capital gifts to his wife, children or adopted children. On this basis the defendants calculate that having regard to the incidence of income tax and surtax, the plaintiff would have lost between April, 1956, and his 65th birthday a net sum of about £4,650.

The problem with which I am faced is to assess the general damages to which the plaintiff is entitled in the light of the principles laid down in *Gourley's* case,[2] the top limit being something of the order of £48,000 if it is proper to take the gross loss and to include directors' fees, and £4,650 if the defendants' calculation based upon deduction of income tax and surtax and the reduction of payments under covenant is accepted.

I say at once that it was not seriously contended by Mr. Paull that the plaintiff was entitled to recover his gross loss in full. I should also add that I do not think in all the circumstances it is proper to include as a constituent of the gross figure the yearly loss of £578 from directors' fees. The amount of such fees would, no doubt, be voted yearly by appropriate resolution and might be substantially reduced if business were bad or increased if it were good. It is not impossible that the directors might, in certain circumstances, have decided to forego all their directors' fees. The plaintiff's service agreement does not provide for the payment of directors' fees of any stated amount. While the inclusion or exclusion of directors' fees for the contractual period from the plaintiff's gross claim involves a substantial gross figure, this figure was not included as an item of loss in the original or amended claim. While the plaintiff would no doubt have received a substantial figure from the directors' fees during the remainder of the period covered by his agreement, there was no contractual obligation upon the company to pay him such fees or any fees, and I therefore propose to ignore them.

In *Gourley's* case[3] the trial judge awarded the plaintiff the sum of £10,000 for pain and suffering, loss of amenities, and expenses actually incurred. No dispute arose about this sum in the appellate courts. In addition, he awarded the plaintiff the sum of £37,720 by way of general damages. After a careful analysis of all the evidence and the figures put before him, he indicated that if it should ultimately be decided that incidence of income tax and surtax ought to be taken into account, he would have awarded the plaintiff £6,695 as general damages in respect of diminution in his future earning capacity resulting from the disability which he suffered following the accident for which the defendants were responsible.

I would like, first of all, to cite a passage from the speech of

[2] [1956] 2 W.L.R. 41. [3] [1956] 2 W.L.R. 41.

Lord Jowitt.[4] He is there dealing with the duty which will lie upon the court in assessing damages in cases such as *Gourley's* case, and, possibly, also cases such as this case: "It will no "doubt become necessary for the tribunal assessing damages to "form an estimate of what the tax would have been if the money "had been earned, but such an estimate will be none the worse "if it is formed on broad lines, even though it may be described "as rough and ready. It is impossible to assess with mathe-"matical accuracy what reduction should be made by reason of "the tax position just as it is impossible to assess with "mathematical accuracy the amount of damages which should "be awarded for the injury itself and for the pain and suffering "endured."

It should be borne in mind that in *Gourley's* case[5] the plaintiff's earned income was so large that no account seems to have been taken of his unearned income from investments and the trial judge's assessment of damages on the lower basis (which was accepted as a figure by both parties in the appellate courts) was arrived at solely on a consideration of diminution of earned income after deduction of tax and surtax at the appropriate rate. In dealing with "special damage," that is to say, loss actually incurred up to the date of trial, Lord Goddard, with whose speech Lord Radcliffe and Lord Somervell expressly agreed, said[6]: "But in considering special damage in these cases the "rate of tax to be taken must, as it seems to me, be the effective "rate of income tax, and, if necessary, surtax which would have "been applicable to the sums in question if they had been "earned. That rate depends on the combination of a number "of factors that may vary with each case—allowances, reduced "rates, surtax rates, other income of the claimant or his wife, "charges or reliefs. The task of determining it may not always "be an easy one, but in complicated cases it is to be hoped "that the parties, with the help of accountants, will be able to "agree figures. If not, the court must do its best to arrive at a "reasonable figure, even though it cannot be said to be an exact "one."

Dealing with general damages, he says[7]: "In cases where "surtax is payable and the rate has been affected by private "income, the nature of that private income will be relevant. "If it is a life annuity under a will or settlement it may well be "expected to continue. If it is disposable investments which "might be sold at any time or transferred to a child, less, "perhaps little, regard should be had to it."

In the case with which I have to deal, the plaintiff has a large private fortune and an income of, as I have said, over £20,000 derived from private investments. He also has, for my purpose, an earned income of £1,000 per annum. Out of this income he has at present engaged himself to pay a gross yearly sum of

[4] [1956] 2 W.L.R. 41, 48.
[5] [1956] 2 W.L.R. 41.
[6] Ibid. 52.
[7] Ibid. 53.

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about £2,600 to his ex-wife for her life. In addition, he has entered into seven-yearly covenants to pay to other relatives and friends the gross yearly sum of about £2,300. The total gross yearly sum which he pays under covenant has, as I have said, diminished since 1953 from about £12,000 to about £4,900, but I accept the plaintiff's evidence that he intends, in the immediate future, substantially to increase the amounts paid under covenant. I also accept his statement that he intends shortly to make substantial capital provision for his wife, his two sons, and his adopted daughters. What the amount of this capital provision will be I do not know; nor do I know what uninvested sum the plaintiff may now have in his deposit or current accounts at the bank.

I mention these matters because of the concluding sentence from the speech of Lord Goddard which I have already quoted. The case now before me would seem to be essentially the type of case envisaged by Lord Goddard when he says that the nature of "private income" will be relevant. The plaintiff has a large sum of, to use Lord Goddard's words, "disposable investments "which might be sold at any time or transferred to a child." In such a case Lord Goddard's view was that "less, perhaps "little, regard should be had to it," namely, private income, when arriving at the amount by which gross damages should be diminished owing to tax considerations. I appreciate that the passage from Lord Goddard's speech, to which I am referring, was not necessary for the decision of *Gourley's* case.[8] This passage was, however, rightly stressed by Mr. Paull on behalf of the plaintiff. I respectfully agree with the view expressed by the noble Lord[9] in the passage which I have quoted, and even if I had not done so, I should have hesitated long before venturing to express a contrary view. It is common knowledge that, with the present high incidence of taxation on income, those who are fortunate enough to enjoy a large income which is primarily unearned can legitimately and do, in fact, reduce their taxable income substantially by covenanting, sometimes for life, and sometimes for a period in excess of six years, large yearly sums to relatives and sometimes to old friends. They are thus legitimately generous at the expense of the Exchequer. Similarly, it is common knowledge that men of the plaintiff's age with large disposable investments are more prone, owing to high death duties, to transfer during their life capital sums to their children or dependants which, in the past, they would have disposed of by will.

It would not perhaps be too much to say that the plaintiff seems to have acted in the past and intends to act in the future in the fashion which might be expected of a prudent man of affairs of his age possessed of his fortune. He is ordering, and I am satisfied intends to order, his affairs along the lines which he indicated.

[8] [1956] 2 W.L.R. 41. [9] Ibid. 53.

To what, then, is he entitled by way of general damages? If I disregard, as I do, the fact that he has lost his directors' fees, the gross sum of £48,000, to which I have already referred, is diminished by some £5,000 to about £43,000. I make allowance for the fact that the plaintiff might have died during the currency of his service agreement, and also for the fact that he might, owing to ill-health during the same period, have been compelled to accept the lesser salary of £3,333 as technical adviser. I also make allowance for the fact that he will receive now whatever sum is awarded as general damages instead of receiving his salary over the next nine years. While I think it in the highest degree improbable that such a thing would have occurred, I do not forget that his agreement might have been properly terminated for fraud or misconduct. He might have held his job as technical adviser after he reached the age of 65 and it is just possible, I suppose, that his salary might have been increased. Mr. Paull suggested that I should allow these two matters to weigh in favour of the plaintiff, but in a case which is founded on breach of contract I do not feel I ought to do so.

It was submitted on behalf of the defendants that the sum of £1,000 per annum which the plaintiff now draws from the two businesses in which he has bought an interest was too little. The plaintiff made it clear that he intended to devote his energies and attention to these two businesses and hoped to make a success of them. I accept his statement that it is not easy for a redundant chairman of 54 to obtain a salaried post unless he is prepared to put up money. I am satisfied that the plaintiff has done his best to mitigate his loss and I doubt whether he would have succeeded in mitigating it to the extent to which he has if he had not been in a position to put up capital.

With regard to the passage in Lord Goddard's speech [10] to which I have referred it was contended on behalf of the defendants that it was only proper to pay regard to disposable investments to the extent that they were likely to be disposed of and that on the plaintiff's own evidence he might be able to make all, or a substantial proportion of, his proposed capital gifts out of money in the bank, and that the bulk of his free investments would remain undisturbed. If this were the case, the bulk of his present shareholdings, which are worth some £500,000, would still remain disposable and the income tax from them uncharged except in so far as it was required to pay sums due under covenants. So far as I am aware, there is nothing to prevent the plaintiff, after making his proposed capital gifts, from setting aside sufficient income producing investments to pay the sums due under the covenants from time to time, and from investing the remainder of his capital in some non-income bearing investment which possesses the prospects of capital appreciation, provided he keeps in the bank a sum of ready money sufficient to provide for his immediate requirements or, alternatively, to

[10] [1956] 2 W.L.R. 41, 53.

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buy himself a substantial annuity. In such a case the view of Lord Goddard and the two noble Lords who agreed with his speech was that less, or little, regard should be paid to the incidence of tax. The majority of the House of Lords in *Gourley's* case [11] were also of the opinion that no difference in principle existed between the damages to be awarded in a case of personal injury, founded on tort, and in an action for wrongful dismissal founded on breach of contract.

Bearing in mind the considerations which I have endeavoured to set out and mindful of the fact that I have not even the material upon which to arrive at an arithmetically calculable sum to which I should pay "less, or little, regard" I must do my best to arrive at what I consider a reasonable sum to award the plaintiff as general damages. The sum at which I arrive is £18,000.

[His Lordship then dealt with the plaintiff's third head of claim, namely, his alleged loss of benefits under the defendants' retirement scheme for directors. His Lordship found that on a member's entry into the scheme, which was, in effect, a pension scheme, the defendants, who paid all the premiums, took out a non-participatory endowment assurance on the member's life maturing on the member's 65th birthday or on his previous death. Rule 12 of the scheme provided that "in the event of "the employment being terminated by the employer before the "normal pension date" a member should have the option (inter alia) of receiving a fully paid-up policy for the proportionately reduced benefit secured by the premiums already paid, payable in the form of a life pension from normal pension date. On August 26, 1954, the date of the plaintiff's termination of employment, he was entitled to a life annuity purchasable by the sum of £10,647, which he received. Had he continued to serve the defendants until his 65th birthday or died before that date he or his estate would have been entitled to £27,379. His Lordship said that Mr. Paull admitted that the plaintiff had received all that he was entitled to under the scheme, but argued that "being terminated" in rule 12 ought to be confined to cases where the employment was rightfully terminated, and that by the wrongful determination of the plaintiff's contract the defendants had in fact deprived him of the opportunity of receiving the larger sum of £27,379, and he claimed £13,462, which represented actuarially the present value of the difference between the sum actually received and £27,379. Mr. Paull relied on *Chaplain* v. *Hicks* [12] and submitted that just as Miss Chaplain had recovered substantial damages for the loss of her chance to secure an engagement, so the plaintiff was entitled to recover £13,462 for the loss of his chance of obtaining the enhanced sum to which he would have been entitled if his service agreement had not been wrongfully terminated. His

[11] [1956] 2 W.L.R. 41.

[12] [1911] 2 K.B. 786; 27 T.L.R. 458.

Lordship continued:] I think there is a short answer to this argument. *Chaplain* v. *Hicks* [13] decided that when a defendant by his breach of contract deprives the plaintiff of a chance of obtaining another beneficial contract, the plaintiff is entitled to damages for the loss of that chance. The difficulty in *Chaplain* v. *Hicks* [13] was to measure the plaintiff's damage. In the present case it is conceded that the plaintiff's rights under the retirement benefit scheme, as such, are exhausted. The defendant company had a perfect right under the scheme and trust deed to discontinue the whole scheme or, alternatively, to discontinue any participant's assurance under the scheme at any time. They discontinued the plaintiff's assurance and paid him out under the rules of the scheme. The plaintiff's claim is for breach of contract and it is axiomatic that no man can be held liable in contract for failing to do what he is not obliged to do under the contract. If this proposition requires authority to support it (which I doubt), I need only quote a passage from the judgment of Scrutton L.J. in *Abrahams* v. *Herbert Reiach Ltd.* [14] That was a case which concerned the measure of damages payable to two young athletes who had entered into a contract with a firm of publishers to publish certain articles in a magazine and thereafter to publish them in book form, paying a sum for each copy sold. There was a dispute as to what damages, if any, the plaintiffs were entitled to, and Scrutton L.J., in his judgment, said [14]: "I am not inclined to be strict in limiting the damages "recoverable against wrongdoers, but if their obligation is left "so much to their discretion that there are several ways of "performing it, I have always understood that the court assesses "damages on the basis that 'if the contract could have been "'performed by the performance of the alternative least "'beneficial to the plaintiff, the measure of damages would be "'regulated by the loss occasioned by non-performance of that "'alternative': *Deverill* v. *Burnell*, [15] *per* Bovill C.J. The "simple reason for this is that a defendant is not liable in "damages for not doing that which he is not bound to do."

Participation or continued participation in the retirement benefit scheme was no doubt one of the attractive terms of the plaintiff's service agreement, but once it is conceded that the plaintiff's deprivation of a chance of obtaining enhanced benefits under the scheme does not sound in damages because the defendants have fulfilled their obligations under the scheme I find it quite impossible to see how the plaintiff can be entitled to swell the amount of damages to which he is entitled owing to the defendants' wrongful repudiation of his service agreement by including in his claim an item in respect of which no damage is recoverable.

I accordingly award the plaintiff the agreed sum of £1,375 for what may be called the agreed special damage and £18,000

[13] [1911] 2 K.B. 786.
[14] [1922] 1 K.B. 477, 482.
[15] (1873) L.R. 8 C.P. 475, 481.

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by way of general damage, making a total of £19,375. There will be judgment in favour of the plaintiff for that sum with costs.

Judgment for the plaintiff.

Solicitors: *Herbert Smith & Co.; Slaughter & May.*

C. J. E.

[COURT OF APPEAL.]

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Jenkins and Hodson L.JJ.

* POLAK AND ANOTHER *v.* MARCHIONESS OF WINCHESTER.

[1956 P. 490.]

Solicitor—Costs—Taxation—Bill—Counsel's fees entered as paid—Fees in fact unpaid—Subsequent payment of fees—Whether jurisdiction to allow withdrawal of bill and delivery of fresh bill—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *ss.* 65 (1), 66, 68, 81.

Solicitors who had been employed in certain litigation had their instructions withdrawn. Subsequently they delivered a bill of costs to the client, who obtained an order for taxation of that bill. On the matter coming before the taxing master it was discovered that items of disbursements in respect of counsel's fees entered in the bill had not in fact been paid. Thereupon the solicitors sought an adjournment of the taxation, which was granted. Counsel's fees were subsequently paid, and the solicitors then applied to the court by summons asking, inter alia, for leave to withdraw the original bill of costs and deliver a fresh one containing proper entries in respect of counsel's fees. The judge made the order sought:—

Held, that the court, in the exercise of its inherent jurisdiction, had power, provided that it was satisfied that the solicitor concerned had acted honestly and merited assistance, to allow the withdrawal of a bill of costs, which erroneously showed counsel's fees as paid, and after payment of these fees the substitution of a fresh bill showing them as paid.

In re Taxation of Costs, In re A Solicitor [1943] Ch. 48; 59 T.L.R. 68; [1943] 1 All E.R. 157 approved.

APPEAL from Pearson J. (in chambers).

The client, the Marchioness of Winchester, employed in certain litigation as her solicitors Henry S. L. Polak & Co. Subsequently the client withdrew her instructions, and on December 7, 1955, the solicitors delivered a bill of costs. On January 11, 1956, the client obtained an order for taxation of that bill. On the matter coming before the taxing master on March 16, 1956, it was discovered that items of disbursements in respect of counsel's fees entered in the bill amounting to about £300 had not in fact been paid. Thereupon the solicitors asked for the taxation to be adjourned. An adjournment was granted and the solicitors paid counsel's fees.

The solicitors then applied to the court by summons asking, inter alia, for leave to withdraw the original bill of costs and deliver a fresh one containing proper entries in respect of counsel's fees.

On April 11, 1956, the matter came before Pearson J. in chambers, who made the order sought.

The client appealed contending that, by virtue of the Solicitors Act, 1932,[1] there was no jurisdiction in the court to make the order.

The facts are fully set out in the judgment of Jenkins L.J.

Paul Curtis-Bennett for the client.
John Lloyd-Eley for the solicitors.

The following cases, not referred to in the judgments, were cited in argument: *Loveridge* v. *Botham*[2]; *In re Thompson*[3]; *Lumsden* v. *Shipcote Land Co.*[4]

JENKINS L.J. In this case the Marchioness of Winchester, who may conveniently be referred to as the client, employed in certain litigation as her solicitors the firm of Henry S. L. Polak & Co., who may conveniently be referred to as the solicitors. After a period the client decided upon a change of solicitors. She withdrew her instructions from the solicitors, and on December 7, 1955, they delivered a bill of costs. On January 11, 1956, the client obtained an order for taxation of that bill. The matter came before the taxing master on March 16, 1956. It was then discovered that items of disbursements in respect of counsel's fees amounting to a substantial figure, of the order, I think, of £300, had not in fact been paid. This was pointed out as soon as the matter came before the taxing master, and thereupon the solicitors asked for the taxation to be adjourned so that they could apply to the judge for rectification of the bill by substituting a new bill, prior to delivery of which counsel's fees

[1] Solicitors Act, 1932, s. 65: "(1) Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor until one month after a bill thereof has been delivered in accordance with the requirements of this section: . . ."

S. 66: "(1) On the application, made within one month of the delivery of a solicitor's bill, of the party chargeable therewith, the High Court shall, without requiring any sum to be paid into court, order that the bill shall be taxed and that no action shall be commenced thereon until the taxation is completed."

S. 68: "(3) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as they think fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."

S. 81: "(1) In this Act, unless the context otherwise requires—. . . 'Costs' includes fees, charges, disbursements, expenses and remuneration."

[2] (1797) 1 Bos. & P. 49.

[3] (1885) 30 Ch.D. 441, 448, 450.

[4] [1906] 2 K.B. 433, 435, 438; 22 T.L.R. 559.

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would in fact have been paid. An adjournment was granted and the solicitors did in fact pay counsel's fees. They then applied to the court by a summons, on which the relief sought was briefly that the solicitors should pay the whole of the costs of the client incurred in respect of the taxation to date, such costs to be taxed as between solicitor and client, and an order that, subject to those costs being paid within 14 days after completion of their taxation, the solicitors should be at liberty to withdraw their bill of costs delivered on December 7, 1955, and to deliver a new bill of costs in substitution therefor, with a proviso to the effect that such substituted bill of costs should, to put it shortly, be identical with the bill previously delivered save that proper entries could be made in respect of counsel's fees. Counsel's fees, of course, could by that time properly be included in a bill as disbursements because they had in fact been paid.

On April 11, 1956, the matter came before Pearson J. The application was supported by an affidavit of Mr. Maurice Hendrik Leon Polak, one of the partners in the solicitors' firm, which showed that the failure to pay counsel's fees before the bill was delivered had taken place through some confusion in the solicitors' office. Apparently the matter was attended to by the litigation managing clerk to the firm, who was then very busy. As this taxation was regarded as a matter of urgency, it was not referred to the costs draughtsman, who usually dealt with such matters. The litigation clerk, so it was said, was at this period in poor health and in a somewhat overwrought nervous condition. Owing to these various causes, and apparently also to a mistaken assumption by the deponent that his father had attended to the matter of the payment of these fees, and to a notion erroneously entertained by the litigation clerk that it was not necessary actually to pay the fees before taxation, the matter was overlooked.

One cannot regard these errors and assumptions on the question of the payment of these fees as reflecting any great credit on the efficiency of the solicitors' office organization at that time; but the judge was perfectly satisfied that the omission to pay these fees was due to bona fide mistake and inadvertence, and that there was no intention whatever on the part of the solicitors to do anything dishonest in the matter, or to overreach the client in any way. The judge came to that conclusion after he had seen and heard the deponent being cross-examined on his affidavit. In these circumstances the judge made the order sought, and the view of the law on which he made the order was that the court has jurisdiction to allow a bill to be withdrawn and a new bill to be substituted for the purpose of making a correction such as the correction here sought in the matter of counsel's fees, but that the court should, as he said, take a strict view to maintain the necessary safeguards, that is to say, the court should be perfectly satisfied that the error in the bill as originally delivered was due to a bona fide mistake.

The main argument put forward by Mr. Curtis-Bennett for the client before us—though not, I think, the main argument, or indeed an argument put forward at all, before the judge—was to the effect that there was no jurisdiction in the court to make an order of the kind made by the judge. Mr. Curtis-Bennett referred us to certain sections of the Solicitors Act, 1932. He cited the provision in section 65 (1), that "Subject to the "provisions of this Act, no action shall be brought to recover any "costs due to a solicitor until one month after a bill thereof has "been delivered in accordance with the requirements of this "section"—that being read in conjunction with the definition of "costs" in section 81 (1): "... 'Costs' includes fees, charges, "disbursements, expenses and remuneration." He also referred to section 66 (1) as to taxation, and to section 68 (3). [His Lordship read sections 66 (1) and 68 (3), and continued:]

The general rule in cases of this kind is well settled and Mr. Curtis-Bennett referred us for it to *Sadd* v. *Griffin*.[1] The headnote in that case is: "For the purpose of taxation of a solicitor's "bill under the Solicitors Act, 1843, 'disbursements' means "actual payments before delivery of the bill, and any sums "claimed in the bill as disbursements, *e.g.*, fees to counsel, "which have not been paid before its delivery, must be "disallowed."

Farwell L.J., reading the judgment of himself and Fletcher Moulton L.J., used these words[2]: "This is a taxation under the "Solicitors Act, and to such a taxation considerations different "from those applicable to a party and party taxation apply. As "the Master of the Rolls in *Davis* v. *Earl of Dysart*[3] said, "'The bill of costs, as between party and party, is always "'susceptible of being added to or varied, after it has been "'brought into the office. In this respect, it is quite different "'from a bill of costs taxed under the statute, where an altera-"'tion cannot be made as against the client, except with his "'consent, after the bill has been brought in for taxation. In "'cases of taxation or costs as between party and party, the "'bill of costs is analogous to a mere state of facts, and is a "'claim by one party against another party to a suit, and it may "'be amended, in any way and at any time, before the taxation "'is concluded.'"

Then Farwell L.J. said this[4]: "It is equally clear that a "solicitor cannot properly accept payment of the bill unless he "has paid the alleged disbursements, and, if he did so, he "would run considerable risk of being struck off the rolls: see "*In re A Solicitor*[5]; and it is settled beyond controversy that the "solicitor is, for the purposes of taxation, bound by the bill that "he has delivered and cannot alter it without the leave of the "court or the consent of the party." Then he referred to

[1] [1908] 2 K.B. 510; 24 T.L.R. 715.
[2] [1908] 2 K.B. 511.
[3] (1855) 21 Beav. 124, 132.
[4] [1908] 2 K.B. 512.
[5] (1883) 27 S.J. 683.

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In re Thompson,[6] where Cotton L.J. said: "'It has been well "'established that, when a solicitor sends in his bill, he gives "'the client to whom he sends it in a right to have that bill "'taxed. That rule was laid down to prevent any attempt being "'made by solicitors to impose on clients, who did not know "'what the proper charges were, by sending in a bill which "'would not stand taxation, and then, when taxation was "'insisted on or threatened, sending in another bill which they "'knew could stand taxation. The rule has been carried so "'far that even where objections have been made to particular "'items of a bill delivered, and the solicitors have, with the "'assent of the client, taken back the bill for the purpose of "'reconsideration and have struck out certain items, the court "'has held that the bill to be taxed must be the bill as it was "'originally sent in and not the bill as amended.'"

After that quotation from Cotton L.J. Farwell L.J. continued[7]: "The solicitor has claimed in the bill in this case "£54 odd for fees to counsel which, by delivering his bill, he "alleges to have been paid, and he is bound by that statement. "When it is shown to be incorrect, the items cannot be allowed, "for such allowance would enable him to turn an amount which "when the bill was delivered was a liability not enforceable at "law into an actual payment."

It is to be observed that in saying[8] that the solicitor is for the purposes of taxation bound by the bill which he has delivered Farwell L.J. went on to say "and cannot alter it without the "leave of the court or the consent of the party." That reference to the leave of the court recognizes the existence of an inherent jurisdiction in the court to control these matters of taxation. Mr. Curtis-Bennett does not dispute the existence of an inherent jurisdiction of that kind, but he contends that it is not wide enough to justify the court in doing, or to empower the court to do, that which was here done by the judge.

Sir George Jessel M.R., in *In re Holroyde and Smith*,[9] made some observations on this question. He began his judgment in these words: "As regards the law on this question, I will take "it from a decision in the Appeal Court in *In re Heather*,[10] the "headnote to which is as follows: 'A solicitor who has delivered "'his bill to the person chargeable therewith cannot afterwards "'avoid the taxation of the bill by withdrawing it and delivering "'an amended bill even though the person chargeable sent "'back the original bill, with suggested alterations which were "'partially acquiesced in.'" And then at the bottom of the same page he says this: "The reporter's marginal note to *Re* "*Chambers*[11] is certainly not reconcileable with the decision in "*Re Heather*.[12] The marginal note in the former case is: 'A

[6] (1885) 30 Ch.D. 441, 448.
[7] [1908] 2 K.B. 510, 513.
[8] Ibid. 512.
[9] (1881) 43 L.T. 722.
[10] (1870) 5 Ch.App. 694.
[11] (1865) 34 Beav. 177.
[12] 5 Ch.App. 694.

" ' solicitor after delivering his bill of costs may before being " ' served with an order for taxation withdraw it and substitute " ' another bill of a reduced amount.' I think the reporter made " a mistake, for what Lord Romilly seems to have actually " decided was that there must be special circumstances to entitle " a solicitor to withdraw one bill and substitute another. In my " opinion under special circumstances, this might be so, that is " to say, on the ordinary equitable grounds of fraud, accident, or " mistake—such as, for instance, when the solicitor has been " entrapped into making charges by the misrepresentations of " his client or in the case of accident, where a charge or a wrong " page had been inserted by mistake; but special circumstances " there must be. Lord Romilly says, in *In re Chambers* [13]: " ' Lord Langdale held, and I have also held, that a solicitor " ' cannot substitute as a matter of course a second bill for the " ' first, but I have not held that you can never do it.' "

Thus the Master of the Rolls in that case undoubtedly recognized the existence of a jurisdiction in special circumstances to allow one bill of costs to be withdrawn and another to be substituted for it. But Mr. Curtis-Bennett says that the position between a client and his solicitor as regards costs is crystallized once and for all when the bill, for better or worse, is delivered. He says that the rights and liabilities of the parties must be determined once and for all by reference to the position as it stood at the date of the delivery of the original bill. He says that the mistakes which it is permissible for the court to rectify or amend are merely mistakes by reason of which the bill as originally delivered failed properly or truly to show the amount rightly due to the solicitor at that date; and he says that is as far as the inherent jurisdiction goes: it does not extend to the substitution of a new bill which includes not merely matters which were proper to be included at the date of the bill originally delivered, but also matters which can only be claimed by the solicitor by virtue of something which has happened since the date of delivery of the original bill, such as in the present case the payment of counsel's fees, which, until they had actually been paid, retained their character of mere honoraria for the recovery of which by counsel no legal proceedings could be taken. Thus, says Mr. Curtis-Bennett, the court cannot substitute a new bill introducing counsel's fees as disbursements which have, in fact, been made, a character which they did not and could not bear at the date of the original bill. So, says Mr. Curtis-Bennett, the only course which would fall within the inherent jurisdiction of the court would be for it to allow an amendment of the existing bill so as to make it comply with R.S.C., Ord. 65, r. 27, reg. 29A, which provides as follows: " In taxations under or " pursuant to the Solicitors Act, 1932, of a solicitor's fees, " charges and disbursements, no such disbursements shall be " allowed which have not been actually made before the delivery

[13] 34 Beav. 177, 179.

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" of the bill of costs, unless the bill shall expressly state that " they have not been made, and shall set out such unpaid items " of disbursements under a separate heading in the bill, in which " case they may be allowed by the taxing master if they are " actually made before the commencement of the proceedings in " which the taxation takes place, and are made in discharge of " an antecedent liability of the solicitor (including counsel's fees) " properly incurred on behalf of the client. For the purposes of " computation of one-sixth thereof such bill shall be deemed to " include such unpaid items as part of the bill.

" Provided also that if the proceedings for taxation shall have " been commenced by the client or a third party, payments made " by the solicitor pending such proceedings in discharge of any " such antecedent liability so set out in the bill (including " counsel's fees) may be allowed by the taxing master if actually " made before the commencement of the taxation, if it appears " to him that such payments have been properly made and that " no injustice is done thereby."

Mr. Curtis-Bennett says that the utmost the court could allow would be the amendment of the bill by extracting from it the items of counsel's fees shown as disbursements in the ordinary way and setting them out instead as unpaid items of disbursement under a separate heading in the bill; and that if this had been done, then the bill would have been brought within the requirements of regulation 29A. But this concession by Mr. Curtis-Bennett was somewhat in the nature of a Greek gift, for he adds that this will not avail the solicitors because regulation 29A is in truth ultra vires, so that the solicitors would be no better off with their amended bill than they were with their bill as it stands at present. Mr. Curtis-Bennett founded this contention on some observations of Scott L.J. in *In re Taxation of Costs, In re A Solicitor.*[14] I think it suffices if I refer to the following passage[15]: " What then is the true position in regard " to the argument that regulation 29A is ultra vires? Clearly " its first four lines are just as consistent with the new Act as " with the old: that part is not ultra vires. In regard to lines 4 " to 11 of the regulation we need not consider the question of " ultra vires, for nothing in this appeal turns upon that part; " but we must not be understood to express any affirmative view " that that part of the regulation can have the effect of authoriz- " ing the inclusion in the bill of costs of any disbursement which " is not ' due ' as a legally enforceable debt from the client to " the solicitor. In the case of counsel's fees there cannot be any " debt until after actual payment by the solicitor to counsel. " To enter unpaid counsel's fees in the bill of costs under the " permissive words of the regulation would be a direct violation " of the prohibition of the statute. The wording of the regulation

[14] [1936] 1 K.B. 523; 52 T.L.R. 306; [1936] 1 All E.R. 491.

[15] [1936] 1 K.B. 530.

" should be considered by the Rule Committee. On this first " point the appeal must be dismissed."

So that Scott L.J. thus was, to put it at its lowest, expressing grave doubts as to the validity of the regulation. As against that, it was pointed out by Harman J. in *In re A Solicitor* [16] that Scott L.J.'s view expressed in the passage I have just read was " in flat contradiction to the opinion of the court in *In re* " *Hildesheim* [17] " where the Court of Appeal appeared to take the view that regulation 29A was a perfectly valid regulation. I find it unnecessary to express any opinion on that question which may now be regarded as of transitory interest, in view of legislation which is shortly due to come into force. I need express no opinion upon it, for I do not agree that the inherent jurisdiction of the court is limited in the way propounded by Mr. Curtis-Bennett. In my judgment, provided the court is satisfied that the case is one in which the solicitor concerned has acted honestly and merits assistance in the matter, the inherent jurisdiction extends to the withdrawal of a bill already delivered containing, as in the present case, disbursements in respect of counsel's fees which had not then actually been paid and, after the fees have been paid, the substitution of a fresh bill showing them as paid, as in fact they will have been by the time the substituted bill is delivered. It seems to me that the language of Sir George Jessel M.R., in the case I quoted, is wide enough to include such a withdrawal and substitution, and as appears from *In re Taxation of Costs, In re A Solicitor*,[18] Uthwatt J., as he then was, had no doubt that this could be done. That was a case in which counsel's fees which had not been paid were shown as paid in the bill delivered, and, although the actual circumstances were different from those of the present case, it did in that respect resemble this case, so that the technical point involved was exactly the same; and the judge held that the court had jurisdiction to allow the bill to be withdrawn and a fresh bill delivered, and ought in the case then before him to exercise that jurisdiction, as otherwise the client would obtain the benefit of the payments which the solicitors had made and had failed to note properly in the bill.

In reaching that conclusion, Uthwatt J. referred to an unreported case in the Court of Appeal of *Peter Thomas & Co.* v. *Smith*,[19] and after commenting on the merits of the case, he said [20]: " However that may be, there is undoubtedly jurisdic- " tion in the court to allow a solicitor to withdraw a bill and to " deliver a fresh bill. There are old authorities to that effect, " and recently the Court of Appeal, in *Peter Thomas & Co.* v. " *Smith*,[21] exercised that power in circumstances which, so far " as can be gathered from the only available material, were

[16] [1951] W.N. 153; [1951] 1 All E.R. 592, 598.
[17] [1914] 3 K.B. 841.
[18] [1943] Ch. 48; 59 T.L.R. 68; [1943] 1 All E.R. 157.
[19] Unreported, May 2, 1932.
[20] [1943] Ch. 48, 49.
[21] Unreported, May 2, 1932.

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"exceedingly like those of the present case. The question "whether that power ought to be exercised in any particular "case depends on all the circumstances of that case." Finally, at the end of the judgment Uthwatt J. set out the terms of the order he proposed to make, and they are in fact in substance reproduced in the order made by the judge in the present case.

Mr. Curtis-Bennett fastened upon a reference in the report to the submission of Mr. Denning, as he then was, where Mr. Denning is reported as having said [22]: "the solicitor ought to be "allowed to withdraw it"—that is, the bill—"and to deliver a "fresh one showing the £298 as unpaid items of disbursements "under a separate heading as otherwise he will be unable to "recover what he has paid." That, says Mr. Curtis-Bennett, is an obvious reference to the type of amendment which would bring the case within the regulation 29A. Indeed, Mr. Denning began his observations, as reported, by saying [23]: "The bill does "not comply with O. LXV, r. 27, reg. 29 (*a*)." That may be so, but I do not think that affords any ground for the view that that method of amendment is the only method open, and I think that the jurisdiction to allow the bill to be withdrawn and a fresh bill to be substituted extends to allowing the fresh bill to include items of disbursements in respect of counsel's fees which have in fact been paid before the date of the fresh bill and can truly be shown in that bill as disbursements paid.

Harman J.'s case, to which I have already referred, raised the same question of withdrawal of the bill and substitution of a fresh bill in a case involving counsel's fees, and he followed Uthwatt J. in applying *Peter Thomas & Co.* v. *Smith*.[24] It is unfortunate that *Peter Thomas & Co.* v. *Smith* [24] appears to be unreported, but I think enough is known about it to make it reasonably clear that it was a case raising the same technical question as is raised in this case, and that the decision which reversed the decision of the judge below was to the same effect as Uthwatt J.'s decision in *In re Taxation of Costs, In re A Solicitor*.[25] I should add with respect to *Peter Thomas & Co.* v. *Smith* [26] that a slightly more ample reference to it is to be found in the report of Uthwatt J.'s judgment in the same case in the All England Reports, where the judge is reported as having said [27]: "How- "ever that may be, it is undoubted that there is a discretion in "the court, and the court has power, to allow a solicitor to "withdraw a bill and to deliver a fresh bill. There are, I think, "old authorities to that effect, but there is a recent authority "in an unreported case, *Thomas* v. *Smith*,[28] where the Court "of Appeal, reversing the decision of du Parcq, J., exercised that "power and exercised it in circumstances which, as far as one "could gather from the only available material—a note of the

[22] [1943] Ch. 48, 49.
[23] [1943] Ch. 48.
[24] Unreported, May 2, 1932.
[25] [1943] Ch. 48.
[26] Unreported, May 2, 1932.
[27] [1943] 1 All E.R. 157, 158.
[28] Unreported, May 2, 1932.

"decision in the taxing master's office—were exceedingly like "the present case. As far as I am concerned, that case is only "authority for the proposition that there is jurisdiction in the "court to allow a bill to be withdrawn and a new bill to be "delivered." Then the judge, having said that that case is only authority for the proposition that there is jurisdiction, went on to examine the question whether on the merits the jurisdiction ought to be exercised.

In my view, this court should follow the decision in *Peter Thomas & Co.* v. *Smith* [28] and hold that the judge in the court below had jurisdiction to make the order sought. On the question whether this case is one in which the jurisdiction should be exercised in favour of the solicitors, I have made a brief reference to the circumstances in which it came about that these disbursements for counsel's fees were not in fact paid before the bill was delivered. The story is something of a chapter of accidents, of pressure in the office, of somebody who had already had a lot of work to do having this task thrust upon him, of a departure from what was apparently the usual routine of going to a costs specialist to have the bill drafted, of a misapprehension by the particular clerk who was charged with the duty of looking after this particular matter of costs as to the time at which counsel's fees ought to be paid in relation to the delivery of a bill, and of a mistaken assumption by a member of the solicitors' firm that the fees had in fact been paid. A combination of these matters resulted in this unfortunate oversight.

I entirely agree with the judge when he said that one has to take a strict view to maintain the necessary safeguards, and nothing I say is to be regarded as suggesting to solicitors that they can be careless or unbusinesslike in a matter such as this, and then as of course apply for and receive the assistance of the court. It is only in exceptional cases, cases of special circumstances, of genuine mistake of inadvertence, that assistance ought to be given. I agree with the judge that this is a case which is very near the borderline; but he has found it one in which he came to the conclusion that the discretion could properly be exercised in favour of the solicitors. In my view he was justified in coming to that conclusion and it would not be right for this court to interfere with his exercise of that discretion. I think, moreover, that, while the case is near the line, it is a case where I myself, if I were dealing with the matter at first instance, would have been likely to come to the same conclusion as the judge. The loss of this substantial sum which the solicitors have paid out for counsel's fees would, as it seems to me, be a wholly excessive penalty for the carelessness of which they have been guilty in this matter. Be that as it may, the judge seems, from the short note of the judgment, to have directed himself correctly in determining this question of discretion and seems to me to

[28] Unreported, May 2, 1932.

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have come to a conclusion which this court certainly should not disturb.

For these reasons I would dismiss this appeal.

HODSON L.J. I entirely agree with the judgment which my Lord has delivered.

When this matter came before the judge it was simply on the footing that the question was aye or no should he exercise his discretion in the matter. It was a case in which an entry had been made in the bill of costs which was not true: money was said to have been paid which had not been paid, and therefore it was a matter which gave him anxious consideration. He came to the conclusion that the error arose as it was said to have arisen, by a slip, and not with any intention of trying to obtain payment of money which might otherwise not so readily be paid. He saw the witness who had sworn the affidavit and heard him cross-examined, and came to the conclusion that there was no dishonesty.

In those circumstances, he having exercised his discretion, it would not, in my opinion, be right for this court to take a different view. Moreover, I agree with my Lord that on the facts disclosed it seems to me that this is a case in which any judge would be likely to arrive at the same conclusion, if it were open to him. In this court Mr. Curtis-Bennett has argued further that there is no discretion in a case like this where a bill has been delivered: the position is crystallized and no alteration can be made—at any rate, no alteration of such a kind as would alter the position to the prejudice of the client. But in making that submission he realized that he was faced with the decision of Uthwatt J. in *In re Taxation of Costs, In re A Solicitor*,[29] which must therefore, he submitted, be wrongly decided. In my view that submission is not well founded. That case was like the present in that fees were stated to have been paid whereas they had not been paid; they were subsequently paid and an attempt was made by the solicitors to amend the bill; an order was made not that the bill should be amended, but that a fresh bill should be delivered not distinguished from the previous bill in any material particular save that proper entries might be made in respect of counsel's fees. The fees having been paid in that case as in the present one, the only proper entry could be an entry showing the payment of those fees when they were truly paid. Uthwatt J.'s decision was, in my opinion, perfectly correct, and I agree with him that it was supported by the authority of this court, namely, the authority of *Peter Thomas & Co.* v. *Smith*.[30] It is quite true that it seems to have been a settled practice before *Peter Thomas & Co.* v. *Smith*[30] was decided on May 2, 1932, following *Sadd* v. *Griffin*,[31] and what was said in that case in 1908, to prevent

[29] [1943] Ch. 48.
[30] Unreported, May 2, 1932.
[31] [1908] 2 K.B. 510.

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solicitors recovering items unpaid at the time when the bill was delivered and not set out in the bill under a separate head. But that course of disallowance having been taken by the judge of first instance in *Peter Thomas & Co.* v. *Smith*,[32] he was reversed by this court, and the circumstances in which that reversal took place seem to be the same circumstances, so far as our information goes, as those which exist in this case. There appears to me to be no doubt but that Uthwatt J. was acting in accordance with authority when he made the decision which he did; and moreover I agree with my Lord that he was acting in accordance with the principle as set out in the earlier decisions to which our attention has been drawn.

I agree, therefore, that the appeal should be dismissed.

Appeal dismissed with costs, including the costs of the application for leave to appeal.

Solicitors: *Theodore Goddard & Co.; B. C. Somper.*

J. A. G.

[32] Unreported, May 2, 1932.

[COURT OF APPEAL.]

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June 7.
Denning, Birkett and Parker L.JJ.

* NICHOLSON *v.* LITTLE.

[Plaint No. L. 2364.]

Costs—County court action—Counterclaim—Money received on behalf of plaintiff retained by defendant against claim for fees—Plaintiff's action to recover money necessitated by defendant's behaviour—Defendant's recovery of part of money on set-off—Counterclaim dismissed—Discretion as to costs vested in county court unfettered by any rule of law laid down in Court of Appeal decisions—County Court Rules, 1936 (*S.R. & O.*, 1936, *No.* 626/*L.*17), *Ord.* 47, *r.* 1. *Costs—Discretion of court—Unfettered.*

The discretion as to costs vested in the county court judge under County Court Rules, Ord. 47, r. 1,* is unfettered by any decision of the Court of Appeal as to county court costs.

A surveyor, who had received moneys for war damage claims on behalf of a house owner, retained the balance of £84, claiming that the house owner owed him £105 in fees. After the house owner had asked repeatedly and unsuccessfully for the £84, he sued the surveyor in the county court. The surveyor by way of defence claimed a set-off and counterclaimed for £105. The county court

* Ord. 47, r. 1: "Subject to the provisions of any Act or Rule, the costs of proceedings in a county court shall be in the discretion of the court."

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judge found that £61 was owing to the surveyor; he gave judgment for the plaintiff for the balance, £22, dismissed the counterclaim, and awarded costs to the plaintiff. On appeal by the surveyor against the order as to costs:—

Held, that the judge in the exercise of his unfettered discretion was entitled to take into account the fact that all the proceedings had been occasioned by the surveyor's retention of the house owner's money and that the plaintiff would be out of pocket if costs were awarded against him.

Dictum of Brett M.R. in *The Friedeberg* (1885) 54 L.J.P. 75 applied.

Per curiam. N.V. Amsterdamsche Lucifersfabrieken v. *H. & H. Trading Agencies Ltd.* [1940] 1 All E.R. 587, though a useful guide in similar cases, does not lay down any rule of law which fetters the exercise of that discretion.

APPEAL from Judge Hodgson, sitting at Wandsworth County Court.

The plaintiff, William Nicholson, the owner of a number of properties, employed the defendant, Gordon Little, a surveyor, to advise on war damage claims. The money in respect of the claims due to the property owner was paid by the War Damage Commission to the surveyor, who paid part of it over to the owner, but there was left in his hands the sum of £84 6s. 5d. The surveyor claimed that he was entitled to retain that amount on account of fees due to him which he stated to amount to a total of £105 4s. 10d. The owner wrote to the surveyor on a number of occasions asking for the £84 6s. 5d. to be paid to him, and eventually issued a plaint in the county court for that sum. By his defence the surveyor admitted that he had received that sum from the War Damage Commission, but claimed to set off against it an equal amount of the fees due to him, and counterclaimed for £105 4s. 10d. The owner by his reply to the defence and counterclaim admitted that only two guineas were due to the surveyor in respect of fees. No payment was made into court.

In the county court action, the judge found that the sum of £61 19s. 6d. was due to the surveyor in respect of fees; and he gave judgment for the plaintiff on the claim for £22 6s. 11d.—the balance on the £84 odd—and awarded him costs on scale 2, dismissing the defendant's counterclaim.

On the award of costs it was submitted for the surveyor that as the whole contest in the action had been on the counterclaim for his fees, on which he had been successful, he ought to have the whole of the costs of the action, subject to the nominal costs of the plaintiff's setting down the case; and reliance was placed on the decision in *N.V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies Ltd.*† The county court judge was referred to the summary of that case in the County Court Practice (1956 ed., p. 746); but he awarded the costs to the plaintiff. He said: "I decide the point taken as to costs against

† [1940] 1 All E.R. 587.

"the defendant. In view of the plea of set-off there is no real "admission. The plaintiff had to come to court and fight to "recover anything; and he has recovered £22 6s. 11d."

The surveyor appealed on the issue as to costs.

T. H. Tilling for the surveyor.

John Sumner for the owner.

The following cases were cited in the argument: *N.V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies Ltd.*†; *Childs* v. *Gibson, Childs* v. *Blacker*‡; *Cinema Press Ltd.* v. *Pictures and Pleasures Ltd.*§; *Chell Engineering Ltd.* v. *Unit Tool and Engineering Co. Ltd.*¶; *The Friedeberg.*‖

DENNING L.J. stated the facts and continued: From that decision the surveyor appeals to this court. He has again relied on what has been called the *Dutch Match* case (*N.V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies Ltd.*),[1] which he says was followed in a later case in this court of *Childs* v. *Gibson, Childs* v. *Blacker.*[2] He says that in the face of those authorities the county court judge had no option but to give the surveyor the costs. I desire to say at once that those cases cannot be regarded as laying down a rule of law which would fetter the discretion of the judge. The Rule of Court (County Court Order 47, r. 1) states: "Subject to the provisions of any "Act or Rule the costs of proceedings in a county court shall "be in the discretion of the court." In the face of that rule it is impossible for this court or any other court to lay down a rule of law as to costs which would fetter the discretion thus given to the judge. It is interesting to notice that in *The Friedeberg*[3] Sir Baliol Brett M.R. said[4]: "The discretion of the court is to "be exercised in each individual case; but the moment a hard "and fast rule is laid down as to costs, the discretion of the "judge is fettered." He pointed out that if a rule were laid down, it would fetter not only an individual judge but also his successors; and that he declined to do.

Although the *Dutch Match* case[5] is no doubt a useful guide in similar cases, it must not be regarded as laying down a rule of law which would fetter the discretion of the judge. Relieved of that case, can we say in this case that the judge has gone wrong in point of principle in awarding the costs as he did? I can see no fault of principle in what he has done. It is to be remembered that this really was the house owner's money, and the surveyor was clinging on to it and claiming it as being his, the surveyor's, money; he wished to put it in his own pocket for

† [1940] 1 All E.R. 587.
‡ [1954] 1 W.L.R. 809; [1954] 2 All E.R. 243.
§ [1945] K.B. 356; 61 T.L.R. 282; [1945] 1 All E.R. 440.
¶ [1950] W.N. 146; [1950] 1 All E.R. 378.
‖ (1885) 54 L.J.P. 75.
[1] [1940] 1 All E.R. 587.
[2] [1954] 1 W.L.R. 809; [1954] 2 All E.R. 243.
[3] (1885) 54 L.J.P. 75.
[4] Ibid.
[5] [1940] 1 All E.R. 587.

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his fees, and he did put it in his own pocket for his fees, and it would have remained there but for the fact that the house owner brought this action. The house owner had to bring this action to recover his money. He succeeded in getting it, and he did so by greatly reducing this surveyor's claim for fees. The judge probably said to himself "It would be unjust for this house "owner, having had to bring this action to recover money due "to him, to find himself, by reason of costs, with nothing in "hand at all but rather out of pocket." That is a consideration which I think the judge was well entitled to take into account in exercising his discretion; and without saying anything as to the way in which any other judge or this court might exercise its discretion, it seems to me that there is no ground on which we can interfere with his discretion. I think that the appeal should be dismissed.

BIRKETT L.J. I entirely agree. On the face of it, this may not seem a very important matter, but in circumstances analogous to it it might be very important indeed. The question of the discretion of the county court judge, therefore, is a matter of extreme importance; and everybody seems to be agreed that the fundamental rule is in Order 47, r. 1: [His Lordship read Order 47, r. 1, and continued:] There are Acts and rules in force which fetter that discretion with regard to witnesses' allowances and all sorts of special matters, but in general it is a very wise thing that in circumstances which nobody can possibly foresee there should be vested in the county court judge a complete discretion as to costs; and I agree entirely with what my Lord has said about it.

In this case it seems to me quite plain that it really depends on a matter of presentation. It has been presented in very many ways, that if this or that had happened different results might have been achieved. But the county court judge listened to all that argument, read the *Dutch Match* case,[5] and then decided the point taken as to costs against the defendant. I think he did it because this all springs from one act, and that is the retention by the surveyor of the money which had been paid by the War Damage Commission to him as the agent of the owner. It may very well be, and I have no doubt is so, that there was an arrangement whereby the War Damage Commission was empowered to send the money to the surveyor; but it was the owner's money. Suppose nothing had happened; there was the owner saying "You have £84 6s. 5d. of mine"; there was the surveyor saying "It is true that I have, but you owe me "£105 4s. 10d. and I am keeping that £84 6s. 5d. as against "that sum, and I am going to demand the balance from you in "due course."

In this case the owner sued for his money, and the surveyor then said: "I will set off this £105 4s. 10d.," and in the result it was decided that there was a balance of £22 6s. 11d. due to

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the owner. The county court judge then had to decide "What "am I going to do about costs? It is not really possible for "me to say I will divide it into separate compartments in the "ordinary way; it is all mixed up together. The initial fault "that brought about this situation was the retention of this "money, and as I find after consideration that there was a "balance due to the owner I think that in those circumstances "I will make the order as to costs," which he did in fact make.

I cannot find that the county court judge went wrong; and I think it very important that the discretion of the county court judge should be limited only in the way laid down by the order. I would dismiss the appeal.

PARKER L.J. I agree.

Appeal dismissed with costs.

Solicitors: *Gard, Lyell & Co.; Bridgman & Co. for Theodore Bell, Cotton & Curtis, Sutton, Surrey; R. W. Platt.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

*DAVIS v. CAREW-POLE AND OTHERS.

1956
Mar. 19, 20, 21, 26.
Pilcher J.

[1955 D. 1587.]

Tribunal—Domestic—Control by court—Stewards of National Hunt Committee—Disqualification of trainer—Action for declaration—Natural justice—Whether contractual relationship necessary.
Natural Justice—Tribunal—Notice of issues.

The plaintiff, a livery stable keeper, was required to attend a meeting of the stewards of the National Hunt Committee, who were inquiring into an allegation that the plaintiff, an unlicensed trainer, had trained a horse for a steeplechase contrary to the National Hunt Rules. The plaintiff attended the inquiry when, without any prior notification, his alleged activities in connexion with the training of two other horses were considered. The plaintiff was declared a disqualified person under the rules. In an action against the committee claiming a declaration that the stewards' decision was ultra vires and void and an injunction restraining the defendants from treating the plaintiff as a disqualified person, Pilcher J. held that, on the evidence and on the true construction of the rules, the stewards were not entitled to declare the plaintiff a disqualified person. A claim by the plaintiff for damages was abandoned:—

Held, (1) that the mere fact that a person appearing before a domestic tribunal had not been given formal notice of all the matters in which his conduct was to be called in question, did not necessarily entitle him to contend successfully that the proceedings were not conducted in accordance with the principles of national justice; in the present case, no fact was in dispute in relation to

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the other matters raised and, in the circumstances, the plaintiff was not prejudiced by the lack of notice.

Dictum of Tucker L.J. in *Russell* v. *Duke of Norfolk* (1949) 65 T.L.R. 225; [1949] 1 All E.R. 109 applied.

(2) That even though there might not have been any contractual link between the plaintiff and the committee, when there could be no claim in damages, the court had jurisdiction to grant an injunction and declaration; that since under the rules the stewards were not, in the circumstances, entitled to declare the plaintiff a disqualified person, the plaintiff was entitled to the relief sought.

Per curiam. Once the plaintiff submitted to the jurisdiction of the committee, he was in contractual relation with the stewards and might have been entitled to claim damages.

Abbott v. *Sullivan* [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226 considered.

ACTION.

The plaintiff, Walter Davis, a livery stable keeper, carrying on business at East Knoyle, Wiltshire, brought proceedings against the defendants, Sir John Carew-Pole, E. C. Paget and Lord Cadogan, as stewards of the National Hunt Committee on behalf of themselves and all other members of the committee, claiming a declaration that a certain decision of the stewards declaring him to be a disqualified person under rule 97 of the National Hunt Rules was ultra vires and void; an order ordering the defendants to expunge his name from the list of disqualified persons, and an injunction restraining the defendants, their servants or agents, from treating the plaintiff as a disqualified person either under the National Hunt Rules or the National Hunt Regulations for point-to-point steeplechases.

By rule 5 (2) (*f*) of the National Hunt Rules the stewards had power "to impose any fine not exceeding one hundred sovereigns, "to declare any person a 'disqualified person,' and to warn off "any person from all courses where these rules are in force, for "such period as they think fit."

The plaintiff had never been the holder of any licence or permit to train horses under National Hunt Rules. He had for some years been in the habit of taking hunters at livery and also prepared horses which had been hunted from his own stable or from their owner's stable for participation in point-to-point races at the end of the hunting season. He had never until the spring of 1955 engaged in the preparation or training of a horse for a race under National Hunt Rules. Regulation 11 of the point-to-point regulations provided that no horse should be eligible to be entered for a point-to-point in any given year which had since January 1 of that year been trained by a licensed trainer or an unlicensed person unless such unlicensed person was his owner, his groom, or the proprietor of the stable from which the horse was hunted during the season. The effect of this regulation was that if the owner of a horse hunted from another stable sent the horse to the plaintiff's establishment to be trained for point-to-point races such horse was not eligible to run in such races during

that particular season. In the middle of March, 1955, the Duchess of Newcastle sent a horse called King Henry's Road to the plaintiff's establishment. While in the plaintiff's care this horse was entered and ridden by the duchess during the months of March, April and May, 1955, in five point-to-point races, three of which it won. In due course the duchess decided to enter King Henry's Road in the West of England Hunters Steeplechase held at Buckfastleigh, Devon, to be run on May 30, under National Hunt Rules, and while the horse was still under the care of the plaintiff it was sent to Buckfastleigh to take part in this race. The plaintiff did not go to the meeting. On arrival at the course a declaration form was signed by the duchess as required by the rules. The stewards of the meeting, being satisfied that the horse had been trained by the plaintiff and that the plaintiff was not the holder of a licence or permit to train, accordingly refused to allow the horse to run, and in due course reported the matter to the stewards of the National Hunt Committee.

Rule 97 of the National Hunt Rules provides: "Every "person who has under his care, training, management, or "superintendence, a horse belonging wholly, or in part, to "another person unless such person be his wife, son or unmarried "daughter, shall obtain a licence from the Stewards of the "National Hunt Committee before a horse trained by him in "Great Britain is qualified to run for any race under these "rules . . . Any person training and running a horse without "having obtained a licence or permit . . . shall be fined or "declared a 'disqualified person' at the discretion of the "stewards of the National Hunt Committee."

On June 13, 1955, Messrs. Weatherby & Sons, acting as secretaries to the stewards of the National Hunt Committee, wrote the following letter to the plaintiff: "Dear Sir,—The "stewards of Buckfastleigh Whitsuntide Meeting have referred "to the stewards of the National Hunt Committee a case in "which they refused permission for King Henry's Road, property "of the Duchess of Newcastle, to run in the West of England "Hunter Steeplechase at that meeting. The reason for this "action was that the stewards were satisfied that the horse was "trained by yourself, an unlicensed trainer, which is contrary "to the requirements of rule 97 of National Hunt Rules. We "are instructed to inform you that the Stewards of the National "Hunt Committee will hear the case at this office at 12 noon "on Thursday, June 23, and your presence is required. You "may bring with you any persons whose evidence you wish the "Stewards of the National Hunt Committee to hear. Kindly "let us know that you will be present at the time stated." They sent a similar letter to the duchess inviting her also to be present at the same time and place. On June 16 the plaintiff replied to Messrs. Weatherby's letter, stating that he would attend the meeting on the date indicated. On June 17 the stewards sent a

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letter to G. R. Lee, who was the owner of a horse called Belljinks, asking him to attend the meeting on June 23, as they understood that the horse was stabled with the plaintiff and that it was not in order for the plaintiff to have in his care and train the horse for hunter steeplechases, this being contrary to the requirements of rule 97 of the National Hunt Rules. They pointed out that under that rule the plaintiff became a trainer without a licence and that the horse was entered for hunter steeplechases at Worcester although in each case the meeting was cancelled due to flooding. On June 20 the stewards again wrote to the duchess, notifying her that they proposed at the forthcoming inquiry to inquire also into the arrangements she had made for training King Henry's Road for point-to-point races.

Shortly before the trial a letter was disclosed, written by Messrs. Weatherby's to Mr. Paget, one of the three stewards conducting the inquiry, enclosing a memorandum setting out the various points to be decided at the inquiry. After having referred to the cases of King Henry's Road and Belljinks, the memorandum continued: "(3) Miss S. Spencer owns a horse "named 'Prince Balbo' which she hunted from home near "Sturminster Newton, Dorset, with the Portman and obtained "a certificate. At the end of the season the horse was sent to "Davis and subsequently ran in six point-to-points, being twice "placed. This appears to be directly contrary to regulation 11."

At the inquiry the stewards dealt first, in the presence of the plaintiff, with the training of King Henry's Road for point-to-point races and National Hunt races, and also Belljinks for National Hunt races. The stewards later considered the case of Prince Balbo. There was no dispute that Miss Spencer, having hunted her horse Prince Balbo from her own stables, had sent it to the plaintiff some time in March to be prepared for point-to-point racing. The plaintiff was present whilst Miss Spencer was questioned. He was not asked whether he wanted to say anything. The plaintiff had not received any prior notification that his activities in connexion with the training of King Henry's Road for point-to-point races or the training of Belljinks or Prince Balbo were to be the subject of inquiry. At the conclusion of the inquiry the stewards made the following formal report, which was subsequently published in the Racing Calendar: "The "Stewards of the National Hunt Committee held an inquiry "on June 23 into the case reported to them by the stewards "of the [Buckfastleigh] meeting. Having heard evidence, they "were satisfied that the Duchess of Newcastle had placed her "horse, King Henry's Road, in the hands of [the plaintiff], an "unlicensed person, to be trained for its engagements under "National Hunt Rules. It transpired during the inquiry that [the "plaintiff] had also trained Belljinks, owned by Mr. G. R. Lee, "for engagements in hunter steeplechases. This was contrary "to the requirements of rule 97. A further inquiry was held "into the training of King Henry's Road and Prince Balbo, the

"property of the Duchess of Newcastle and Miss S. Spencer "respectively, for races at point-to-point steeplechases. The "stewards were satisfied that, although both of these horses "were hunted by their owners from their own stables to obtain "hunters' certificates, they were subsequently sent to [the plain-"tiff] to be trained for point-to-point steeplechases. The stewards "severely cautioned Mr. G. R. Lee and Miss S. Spencer for not "making themselves acquainted with the rules under which their "horses were to run. They considered the Duchess of Newcastle "guilty of grave neglect in not making herself acquainted with "the requirements of National Hunt Rules and point-to-point "regulations and a fine of one hundred sovereigns was imposed. "The stewards were satisfied that [the plaintiff] should have "been aware of the requirements of both National Hunt Rules "and point-to-point regulations for the training of horses. He "was declared a disqualified person under rule 97."

The plaintiff contended that the inquiry by the stewards was not conducted in accordance with the principles of natural justice; that in declaring him a disqualified person the stewards were not acting in accordance with their own rules; and that the stewards had not complied with the requirements of rule 5 (2) (*f*) of the National Hunt Rules in that they had failed to state the period of disqualification. It was conceded by the defendants that the plaintiff was not in breach of rule 97 in regard to Belljinks.

Gerald Gardiner Q.C. and *Dennis Lloyd* for the plaintiff.
Cyril Salmon Q.C. and *H. P. J. Milmo* for the defendants.

In addition to the cases referred to in the judgment, the following were cited in argument: *Fisher* v. *Keane* [1]; *Young* v. *Ladies' Imperial Club* [2]; *Weinberger* v. *Inglis* [3]; *Lumiansky* v. *Myddleton* [4]; *Green* v. *Blake* [5]; *Lee* v. *Showmen's Guild of Great Britain.* [6]

Cur. adv. vult.

March 26. PILCHER J. read the following judgment, in which he stated the facts and continued: It is not, I think, in dispute that to declare a man in the position of the plaintiff who earns his living by horses a "disqualified person" is a serious matter which will almost certainly interfere with his livelihood. The sanction is a heavy one and is no doubt intended to be so. It is also clear that a court of law will not interfere with the decision of a quasi-judicial and domestic tribunal such as the Stewards of the National Hunt Committee, provided that the proceedings of the committee are conducted in accordance with what have

[1] (1878) 11 Ch.D. 353.
[2] [1920] 2 K.B. 523; 36 T.L.R. 392.
[3] [1919] A.C. 606.
[4] (1934) 78 Sol.J. 223.
[5] [1948] I.R. 242.
[6] [1952] 2 Q.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175.

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frequently been called the principles of natural justice. It is further clear that, if the powers of the quasi-judicial body are set out in a code of rules to which the party aggrieved is in the circumstances subject, the quasi-judicial body is also bound by its own rules and can only mete out punishment in strict accordance with such rules.

In the present case it is contended on behalf of the plaintiff that the inquiry by the stewards into his activities in connexion with the three horses I have mentioned was not conducted in accordance with the principles of natural justice. It is further contended that in declaring the plaintiff a disqualified person the stewards were acting outside the powers conferred upon them by their own rules.

It was made quite clear at the outset by Mr. Gardiner, who appeared for the plaintiff, that it was not suggested that the stewards had acted other than perfectly honestly and bona fide. His first contention was that the inquiry had not been conducted in accordance with the principles of natural justice. This contention he based principally upon a criticism of the staging of the inquiry by Messrs. Weatherby, who acted as the agents and secretaries of the stewards. Mr. Gardiner complained, and I think rightly complained, that until the moment when the plaintiff was ushered into the inquiry before the stewards he had only been notified that it was proposed to inquire into his dealings with King Henry's Road in relation to the Buckfastleigh hunter 'chase. In fact the stewards during the first part of the inquiry, without any notice to the plaintiff, dealt with his alleged offences under regulation 11 of the point-to-point regulations in connexion with King Henry's Road and also with the alleged offence of training Belljinks for a hunter chase. Again, they called him into the second part of the inquiry without having given him any notice of the fact that he was said to be involved in the breach of regulation 11 of the point-to-point regulations in connexion with Prince Balbo.

It has been laid down frequently by the courts that domestic tribunals such as committees of clubs and committees of trade unions, whilst not bound by the strict rules which prevail in a court of law, should observe the cardinal principles of natural justice—no doubt in order that they should not unwittingly commit an injustice. It has also frequently been said that prominent amongst such rules is the rule that an accused person should be given reasonable notice of the charges to be brought against him so that he may consider and prepare his defence, if any. The second cardinal rule is that the accused should be afforded an opportunity of saying anything he may wish to in his own defence.

The first of these rules was clearly not observed in the present case. I think it is a great pity that Messrs. Weatherbys did not send to the plaintiff in good time before the hearing of the inquiry some simple notification that the stewards intended to

inquire also into his conduct in relation to the three other matters of which he was given no notice. That it was contemplated that the stewards would inquire into all four matters is made quite clear by the memorandum which Messrs. Weatherbys sent to Mr. Paget.

The mere fact, however, that the accused person has not in a particular case been given formal notice of all the matters in which his conduct is to be called in question does not, in my view, necessarily entitle him to contend successfully that the proceedings of a tribunal consisting of fair-minded and honest laymen were not conducted in accordance with the principles of natural justice. Except in regard to the question as to whether the plaintiff had " trained " King Henry's Road, no fact in regard to the plaintiff's activities with the three horses was in dispute. The plaintiff had notice that the issue of the " training " of King Henry's Road was to be gone into and the whole question was thrashed out before the stewards.

In connexion with this point I should like to refer to a passage in the judgment of Tucker L.J. in *Russell* v. *Duke of Norfolk*.[1] That was a case in which it was contended on behalf of the plaintiff, a trainer, whose horse was found to have been doped and whose licence to train had consequently been withdrawn by the Stewards of the Jockey Club, that the stewards had acted contrary to the principles of natural justice. Tucker L.J. said[2]: " As to the specific complaints that were made, it is clear from " the letter I have already read, and from the evidence, that the " plaintiff, who has been in racing circles for 40 years, knew " perfectly well what was the nature of the matter that was " going to be inquired into. Complaint is made that only part " of the analyst's certificate was read to him. It is clear that " that is so, but I find it impossible to say that the mere fact " that they omitted that part which dealt with the particular " drug, viz., whether it was morphine or heroin, is sufficient " for any tribunal to say that this inquiry was not conducted " according to the principles of natural justice, and was, there- " fore, void. The only other matter complained of is that it was " not until after the stewards had conferred together and come " to a decision as to the course which they proposed to take that " the plaintiff was, in terms, asked whether he had any further " evidence to offer. Throughout this inquiry he was, at every " stage, it seems to me, given an opportunity of presenting his " case and of asking any questions which he desired to ask. It " is true that he was not in terms asked: ' Have you got any " ' witnesses? Do you want an adjournment?' A layman at " an inquiry of this kind is, of course, at a grave disadvantage " compared with a trained advocate, but that is a necessary " result of these domestic tribunals which proceed in a somewhat

[1] (1949) 65 T.L.R. 225; [1949] 1 All E.R. 109.

[2] [1949] 1 All E.R. 109, 117.

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" informal manner. Counsel for the plaintiff, in the course of " his forceful argument on this point, again and again said: " ' What would be said of local justices who acted in this way?' " With all due respect, the position is totally different. This " matter is not to be judged by the standards applicable to local " justices. Domestic tribunals of this kind are entitled to act in " a way which would not be permissible on the part of local " justices sitting as a court of law. The conclusion I have " reached on this aspect of the case is that there was no material " on which a jury could have arrived at a conclusion that this " inquiry was conducted in a way contrary to the principles of " natural justice. If, as I think is the better view, it really was " a matter of law for the decision of the judge, I should " unhesitatingly hold that there was nothing here which was " contrary to the principles of natural justice as laid down in " the various authorities which have been brought to our notice. " There are, in my view, no words which are of universal applica- " tion to every kind of inquiry and every kind of domestic " tribunal. The requirements of natural justice must depend on " the circumstances of the case, the nature of the inquiry, the " rules under which the tribunal is acting, the subject matter " that is being dealt with, and so forth."

It may well be in the present case that, although not formally notified of the alleged point-to-point offences and the alleged offence in regard to Belljinks, the plaintiff had a shrewd suspicion that those matters would also be inquired into. In any event, as I say, no fact was in dispute in relation to these other matters and in the circumstances of the present case I am not prepared to hold, as a matter of law (and it has been held to be a matter of law), that the plaintiff is entitled to succeed in his contention that the inquiry was not held in accordance with the principles of natural justice, because I do not think that the plaintiff was, on the facts of the case, prejudiced by the lack of notice.

At the same time I think that Messrs. Weatherbys would be well advised in future to see that clear and proper notice is given beforehand to persons whose conduct has been called in question by the stewards of all the matters affecting their conduct which are to form the subject-matter of an inquiry.

[His Lordship then considered the rules and held that on the evidence, and on the true construction of the rules, the stewards were not entitled to find that the plaintiff was " running " King Henry's Road at Buckfastleigh; that under rule 5 (2) (*f*) of the National Hunt Rules the stewards were required to specify the period of disqualification; and that neither the point-to-point regulations nor any of the National Hunt Rules which applied to point-to-point races entitled the stewards to declare the plaintiff a disqualified person in respect of the alleged point-to-point offences committed by him. He continued:] In the statement of claim the plaintiff, in addition to other relief, was claiming damages. In opening the case for the defendants, Mr. Salmon

intimated that, while he relied principally upon the contention that the stewards could not be shown to have acted contrary to the principles of natural justice, an issue which I have determined in his favour, he also contended that the stewards complied with their own rules as properly construed, an issue which I have found against him. He also submitted a third point, namely, that in the particular circumstances of this case, if it were found that the stewards had acted in accordance with the principles of natural justice, the plaintiff had no cause of action.

In his reply Mr. Gardiner abandoned his claim for damages, and in the circumstances it may be that the point that Mr. Salmon desired to raise does not now arise. The point was as follows. Originally in this type of action it was necessary for the plaintiff to show, if he wished to succeed, either that some proprietary right had been infringed or that the defendants had committed a tort such as a libel or had been guilty of a conspiracy to injure the plaintiff or had acted in breach of contract if the parties were linked by any contract express or implied.

Mr. Salmon submitted that in the present case it was impossible to imply any contract between the plaintiff and the National Hunt Committee or its stewards. He said that the plaintiff was a member of the public who was concerned with horses and that no contract could be implied between him and the defendants, because by concerning himself with horses running in point-to-point races or in steeplechases he had brought himself into the category of persons whom the defendants under their rules were entitled to control and if necessary punish. Mr. Salmon boldly argued that, if no tort was alleged and no contract proved, the plaintiff had no remedy even if it turned out that the defendants had done him a grievous wrong.

This argument did not appeal to me. It is no doubt true to say that, where no tort is alleged and no contract express or implied is made out, no claim for damages can succeed in cases of this type. In this connexion I refer to the decision of the Court of Appeal in *Abbott* v. *Sullivan*.[3] That was a case in which the facts were somewhat complicated, and I think that the simplest way would be if I read the headnote: "The plaintiff "was a cornporter, being one of those employed in removing "grain from ships in London Docks, and the cornporters had "long had a committee to safeguard their interests and exercise "considerable disciplinary powers over them. A complaint was "lodged against the plaintiff as ganger by six members of the "gang. At a meeting on September 18, 1947, the Cornporters' "Committee (with, as always, a divisional officer of the Transport "and General Workers Union present to advise) fined the plain-"tiff and ordered him to recompense the six complainants for "loss of a day's work. On leaving the committee, the plaintiff

[3] [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

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" in his annoyance struck the divisional officer while in the street. " The divisional officer brought his complaint before the Corn- " porters' Committee on September 24, 1947, but the plaintiff " refused to attend on the ground that the matter was not within " the committee's jurisdiction. The committee, however, made " an order which resulted in the plaintiff's loss of his position " as a cornporter. After an application by the plaintiff for " reinstatement which was only granted on July 19, 1948, " subject to a satisfactory undertaking being entered into by the " plaintiff, the plaintiff brought proceedings on October 15, 1948, " claiming (inter alia) damages against the first two defendants " as members of the Cornporters' Committee, on the ground that " the committee had exceeded its jurisdiction by the resolution " of September 24, 1947, against the trade union, and against " the fourth defendant, the divisional officer, for procuring the " committee's ultra vires resolution. Croom-Johnson J. made " declarations that the resolution of September 24, 1947, and " the condition in the resolution of July 19, 1948, were not within " the jurisdiction of the committee, but refused to grant damages " against any of the four defendants. The plaintiff appealed and " there was a cross-appeal of the defendants against the declara- " tions. But before the appeal or cross-appeal came on the " Cornporters' Committee had passed an unconditional resolu- " tion which resulted in the plaintiff's restoration to being a " cornporter and made the question as to the resolution of " July 19, 1948, academic:—*Held*, by the Court of Appeal " (Evershed M.R. and Denning and Morris L.JJ.) that the com- " mittee's resolution of September 24, 1947, was ultra vires and " no action lay against the trade union on any ground. But, " held by Evershed M.R. and Morris L.J., Denning L.J. dis- " senting, that in acting outside their jurisdiction the Cornporters' " Committee had not acted in breach of contract, and that an " order for damages could not be made against the first two " defendants for the committee's ultra vires resolution or against " the fourth defendant for inducing the committee to make the " resolution."

The principal matter dealt with in the judgments of the court related to the question whether it could properly be said on the facts of that case that any contract could be implied between the plaintiff and any of the defendants which would enable the plaintiff to recover damages against such defendants or any of them. Evershed M.R. and Morris L.J. took the view that no contract could be implied and therefore no damages were recoverable. Denning L.J. took a contrary view. Croom-Johnson J., in the court below, had made certain declarations, one of which is conveniently set out in Morris L.J.'s judgment.[4] The declaration was: " as and from June 14, 1948, at latest the plaintiff " was entitled to be reinstated on the cornporters' list or register

[4] [1952] 1 K.B. 189, 211.

" with an opportunity to regain his former position as ganger in " accordance with the normal procedure within the industry " pursuant to the resolution of the said Area Emergency and " General Purposes Committee of that date."

Morris L.J. said that he could see no objection to this declaration, although the necessity for the declaration had by that time become academic because the plaintiff had in fact been reinstated. Evershed M.R. took a similar view, and it therefore appears that the majority of the court would, if necessary, have been prepared to hold in that case that, although there was no contractual link between the plaintiff and the Cornporters' Association, none the less, the committee having purported to expel him from the Cornporters' Association, the court had jurisdiction to declare that he should be reinstated on the list or register. The case, therefore, is one which, although that particular decision may not have been necessary and had become academic, none the less shows that the majority of the Court of Appeal, in a case where there was no contractual link between the plaintiff and the committee, assented to the view that the court had jurisdiction to make the type of declaration there asked for, namely, that the Cornporters' Committee, in purporting to do what they had, had exceeded their jurisdiction.

I should also like to read a passage from the dissenting judgment of Denning L.J. in that case, because it is interesting and instructive. Dealing with the question of damages, which is not of course before me now, he said[5]: " Is Mr. Abbott " entitled to damages for the ultra vires action of the committee? " The judge thought not. He said he could not see any legal " peg on which to hang an award of damages. I should be sorry " to think that, if a wrong has been done, the plaintiff is to go " without a remedy simply because no one can find a peg to " hang it on. We should then be going back to the days when " a man's rights depended on whether he could fit them into a " prescribed form of action; whereas in these days the principle " to be applied is that where there is a right there should be a " remedy. It has been said by high authority that it is an " actionable wrong for any man intentionally to injure another " without just cause or excuse," and then he cites *Mogul Steamship Company* v. *McGregor, Gow & Company*[6] and *Giblan* v. *National Amalgamated Labourers' Union*,[7] and continues: " If " this is correct, there can be no doubt that the conduct of the " Cornporters' Committee and Mr. Platt was an actionable " wrong; for they intended to deprive the plaintiff of his liveli- " hood and they succeeded in doing so; and they had no just " cause or excuse for their action, because they should have " known it was ultra vires. But I do not think that this wide " proposition has yet been accepted into our law. There is, " however, a narrower proposition which does seem to me to fit

[5] Ibid. 200.

[6] (1889) 23 Q.B.D. 598.

[7] [1903] 2 K.B. 600; 19 T.L.R. 708.

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"the case. It is this: that if the members of a tribunal take "it upon themselves to punish a man for real or supposed "wrongdoing, when they know, or have the means of knowing, "that they have no jurisdiction in that behalf, then they are "liable to him for any damages so caused even though they "were not actuated by malice; but if it is a case where, on the "facts as known to them, they did have jurisdiction, then they "are not liable for the erroneous exercise of that jurisdiction, "at any rate not unless they were actuated by malice. The "form of remedy varies." Then the Lord Justice proceeds to deal with the various types of case, starting with the case where the domestic tribunal or the quasi-domestic tribunal is acting under statutory power.

A glance at the statement of claim in the present case will show how the learned pleader has done his best to link the plaintiff and the defendants by contract. Whilst admiring his ingenuity, I am not prepared to hold that any implied contract could properly be inferred, at any rate until the plaintiff received the summons to attend the inquiry and submitted himself to the jurisdiction of the stewards. In *Abbott* v. *Sullivan*[8] it will be remembered that the plaintiff had refused to attend the tribunal, saying that they had no jurisdiction. In the present case the plaintiff has submitted to the jurisdiction of the National Hunt Stewards, and at least from the moment when he did so impliedly agreed to abide by their finding, subject, of course, to any legal right which he might have to impugn it. From that moment it seems to me that he was in contractual relation with the stewards of the committee. In those circumstances, unless Mr. Gardiner had decided, I think quite wisely, to waive his claim for damages, he might have been entitled to recover damages. If at a time antecedent to the hearing of the inquiry the plaintiff has submitted to the jurisdiction of the tribunal, if it be necessary that the parties should be in contractual relationship (and I think that it follows from *Abbott* v. *Sullivan*[8] that it is not, where no damages are claimed), then it seems to me that there is a very great deal to be said for the proposition that, once the plaintiff had submitted to the jurisdiction of the committee, they were impliedly linked by contract and linked in such a fashion that it would certainly be inequitable and I think wrong that the defendants should be entitled to say that the plaintiff in any event in this particular case had no cause of action against them. I accordingly grant the plaintiff the declaration, the order and the injunction which he seeks.

Judgment for the plaintiff.

Solicitors: *Rider, Heaton, Meredith & Mills for Burridge, Kent & Arkell, Shaftesbury; Charles Russell & Co.*

J. D. P.

[8] [1952] 1 K.B. 189.

[COURT OF APPEAL.]

C. A.

1956
June 6, 7.

Denning, Birkett and Parker L.JJ.

* REOHORN AND ANOTHER *v.* BARRY CORPORATION.

[Matter No. M. 61.]

Landlord and Tenant — Act of 1954 — *Business premises (Security of tenure)—Landlord's intention to reconstruct—Land leased as car park by a corporation—Application for new tenancy—Landlord's intention to carry out substantial work of construction not supported at date of hearing by proof of ability to carry out work—Development dependent on third party—Intention not sufficiently established—New tenancy granted—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

The lessees of land used as a car park in the centre of a town and ripe for development applied to the county court for a new lease under the Landlord and Tenant Act, 1954. The town corporation, which owned the land and which had previously served notice on the lessees determining the tenancy, resisted the application on the ground set out in section 30 (1) (*f*) of the Act,[1] namely, that on the termination of the current tenancy they intended to carry out substantial work of construction on the holding and could not reasonably do so without obtaining possession.

At the hearing, the corporation, in proof of their intention under the subsection, produced, inter alia, resolutions for a proposed comprehensive development scheme on the land, an outline plan, evidence of consultations with an architect, and a letter from a development company stating that the company was agreed "in "principle" to start work at a certain date "subject to the "approval of the council and the conclusion of satisfactory building "arrangements." No plans had been prepared or agreed, nor any terms as to a building lease, nor was any proof produced that the proposed developers, who did not give evidence, were financially in a position to carry out the work. The county court judge held that the corporation had discharged the onus of showing a genuine intention to do the work and that they could not do it without possession; and he refused the lessees' application. On appeal by the lessees:—

Held, that as the landlords could not at the date of the hearing show that they had the present means or ability to carry out the work themselves or to control its execution by a third party, they had not established the quality of intention required by the Act, for intention here connoted an ability to carry it into effect. Accordingly, the tenant was entitled to a new tenancy on such terms as would not impede the development of the land if and when the landlords could establish both intention and ability.

Dicta of Asquith L.J. in *Cunliffe* v. *Goodman* [1950] 2 K.B. 237, 253–254; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720 and of Denning L.J. in *Fisher* v. *Taylor's Furnishing Stores Ltd.* [1956] 2 W.L.R. 985, 988; [1956] 2 All E.R. 78 applied.

[1] Landlord and Tenant Act, 1954, s. 30 (1) (*f*): "The grounds on which "a landlord may oppose an application . . . are such of the following "grounds as may be stated in the "landlord's notice . . . that is to "say:— . . . (*f*) that on the termination of the current tenancy the "landlord intends to demolish or "reconstruct the premises comprised "in the holding . . . or to carry out "substantial work of construction on "the holding . . . and that he could "not reasonably do so without obtaining possession of the holding."

C. A.

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Gilmour Caterers Ltd. v. *St. Bartholomew's Hospital Governors* [1956] 1 Q.B. 387; [1956] 2 W.L.R. 419; [1956] 1 All E.R. 314 distinguished.

Quaere whether the landlord must prove an intention existing when the ground of opposition was first stated or only at the date of the hearing.

Per Denning L.J. The intention existing at the date of the hearing is, I think, the right time to take.

Betty's Cafés Ltd. v. *Phillips Furnishing Stores Ltd.* [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497 questioned.

APPEAL from Judge Temple-Morris, sitting at Cardiff and Barry County Court.

The Barry Corporation, as landlords of a piece of land about 6½ acres in the centre of Barry Island and used as a car park by the lessees since 1929, served a notice determining the tenancy on October 29, 1955, to expire on May 1, 1956. The corporation had acquired the reversion on the land in 1952, and also owned some 10 adjoining acres. The lessees on December 16, 1955, gave notice of opposition to leave the premises, and applied on January 27, 1956, to the county court under the Landlord and Tenant Act, 1954,[1] for a new tenancy. On February 10, the corporation delivered their answer, giving as their ground of objection to the new tenancy the ground in section 30 (1) (*f*) of the Act, namely, that on the termination of the current tenancy the landlord intended to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof, and that they could not reasonably do so without obtaining possession of the holding.

When the application came before the county court judge on February 23, 1956, the lessee Reohorn said that if the corporation required the whole area for building purposes they could have it tomorrow; but that he felt that the corporation wanted the land to use it as a car park and that he would be very much annoyed if that happened; his uncles had taken over the car park in 1929 and he himself had been associated with it since 1930. The corporation produced resolutions on a proposed comprehensive scheme for development of the land by putting up on it shops, hotels, boarding houses, and in addition a garage with several floors to make room for cars when the car park had gone, and submitted an outline plan, which showed an extensive scheme, estimated to cost £500,000. They also produced a proposal to build a new road on the north of the site, which would improve the access to the shore and beaches on Barry Island, for which purpose an expenditure of £2,500 in 1956 and 1957 had been approved. They produced also from a development company with which they had been in correspondence a letter dated February 17, 1956, stating that the company was agreed "in principle" to start work on the scheme in June, 1956, "subject to the approval of the council and the conclu-" "sion of satisfactory arrangements." The correspondence also

showed that it was proposed to form a new company which would take a building lease of the land. No one was called from the development company to give evidence before the county court as to the provision of the necessary finance, their financial stability, and so forth.

In a reserved judgment on March 22, 1956, the county court judge said that the only issue was whether the corporation could establish to the court's satisfaction the ground set out in their answer. Intention was a question of degree. He found as outward and visible signs of the corporation's intentions (a) the minutes of the corporation, and in particular a minute of February 13, 1956, when it was resolved that the corporation should proceed with a scheme of comprehensive development of the land in question and the adjoining land owned by them on the lines then discussed and shown on the outline plan, and that the corporation's chief officers were authorized to take the necessary steps to carry that decision into effect; (b) that a consultant architect, engaged at a fee of £1,000, had visited the site, said it was a fine one, that that form of development was suitable for it, and that the site was ready; (c) that the corporation's engineer, surveyor and valuer had said that the town planning authority had approved in general of the scheme, but that it could not proceed until vacant possession was obtained; that he (the official) had taken part in all the negotiations for developing the site, had given the name of a development company, and had added that no contract had yet been signed, but produced the letter of February 17, 1956. No architects' drawings had yet been obtained and the work could not proceed unless it started from a central point. The deputy town clerk had stated in his evidence that the consent of the Ministry of Housing and Local Government was necessary, but that in his experience it would be easy to obtain.

After setting out those "outward and visible signs of intention," the judge found that the corporation intended to do the work of construction, that that work was substantial, and that they could not reasonably do so without possession, which was the key which unlocked the scheme. He held that the corporation had discharged the onus on them, that their intention was genuine, and that they were entitled to succeed. He accordingly refused the application for a new tenancy and awarded costs to the corporation.

The lessees appealed.

J. Raymond Phillips for the lessees.
David Pennant for the corporation.

The following cases were cited in the argument: *Gilmour Caterers Ltd.* v. *St. Bartholomew's Hospital*[2]; *Cunliffe* v.

[2] [1956] 1 Q.B. 387; [1956] 2 W.L.R. 419; [1956] 1 All E.R. 314.

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Goodman[3]; *Fisher* v. *Taylor's Furnishing Stores Ltd.*[4]; *Betty's Café Ltd.* v. *Phillips Furnishing Stores Ltd.*[5]

In the Court of Appeal additional evidence was admitted to show that the Ministry of Housing and Local Government consented to the proposal to let the land to a development company for 999 years at a rental of £2,500 a year.

DENNING L.J. stated the facts and continued: The question in the case is whether the corporation have proved the requirements of section 30 (1) (*f*) of the Act, namely, that they *intend* to carry out that work of construction on the holding. The corporation cannot do the work themselves, or by independent contractors, for several reasons.

One reason is that in these days of credit restrictions they could not raise the money for the purpose; it would involve, we are told, half a million pounds. Another reason is that it might well be beyond their powers to do the work themselves, because it is not one of the functions of a local authority to carry on hotels or shops. So they propose to let the land on a building lease to a development company, say, for 999 years, and then the building lessees would do the work and pay a rent to the corporation. The corporation would need the sanction of the Ministry for such a dealing with their land. They said in evidence in the court below that there would be no difficulty in getting the consent; and indeed since then the Ministry of Housing have given consent, recommending that the rental under such a building lease should be £2,500 a year.

The corporation have passed resolutions on the matter. As part of the scheme, they propose building a new road on the north of the site, a road which would, in any event, be of great value in improving the access to the shore and beaches on Barry Island. They have approved the expenditure of £2,500 to be laid out on the new road in 1956 and 1957. The tenant says he is quite prepared for that new road to be built during the continuance of the tenancy—indeed, it would help his car park—so they do not need to have possession of the demised premises for the purpose of building the new road. But they cannot carry out the rest of this vast scheme without obtaining possession. The evidence showed that the corporation have been in touch with a development company, who have had discussions with the corporation's officials. The development company wrote a letter saying they were agreed "in principle" to start work in June, 1956, "subject to the approval of the council and the conclusion "of satisfactory building arrangements": but no one was ever called from the development company to give evidence before the court. The correspondence shows that it is proposed that a new

[3] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

[4] [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.

[5] [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497.

company should be formed and that this new company should take the building lease; but what the financial stability and backing of that new company will be no one knows, or at all events the court does not know. Plans for the development are hardly started. There is an outline plan which has been supplied to the court, but nothing more. It is obvious that there will still be required long and detailed negotiations about the plans, the nature of the buildings, the amount of rent, the terms of the lease, the time-table, and so forth.

Such being the facts, the question is whether the intention required by the Act is satisfied. In the recent case of *Fisher* v. *Taylors Furnishing Stores Ltd.*,[1] I pointed out that the intention must be[2] "a firm and settled intention, not likely to be "changed; . . . It must be remembered that if the landlord, "having got possession, honestly changes his mind and does not "do any work of reconstruction, the tenant has no remedy." In considering whether the court should be satisfied of the landlord's intention, I think that it may readily be satisfied when the premises are old and worn out or are ripe for development, the proposed work is obviously desirable, plans and arrangements are well in hand, and the landlord has the present means and ability to carry out the work. Such was the position in *Fisher's* case,[3] and in several other cases which have come before this court. But the court will not be so readily satisfied when the premises are comparatively new or the desirability of the project is open to doubt, when there are many difficulties still to be surmounted, such as the preparation and approval of plans or the obtaining of finance, or when the landlord has in the past fluctuated in his mind as to what to do with the premises. In those circumstances, even though he should assert at the hearing that he has a firm and settled intention, the court is not bound to accept it because of the likelihood that he may change his mind once he gets possession. Such was the position in *Herbert* v. *Blakey (Bradford) Ltd.*[4] (under section 30 (1) (*g*)).

In the present case, the premises are ripe for development and the proposed work is obviously desirable: but the difficulty is to be satisfied that the corporation have the present means and ability to carry out the work. "Intention" connotes an ability to carry it into effect. A man cannot properly be said to "intend" to do a work of reconstruction when he has not got the means to carry it out. He may *hope* to do so: he will not have the *intention* to do so. In this case the corporation contemplate turning this land into a splendid estate by the sea. They are exploring the possibilities of it; they are discussing the ways and means, in the shape of a building lease; but that is as far as they have got. Their ability to do the work, or to cause it to be done, is, I think, open to question.

[1] [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.
[2] [1956] 2 W.L.R. 985, 988.
[3] [1956] 2 W.L.R. 985.
[4] Unreported; January 11, 1956 (C.A.).

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I desire to say at once that there is no objection to their doing it by way of a building lease. Indeed, as I have indicated, it is the only way in which the corporation can develop this land; and no one would wish to hold up development because a building lease was chosen as a means of doing it rather than doing it through independent contractors. The decision of this court a little while ago in *Gilmour Caterers Ltd.* v. *St. Bartholomew's Hospital Governors*[5] shows that it is permissible for a landlord to cause the work to be done by way of a building lease. But in that case the building lease was already executed; the premises were old and ripe for development; the landlords had complete control of the work to be done: it was all specified and ready to be done at once. In this case, however, it is very different. There is no building lease, no lessee in existence at the moment, no plans with any details, no knowledge of any financial backing. There is so much still to be explored and discussed, there are so many factors outside the control of the corporation altogether, that I do not think that there is here that "intention not likely "to be changed" which is required before the tenant is to be deprived of a new lease. I can well see that in the course of the next few months difficulties may arise which might lead to the abandonment of this plan, or, at all events, to its suspension for an indefinite period. It would not be right that the tenant should be turned out by the landlords on such an uncertain and unsettled intention. It seems to me that, to apply Asquith L.J.'s words in *Cunliffe* v. *Goodman*,[6] the matter is still in the region of "the "tentative, the provisional and the exploratory," and has not yet reached "the valley of decision."

I am aware that the county court judge took a different view. He found that the landlords had the necessary intention. But, nevertheless, the facts are not in doubt. The only question is, what is the proper inference from those facts? It seems to me in the circumstances before us that the landlords have not sufficiently proved a "firm and settled intention not likely to be "changed." I ought to say that I look at the intention in this case as the county court judge did—the intention existing at the date of the hearing—which is, I think, the right time to take. But even looking at it at the date of the hearing, I do not think that the intention was sufficiently proved. That being so, the tenant is entitled to the extension of his tenancy.

But what are the terms of the new tenancy to be? In this case, where the land is ripe for development and the work is obviously desirable, I think that the terms of a new tenancy should not in any way impede the development of the land in due course as and when the intention and the ability are present. Indeed, the tenant himself, Mr. Reohorn, said in evidence: "If "the council requires the whole area for building purposes or

[5] [1956] 1 Q.B. 387; [1956] 2 W.L.R. 419; [1956] 1 All E.R. 314.

[6] [1950] 2 K.B. 237, 254; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

" development of Barry Island, they can have the lot tomorrow " if they wanted to build or let in a few months." So the tenant himself takes the view, very rightly, that he does not want to hold up the development. Possession of the land is not needed for the road; that can be done straight away; and, in order to protect both corporation and tenant, the terms which I suggest for the new tenancy are that it should be from May 1, 1956 (that is the end of the old tenancy), until December 31, 1956, and thereafter until determined by six months' notice to be given by either party to expire at any time on or after December 31, 1956. This means that once the corporation evince a firm and settled intention to carry out this work the tenant will have no claim to stay longer. In view of what the tenant has said, he will not seek to do so; but in case he should make an application for an extension of this new tenancy which we grant, I would like to say that any court to whom application is made should deal with the application at the earliest possible moment so that the development of this land should not be in any way held up. I would allow the appeal accordingly.

BIRKETT L.J. I am of the same opinion. The Landlord and Tenant Act, 1954, was obviously designed to deal with what had long been a matter of complaint, namely, the ending of leases which had been in existence for some time by business men and professional men, and it was thought proper that an Act of Parliament should give some relief to tenants and should also protect landlords. For example, section 24 (1) provides: " A tenancy to " which this part of this Act applies shall not come to an end " unless terminated in accordance with the provisions of this " Part of this Act; and, subject to the provisions of section " twenty-nine of this Act, the tenant under such a tenancy may " apply to the court for a new tenancy." Then, in sections 25 and 26 the conditions are laid down; and subsection (6) of section 26 states: " Within two months of the making of a " tenant's request for a new tenancy, the landlord may give " notice to the tenant that he will oppose an application to the " court for the grant of a new tenancy, and any such notice shall " state on which of the grounds mentioned in section thirty of " this Act the landlord will oppose the application."

In the present case the tenant and his family have been in possession of this particular car park for a very long time indeed—25 years, or thereabouts. The corporation desire possession of it; and it is very important in this case to keep well in mind that the tenant said: " If you really want it for the purpose which " you say, namely, for the development of Barry, I shall have " no objection. . . . The real reason why I am asking for this " new tenancy and opposing the wish of the corporation is that " for my own part I do not think there is that fixed intention on " the part of the corporation so to do. If I were satisfied about " that, I should not raise any opposition."

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Under section 30 the landlord makes the application opposing the tenant's request on the ground that on the termination of the current tenancy the landlord intends to carry out substantial work on this particular land. I do not need to trouble about the termination of the current tenancy, when that actually comes about. It is enough for me to say that I do not think it means that the landlords must be ready to start work immediately, the next day, or, in the rather vivid expression used in the course of the argument, that "the bulldozers would arrive the next "day." I do not think it means that; but it means, on a reasonable interpretation, that it is the settled intention to end this tenancy for this purpose and that the work will begin, not at any long delayed time, but on the termination of the tenancy.

But the contest in this court has revolved round the use of this word "intends"—"the landlord intends to demolish." One of the difficulties has been this. The county court judge cited from *Fisher* v. *Taylor's Furnishing Stores Ltd.*,[7] in which Denning L.J. said[8]: "the court must be careful to see that "section 30 (1) (*f*) is fully satisfied before it allows him to get "possession. For this purpose the court must be satisfied that "the intention to reconstruct is genuine and not colourable; that "it is a firm and settled intention, not likely to be changed; "that the reconstruction is of a substantial part of the premises, "indeed so substantial that it cannot be thought to be a device "to get possession; that the work is so extensive that it is "necessary to get possession of the holding in order to do it; "and that it is intended to do the work at once and not after a "time"; and, quite naturally, therefore, counsel said that a judge who has repeated those words to himself and made them part of his judgment cannot be said to have overlooked what is the main matter in the case, namely, the quality and the character of the intention. Indeed, the county court judge said: "I find "that the respondents intend to do the work of construction."

That has raised a difficulty here—whether the county court judge had made a finding of fact. I am of the same opinion as my Lord on this particular matter. I think there is no doubt that in this case, in the ordinary use of English language, the corporation "intends" to carry out this work; but, of course, our English tongue is capable of so many interpretations and it is very necessary, in a statute of this kind, to be clear and precise as to what the connotation of the word "intends," or "intention," may be.

I have been very greatly assisted by the judgment of Asquith L.J. in *Cunliffe* v. *Goodman*,[9] another illustration of the clearness of that learned Lord's mind and of his mastery of the English tongue and his great powers of exposition. I would like to quote from his judgment in that case, which did not raise quite the point which we had to consider in the present case, since it was

[7] [1956] 2 W.L.R. 985.
[8] Ibid. 988.
[9] [1950] 2 K.B. 237.

taken under section 18 (1) of the Landlord and Tenant Act, 1927. The particular words there under discussion were these: "and "in particular no damage shall be recovered for a breach of any "such covenant or agreement to leave or put premises in repair "at the termination of a lease, if it is shown that the premises, "in whatever state of repair they might be, would at or shortly "after the termination of the tenancy have been or be pulled "down, or such structural alterations made therein as would "render valueless the repairs covered by the covenant or agree-"ment." In that case the "firm intention" became a matter of supreme importance; and Asquith L.J. said [10]: "The question "to be answered is whether the defendant (on whom the onus "lies) has proved that the plaintiff, on November 30, 1945, "'intended' to pull down the premises on this site. This "question is in my view one of fact. If the plaintiff did no more "than entertain the idea of this demolition, if she got no further "than to contemplate it as a (perhaps attractive) possibility, "then one would have to say (and it matters not which way it is "put) either that there was *no* evidence of a positive 'intention,' "or that the word 'intention' was incapable as a matter of "construction of applying to anything so tentative and so "indefinite."

If I may stop there and comment, it is quite plain that it is not enough for somebody to say "I have an intention to do "this thing": the expression must be carried much further as to the quality of the intention. Asquith L.J. continued [10]: "An "'intention' to my mind connotes a state of affairs which the "party 'intending'—I will call him X—does more than merely "contemplate: it connotes a state of affairs which, on the "contrary, he decides, so far as in him lies, to bring about, and "which, in point of possibility, he has a reasonable prospect of "being able to bring about, by his own act of volition. X "cannot, with any due regard to the English language, be said "to 'intend' a result which is wholly beyond the control of his "will."

Then the Lord Justice proceeded to give illustrations. It is to be observed that in the course of the argument he made this rather pungent intervention [11]: "Has 'intention' or 'decision' "any reality where a person is hedged about with so many legal "obstructions which he has to surmount before he can make "his wish prevail?" It is quite clear that, in considering the word "intention" and in construing its connotation, Asquith L.J. had that kind of consideration in mind. He concludes in this way [12]: "If there a sufficiently formidable succession of "fences to be surmounted before the result at which X aims "can be achieved, it may well be unmeaning to say that X "'intended' that result."

It seems to me that that really covers the situation in this

[10] [1950] 2 K.B. 237, 253.
[11] Ibid. 247.
[12] Ibid. 253.

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case. I do not doubt for one single moment the good faith of the corporation, and I am very glad to think that nobody does. When they say that they "intend" to make this very great development I entertain no doubt about their good faith and that they really mean that they intend to do it. But when the considerations which Asquith L.J. lays down are really considered and applied to the facts of this case a different situation emerges. In my opinion, "intention" (as used in this statute, whether by the word "intends" or however it may be used) to do something must include the ability to do the thing said to be intended; and when Asquith L.J.'s words are remembered about "the succession of fences" one has only to enumerate them in this case. From the beginning, one was really rather oppressed by one consideration in regard to a great scheme of this kind, namely, that on the considerations enunciated in Asquith L.J.'s judgment, it is really not within the control of the corporation at all in any true sense of that term. They are not going to do this work themselves. Some of the matters are clearly ultra vires the corporation. But from the beginning there has never been an intention that they should do the work themselves and, therefore, should have it completely within their control when to start, how to do it, in what stages, and so on. There is to be a building lease, it is supposed, of 999 years. Before that is brought into anything like practical possibility, the fences to be overcome are really quite formidable in themselves. All that we have at the moment is a letter dated February 17, 1956, from the Heybridge Development and Construction Company Ltd., who had been approached by the town clerk as to their willingness or ability to perform this very great work of development. That letter of the town clerk (which was dated February 7) had merely asked the solicitors for this company whether their clients were definitely interested in carrying out the proposals outlined by the corporation. Thus the only letter on this matter is that dated February 17, from the Heybridge Development and Construction Company Ltd. to the town clerk, which reads: "Sir,—Re the "proposed comprehensive development scheme of land Barry "Island, we are agreed in principle to start work next June, "1956"—now here is the first matter—"subject to the approval "of the council"—and the second matter—"and to the conclu-"sion of satisfactory building arrangements."

What trouble lies ahead in those two simple matters it is not really for me to say, but it is quite clear that the whole matter is, in the words of Asquith L.J., purely tentative. Asquith L.J., in the passage to which my Lord referred in regard to that matter, said this [13]: "Neither project moved out of the zone "of contemplation—out of the sphere of the tentative, the "provisional and the exploratory—into the valley of decision." I should have thought myself that merely stating it as I have

[13] [1950] 2 K.B. 237, 254.

stated it brings it entirely within that wording of Asquith L.J.: it is merely an exploring of the situation—" In principle we " would like to do it and are willing to do it and willing to start, " but that must be subject to the approval of the council." And what has the council got to approve? Something which is not yet in being, so far as I understand, because the council have said: " This is the scheme we want to have carried out," and the construction company are saying " Something on those lines " we propose to carry out, subject to the approval of the council " and subject to the conclusion of satisfactory building arrange- " ments."

I think that is the first fence. In addition, there is the question of finance. With regard to the construction company, the court knows nothing at all; but it is a contingency always to be faced that the arrangements for providing finance for so great a scheme might turn out to be unsatisfactory. I do not know; we have no evidence whatever about it; and " the con- " clusion of satisfactory building arrangements " might mean anything. I do not know what labour is to be employed, what work is to be done first, by what time it is to be completed: all the matters of that sort are entirely in the air.

Therefore, while the good faith of the corporation is not to be doubted, and when they say " We intend to do this work " they do intend to do it, on the view I have taken about the construction of the word " intention " there was no evidence of a firm intention on which the county court judge could come to the conclusion which he did. Therefore, having regard to this Act—which is intended to be a benefit to tenants but which, of course, must not be made oppressive to landlords and certainly ought never to be made the instrument of preventing a development of this nature, which is wise and in the public interest—at this stage at which the matter comes before us and as it came before the county court judge, I am of opinion that the " intent " referred to in section 30 (1) (*f*) is not proved in this case.

For the rest, I entirely agree about the terms of the lease and the period for which it ought to be granted. I would like to add to and endorse what my Lord said about the matter. If the tenant is sincere in his protestation that " I have no desire to " object to the development if it is a reality: my real objection " is that I who have been there with my car park and my family " for 25 years should not be turned out at the end of this agree- " ment and then find to my dismay and chagrin that this scheme " is not going forward at all but that somebody else is using the " car park, it may be the corporation itself "—and if the period of the lease and the terms on which the notice may be given are such that the corporation are not really hindered in their scheme, and the intervening period is a period in which they may bring to the point of fruition their plans showing the full intent, which any court would be ready and willing to accept, there would be no further opposition of any kind. One cannot entirely build on

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human conduct, and it may be that circumstances may alter; the attitude of the tenant may change; but, giving the matter the best consideration I can, and having regard to the wording and purpose of the Act, and the desire that the Act shall be construed fairly to both tenant and landlord, the decision announced seems to me to be an ideal solution of a rather difficult situation; and I would agree that on those terms the appeal should be allowed.

PARKER L.J. I have come to the same conclusion. I am satisfied that there was no evidence here on which the county court judge was entitled to hold, as he did, that the landlords had proved that they "intended" to carry out substantial work of construction on the termination of the current tenancy, within the meaning of paragraph (*f*) of section 30 (1) of the Act.

It is conceded that the landlords' frame of mind was a genuine frame of mind; but in order that it should amount to a "firm "and settled intention" it must be shown that there is a reasonable prospect that they will be able to bring about the construction contemplated. As Asquith L.J. said in *Cunliffe* v. *Goodman* [14]: "If there is a sufficiently formidable succession of "fences to be surmounted before the result at which X aims "can be achieved, it may well be unmeaning to say that X "'intended' that result." Where, as here, the contemplated development is not going to be carried out by the landlords through their servants or agents, in which case the development depends almost entirely on their own volition, but is to be carried out by means of a building lease, the landlords' volition (to use again the words of Asquith L.J.) is "no more than a "minor agency." [15] The result will depend ultimately on the volition of the proposed developer who is prepared to enter into the particular building lease.

Accordingly, the landlord, in my view, must prove in such a case that the developer and he have agreed on at least the essential terms of the lease, even though the document has not been signed. In the present case, the parties had not nearly reached that stage. No plans of the proposed development had been prepared or agreed, nor had any terms as to rent been agreed, nor was there any evidence that the proposed developers were in a position financially to carry it out. They did not give any oral evidence, and the only evidence emanating from them was that contained in the letter of February 17, 1956—a letter which clearly shows the fences to be surmounted before they committed themselves. Bearing this in mind, I cannot think that this letter could amount to proof that there was a reasonable prospect of the development being carried out. I think that the county court judge was influenced by the evidence given by the landlords to the effect that the scheme could not go further till

[14] [1950] 2 K.B. 237, 253. [15] Ibid. 253.

they got vacant possession. "We must be assured," they said in evidence, "of being able to proceed with the scheme." What the landlords no doubt meant by that was that they were not prepared to go further and incur considerable expense in the preparation of plans, and so on, until they knew they could get possession. But however reasonable this attitude may have been from the financial angle, it cannot dispense with the proof which is required to enable them to oppose the tenant's claim successfully. If such proof can only be adduced by incurring such expense, then the landlords must incur the expense and risk failure to get possession. After all, there is no discretion involved under paragraph (*f*). If a landlord establishes the ground stated in that paragraph the result is automatic. The court then "shall "not make an order for the grant of a new tenancy": see section 31 (1).

In the above I have assumed that the relevant time to be considered is the time of the application. If, as Danckwerts J. has held in *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*,[16] the relevant time is the time when the ground of opposition is first stated (in this case October 29, 1955), the matter is really unarguable. At that date no proposed developer had even been approached. Taking the view that I do as to the position even at the hearing, it is unnecessary to consider what is the relevant date, and I leave this over for future consideration when the point arises.

I should add that the intention to construct a road was, I think, proved, but the landlords cannot rely on that as a ground for getting possession, since, clearly, it was unnecessary to obtain possession of the holding in order to carry out that construction.

The position, however, on the evidence is that this waste piece of land now used for a car park is ripe for development. This is, I think, a circumstance to be considered when considering the duration of a new tenancy under section 33 of the Act, since the Act should clearly not be used as an instrument to defeat development. The new tenancy, therefore, should be one of short duration, and I agree with the proposed terms of the extended tenancy. Accordingly, I would allow the appeal on those terms.

Appeal allowed.
New tenancy accordingly. Rent to be agreed or, in default of agreement, determined by county court judge.

Solicitors: *J. H. Milner & Son; Lewin, Gregory, Mead & Sons for J. Clement Colley, Town Clerk, Barry.*

M. M. H.

[16] [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497.

[CHANCERY DIVISION.]

1956
May 9, 10.

Upjohn J.

* LONDON INVESTMENT AND MORTGAGE CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.

SAME *v.* F. N. WORTHINGTON (H.M. INSPECTOR OF TAXES).

Revenue — Income tax — War damage — Value payments — Property dealing company—Whether profits or gains for income tax purposes —Benefits to taxpayer, not as trader, but as owner of land—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case I—War Damage Act*, 1943 (6 & 7 *Geo.* 6, *c.* 21), *ss.* 36, 66, 79—*War Damage (Public Utility Undertakings, etc.) Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 36), *s.* 28 (1) (4).
War Damage.

A company, which carried on the trade of property dealing, received value payments under the provisions of the War Damage Act, 1943, in respect of some of its properties which had been damaged and destroyed by enemy action.

The special commissioners held (1) that, in computing the balance of profits for taxation purposes, the company should in general include value payments as receipts of its trade, but that (2) where a property had been, was being, or was intended to be repaired or rebuilt, sums received in respect of such payments should not be included as receipts, but should be deducted from the amount expended on rebuilding. The company appealed against the first conclusion of the commissioners; the Crown cross-appealed against the second:—

Held, that the value payments were not a trading receipt, as they constituted a receipt by the taxpayer, not as a part of his trading operation, but because he was compelled under the war damage scheme to make payments with the corresponding right of receiving the benefit in his capacity, not as a trader, but as an owner of the land; so that the company's appeals would be allowed and the appeals of the Crown would be dismissed.

Gliksten (J.) & Son v. *Green* [1929] A.C. 381; 45 T.L.R. 274; 14 T.C. 364; *Newcastle Breweries Ltd.* v. *The Commissioners of Inland Revenue* (1927) 43 T.L.R. 476; 12 T.C. 927; *Crook* v. *Seaham Harbour Dock Co.* (1921) 48 T.L.R. 91; 16 T.C. 333 considered.

APPEAL from the Special Commissioners for the purposes of the Income Tax Acts.

There were before the court four appeals: two by the tax payer, London Investment and Mortgage Co. Ltd., from the decision of the Special Commissioners in relation to assessments on them for income tax and profits tax; those appeals were against the whole of the special commissioners' decision. The other two appeals were cross-appeals by the Crown in respect of the same assessments to income tax and profits tax, these appeals being against part only of the decision of the special commissioners.

The case stated, so far as relevant, provided:

" 1. At a meeting of the Commissioners held on December 3, " 1952, the London Investment and Mortgage Co. Ltd. (herein- " after called ' the appellant company ') appealed against income " tax assessments for the accounting periods for the years 1948/ " 49 and 1949/50 and profits tax assessments for the accounting " periods April 1, 1947, to March 31, 1948, and April 1, 1948, " to March 31, 1949.

" 2. The question for determination in this appeal is whether " value payments arising under the provisions of the War " Damage Acts, 1941, and 1943,[1] and paid to the appellant " company, who carry on the trade of property dealing, are " receipts of the appellant company's trade to be brought into " account in computing the balance of profits and gains of the " appellant company for taxation purposes, and, if this is so, to

[1] War Damage Act, 1943, s. 36 (1): " The contributions to be made to- " wards the expense of making pay- " ments under this Part of this Act " in respect of war damage shall, " subject to the provisions of this Part " of this Act, be made in respect of " the properties, being units for the " purposes of Schedule A or for rating " valuations, which are specified in " section 39 of this Act; and a " property in respect of which such " a contribution is to be made is in " this Act referred to as a ' contri- " ' butory property.' (2) The said " contributions shall be made by the " payment of five instalments, falling " due on the first day of July in the " year 1941 and each of the four " following years. (3) The amount " of an instalment shall, subject to " the provisions of this Part of this " Act, be computed as mentioned in " sections forty to forty-three of this " Act by reference to the assessment " of the contributory property for the " purposes of Schedule A or the " annual value of the property shown " in a valuation list in force for " rating purposes; and the value by " reference to which an instalment is " computed is in this Act referred to " as the ' contributory value ' of the " property."

S. 66 (1): " Contributions made and " indemnities given under this Part " of this Act shall be treated for all " purposes as outgoings of a capital " nature . . ."

S. 113: [This section was amended and substantially re-enacted by s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949):— see below.]

S. 79 (1): " Payments by the " Commission in respect of war " damage, and payments of interest " on value payments and on pay- " ments to be made under section 18 " of this Act, shall be made out of " moneys provided by Parliament."

War Damage (Public Utility Undertakings, etc.) Act, 1949, s. 28: " (1) In computing the amount of the " profits or gains, or of the income " from any source, of any person for " any purpose of the Income Tax " Acts, or the amount of the profits " of any person for the purposes of " the profits tax or for the purposes " of excess profits tax, no sum shall " be deducted in respect of any pay- " ment or expenditure to which this " section applies . . . (4) Expendi- " ture to which this section applies " is—(*a*) any expenditure on repairing " or otherwise making good war " damage to land in so far as any " person has received or is entitled to " a payment in respect of the damage " by virtue of any of the provisions " of the principal Act (whether alone " or as applied or modified by or " under any provision of this Act), " and any expenditure on making " good detriment to an interest in " goods caused by war damage in so " far as any person has received or " is entitled to a payment in respect " of the detriment by virtue of any of " those provisions or of a policy issued " under either of the schemes operated " under Part II of the principal Act " or by virtue of section ten of this " Act; and (*b*) any expenditure on " repairing or otherwise making good " war damage being damage of a " class mentioned in any of para- " graphs (*a*) to (*d*) of subsection (1) " of section one of this Act, or on " measures for meeting the circum- " stances created by any such obstruc- " tion as is mentioned in section " eighteen of this Act."

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" which of the appellant company's trading years should these " payments be properly assigned . . ."

" The facts as found by us are contained in paragraphs 4 to 6 inclusive.

" 4. The appellant company is a property dealing company. " During the war certain of the properties belonging to the " appellant company sustained war damage. Under the provi- " sions of the War Damage Acts, 1941 and 1943, the appellant " company has received value payments from the War Damage " Commission in respect of a number of these properties. The " amount of a value payment, by section 10 (1), War Damage " Act, 1943, ' shall be an amount equal to the amount of the " ' depreciation in value of the hereditament caused by the war " ' damage, that is to say, the amount by which the value of the " ' hereditament in the state in which it was immediately after " ' the occurrence of the damage is less than its value in the " ' state in which it was immediately before the occurrence of " ' the damage.'

" 5. Subsequent to the receipt of the value payments certain " of these damaged properties, both freehold and leasehold, have " been disposed of by the appellant company. The remainder " continue to be part of its stock and are either being rebuilt " or are to be rebuilt. . . . It has been the practice of the " appellant company to place any value payment received in a " suspense account called the Value Payment Account. Any " money spent in making good war damage to properties for " which a value payment has been received is charged against " this Value Payment Account.

" 6. By section 66 (1), War Damage Act, 1943, war damage " contributions are to be treated for all purposes as outgoings " of a capital nature.

" Section 113, War Damage Act, 1943, provides that expen- " diture on repairing or otherwise making good war damage " in so far as a person is entitled to a payment in respect of the " damage is not to be deducted in computing the profits of any " person for the purposes of the Income Tax Acts or the profits " of any person for the purposes of the national defence " contribution.

" The War Damage Acts do not specifically mention the " treatment of value payments for the purposes of the Income " Tax Acts."

" 7. It is contended on behalf of the appellant company that " value payments received from the War Damage Commission " are, by implication from the provisions of sections 66 and 113,[1] " War Damage Act, 1943, as applied to the appellant company, " receipts of a capital nature which ought not to be brought " into the accounts of the appellant company as trading receipts " and that the appeal should succeed.

[1] See note 1, p. 859.

" 8. It is contended on behalf of the Commissioners of Inland " Revenue that the sums received by the appellant company by " way of value payments are ordinary trade receipts and the fact " that section 66, War Damage Act, 1943, prohibits any deduc- " tion of war damage contributions makes no difference to the " nature of the value payments which represent stock in trade " of the appellant company converted into cash and that the " appeal should be dismissed.

" 10. We, the commissioners who heard this appeal, having " considered all the evidence and the arguments addressed to us, " gave our decision in writing on July 31, 1953, as follows:—

" (1) We hold that where the appellant company has received " payments under the War Damage Act, 1943, in respect of " properties which have been damaged or destroyed, such pay- " ments are prima facie to be brought in as receipts of its trade. " The properties form part of its stock-in-trade, and on well- " known principles any sum received as compensation for their " loss is a trading receipt: see *Gliksten* v. *Green* [2] and *Newcastle Breweries Ltd.* v. *Commissioners of Inland Revenue*.[3] We " do not consider that section 66 (1) of the War Damage Act " (which provides that contributions made under that Act are " to be treated for all purposes as outgoings of a capital nature) " contains any sufficient implication to the contrary.

" (2) Where, however, the company expends money on " repairing or rebuilding properties which have been damaged " or destroyed, section 113 of the War Damage Act provides " in effect that such expenditure is not to be deducted in " computing the profits of the company's trade to the extent " that it is recouped by payments received under the Act. If " in addition to deducting the payments received from its " expenditure the company had to include such receipts on the " credit side of its accounts they would be included twice, and " we hold that section 113 clearly implies that such a result is " not to follow.

" (3) In the result we hold that the company should in general " include payments received under the War Damage Act, but " that where a property has been, is being, or is intended to be " repaired or rebuilt sums received in respect of it should not " be included as receipts, but should be deducted from the " amount expended on rebuilding.

" 4. We leave figures to be agreed, but we recognize that the " application of our decision to properties not yet repaired may " give rise to questions upon which the parties have not yet had " an opportunity of addressing arguments to us, and we will " re-list the case for argument upon this point if requested either " by the appellants or the Crown. . . .

" 12. Both parties immediately after the determination of the " appeal declared to us their dissatisfaction therewith as being

[2] [1929] A.C. 381; 45 T.L.R. 274; 14 T.C. 364.

[3] (1927) 43 T.L.R. 476; 12 T.C. 927.

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" erroneous in point of law and in due course required us to state " a case for the opinion of the High Court. . . .

" 13. The question of law for the opinion of the High Court " is whether or not our decision set out in paragraph 10 (above) " is correct."

John Senter Q.C. and *Desmond Miller* for the taxpayer.

Geoffrey Cross Q.C. and *Sir Reginald Hills* for the Inspector of Taxes.

Cases cited in argument not referred to in the judgment: *In re Scholfield's Will Trusts* [4]; *Pontypridd and Rhondda Joint Water Board* v. *Ostime* [5]; *Bennett* v. *Marshall* [6]; *Smith* v. *Lion Brewery Co. Ltd.* [7]

UPJOHN J. stated the nature of the appeals and continued: It is common ground that for relevant purposes the same principles have to be applied for the purposes of computing liability to profits tax as to income tax, and the same point arises in all these appeals, and I need not further distinguish between them.

The facts in this case and the questions which I have to consider can be stated in one sentence. The company carries on the trade of property dealing, and during the war some of their properties were damaged and destroyed by enemy action, and they have received value payments under the provisions of the War Damage Act, 1943; the question is whether those payments ought to be brought into account in computing the balance of profits against the company under Case I of Schedule D of the Income Tax Act, 1918. I had better refer at once to those provisions which, so far as relevant, are in these terms: " Tax " under this Schedule shall be charged in respect of—(*a*) the " annual profits or gains arising or accruing . . . (ii) to any " person residing in the United Kingdom from any trade . . ." The whole question is whether these payments are such profits or gains.

Before I deal with the respective contentions of the parties, some reference to the War Damage Act, 1943, is necessary. The Act was passed in 1943, but under section 127 it had retrospective effect as if it had come into operation at the time of the passing of the War Damage Act, 1941. Section 1 lays down the cardinal purpose and object of the Act: " There shall be made, subject " to and in accordance with the provisions of Part I of this Act,— " (*a*) payments by the War Damage Commission out of moneys " provided by Parliament in respect of war damage to land

[4] [1949] Ch. 341; 65 T.L.R. 156; [1949] 1 All E.R. 490.

[5] [1946] A.C. 477; 62 T.L.R. 295; [1946] 1 All E.R. 668; 28 T.C. 261.

[6] [1938] 1 K.B. 591; 54 T.L.R. 320; [1938] 1 All E.R. 93; 22 T.C. 73.

[7] [1911] A.C. 150; 27 T.L.R. 261; 5 T.C. 568.

"occurring during the risk period," which I need not further define, and "(*b*) contributions by persons interested in land "towards the expense of making such payments." Then in sections 6 and 7 and the succeeding sections provision was made for the "cost of works" payments, that is to say, payment based on an estimated cost of works on reinstating the property where it was damaged and "value payments" where the property was wholly destroyed, the value payments being the difference between the value of the hereditament immediately before war damage and its value immediately after it. I am in this case only concerned with value payments, although, so far as I know, no different principles would be applicable had they been cost of works payments.

Under section 10 (5) interest is payable on these value payments from the time of the war damage until payment. Under section 11 there is power to increase the amount of the value payments, and, in fact, in this case there was under a Statutory Instrument an increase of 45 per cent. described in horrible civil service jargon as "45 per cent. escalation." Under section 23 the right to payments under the Act can be assigned with the consent of the commission.

Section 36 is important, and I must read it. [His Lordship read this section and continued:] The amount of each instalment was 2s. 0d. in the pound. The next section which I think I need read is section 66: "Contributions made and indemnities given "under this Part of this Act shall be treated for all purposes as "outgoings of a capital nature." I think that is all I need read there. Part II of the Act deals with the insurance of goods against war damage. This much is common ground, that in fact the goods insured under that Part of the Act were what I may call briefly, and I hope reasonably accurately, capital goods —plant, machinery, tools, and so forth. Goods in the nature of stock in trade, and so forth, were insured under another Act known as the War Risks Insurance Act of 1939. Save in respect of goods below a certain value, the insurance of goods was compulsory, and was provided for by "premiums," as they were described, in relation to goods. Section 96 provided that such "premiums" were to be treated for all purposes as being "of "a capital nature."

Then follows an important section, section 113. That has in fact been amended and retrospectively re-enacted in the War Damage (Public Utility Undertakings, etc.) Act, 1949. It is section 28 in that Act. Subsection (1) is in these terms: "In "computing the amount of the profits or gains, or of the income "from any source, of any person for any purpose of the Income "Tax Acts, or the amount of the profits of any person for the "purposes of the profits tax or for the purposes of excess profits "tax, no sum shall be deducted in respect of any payment or "expenditure to which this section applies." Then subsection (3) defines payments to which the section applies and includes

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payments "in or towards discharge of a liability imposed by or "under any provision of Part I of the principal Act." That is defined in section 1 (6) as the War Damage Act, 1943. In a sense that was redundant because it had already been made quite plain by section 66 that all contributions made under the Act were capital. Then subclause (*b*) of subsection (3) repeats again in effect section 96 in relation to the premiums payable under Part II of the War Damage Act, 1943. Then subsection (4) says: [His Lordship read the subsection and continued:]

The finding of the commissioners was in these terms: "(1) We hold that where the appellant company has received "payments under the War Damage Act, 1943, in respect of "properties which have been damaged or destroyed such pay- "ments are prima facie to be brought in as receipts of its trade. "The properties form part of its stock-in-trade, and on well- "known principles any sum received as compensation for their "loss is a trading receipt: see *Gliksten (J.) & Son* v. *Green* [1] "and *Newcastle Breweries Ltd.* v. *Commissioners of Inland "Revenue.*[2] We do not consider that section 66 (1) of the War "Damage Act (which provides that contributions made under "that Act are to be treated for any purposes as outgoings of a "capital nature) contains any sufficient implication to the "contrary." That principal finding is challenged by the tax- payer, the company. Then they proceed: "(2) Where, "however, the company expends money on repairing or "rebuilding properties which have been damaged or destroyed, "section 113 of the War Damage Act provides in effect that "such expenditure is not to be deducted in computing the "profits of the company's trade to the extent that it is recouped "by payments received under the Act. If in addition to deduct- "ing the payments received from its expenditure the company "had to include such receipts on the credit side of its accounts "they would be included twice, and we hold that section 113 "clearly implies that such a result is not to follow." The reference to section 113 is plainly per incuriam. It should be section 28 of the Act of 1949 which I have just read. The second sentence of that paragraph, if read literally, is meaning- less, and it is unfortunate that the special commissioners have not expressed themselves more intelligibly. However, it has been agreed before me that the second sentence should be read in this way: "If in addition to not being allowed to deduct the "expenditure on repairs up to the amount of the value payment "the company had to include the whole of the value payment, "such receipts on the credit side in its accounts would be "included twice, and we hold that section 113 clearly implies "that such a result is not to follow." They continue: "In "the result we hold that the company should in general include "payments received under the War Damage Act, but that

[1] [1929] A.C. 381; 45 T.L.R. 274; 14 T.C. 364.

[2] 43 T.L.R. 476; 12 T.C. 927.

"where a property has been, is being, or is intended to be "repaired or rebuilt, sums received in respect of it should not "be included as receipts, but should be deducted from the "amount expended on rebuilding."

It was that part of the finding of the commissioners which the Crown challenged. Before the commissioners the Crown maintained that nothing expended on rebuilding could be recovered for the purposes of tax. However, before me they have submitted a more benevolent construction of section 28 with which I must deal later.

Mr. Senter for the company puts his submissions in this way. He says the purpose of the legislation was to create a national fund to be used to make good war damage to land. It was compulsory on the owners of all land in England and Wales. A contribution had to be made, and that contribution, it is clear under the provisions of the Act, was one contribution of a capital nature payable by five instalments. If war damage, unhappily, ensued, he submits that it is quite plain on section 28 of the Act of 1949 that the sum received must be a capital receipt, for he is not entitled to bring into account for the purposes of tax any part expended by him on restoring the property. He says that is the plain construction of section 28. He also says that this contribution is made as a payment received by the company, not as part of its trading operations at all, but solely in its capacity as a company, the proprietor of an interest in land, and it has nothing to do with its trading activities. Mr. Senter points out the hardship which will arise on what he submits is the plain construction of section 28, for, if, having received a value payment, the company expends that in restoring its stock-in-trade, that is to say, its destroyed building, it is plain that it cannot deduct that when the property is realized and its profits and gains come to be computed. He says that will be most unjust if the Crown's contention is right, for this reason. If it has to pay tax on what it gets, it will have that much less to expend on the property. When it comes to sell it cannot, at any rate up to the limit of what it has received, deduct that before it realizes its profit. That would manifestly have an unjust effect.

On the other hand, going forward to Mr. Cross's argument for the Crown for a moment, he points out that an equally anomalous effect would arise if the site is sold without restoration and if the company's contention is right, for the company would then get a tax-free payment from the War Damage Commission; but they might make a very nice loss on the sale of their site and that loss would be available to be set off upon the profits made on other transactions, and that that would be, so to speak, unfair on the Revenue because they would be missing some tax. That shows that to regard hardships and anomalies when one is considering tax matters is no sure ground on which to ascertain the principle. Tax sometimes bears hardly on a section of people, and sometimes it allows another section to escape

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altogether. No guidance, at all events no sure guidance, is to be gained by considering hardships and anomalies.

Mr. Senter referred in support of his argument to *Crook (H.M. Inspector of Taxes)* v. *Seaham Harbour Dock Co.*[3] That was a different case. What happened there was that the Seaham Harbour Dock Company received unemployment grants and other financial assistance for the purpose of extending the Seaham Harbour dock, and it was held that those payments were not annual profits or gains liable to income tax. Lord Buckmaster said this: "Now I do not myself think that the matter "can be put more succinctly than it was put by Mr. Hills when "he said: 'Was this a trade receipt?,' and my answer is most "unhesitatingly: No. It appears to me that it was nothing "whatever of the kind. It was a grant which was made by a "government department with the idea that by its use men "might be kept in employment, and it was paid to and received "by the Dock Company without any special allocation to any "particular part of their property, either capital or revenue, and "was simply to enable them to carry out the work upon which "they were engaged, with the idea that by so doing people might "be employed. I find myself quite unable to see that it was a "trade receipt, or that it bore any resemblance to a trade "receipt." Lord Atkin, in the course of his speech, said this[4]: "It would appear to me to be a remarkable proposition that "Parliament assented to that sum being appropriated for that "purpose, but intended, in certain events at any rate, only fifteen "shillings in the pound to be appropriated for that purpose, five "shillings in the pound of the full amount coming back in the "way of income tax. I do not think that that was the effect. It "appears to me that, when these sums were granted and when "they were received, they were received by the appropriate body "not as part of their profits or gains or as a sum which went to "make up the profits or gains of their trade. It is a receipt "which is given for the express purpose which is named, and it "has nothing to do with their trade in the sense in which you "are considering the profits or gains of the trade." As I have said, that was a very different case, but Mr. Senter naturally points out that it is a remarkable proposition that Parliament was to give you money to restore your building, but in doing so take away at the relevant time not merely 5s. in the pound but 10s. in the pound. He says that would be a most unusual result to have been intended by Parliament.

In support of his argument as to the capacity in which the company pays, being its capacity of proprietor of an interest in land and not in its capacity as a trader, he referred me to the case of *Smith's Potato Crisps Ltd.* v. *Inland Revenue Commis-*

[3] (1931) 48 T.L.R. 91; 16 T.C. 333.

[4] 16 T.C. 353.

sioners,[5] and *Rushden Heel Co., Ltd.* v. *Inland Revenue Commissioners*.[6] He has also referred me to the well-known case of *Strong & Co. of Romsey Ltd.* v. *Woodifield*[7]; but I think that the facts and principle decided in that last case are sufficiently set out in a passage to which I am going to refer in Lord Greene's judgment in the *Rushden Heel* case.[6] In considering those cases, I must bear in mind that they were dealing with deductions and not with profits and gains, deductions being dealt with by rule 3 of the rules under Cases I and II of Schedule D. Nevertheless, I think they are of assistance. In the *Rushden Heel* case[6] the question was whether the costs of litigating about taxes should be deducted as part of the expenses of the business. Lord Greene said this[8]: "In answering the question raised I do "not obtain any assistance from the cases that have been cited "to us other than three to which I will now refer. Special "reliance is placed by the Crown on the well-known dicta of "Lord Davey in *Strong & Co. of Romsey Ltd.* v. *Woodifield*.[9] "The deduction there claimed was in respect of the damages and "costs awarded against the appellants (who were brewers) to a "visitor at one of their licensed houses who was injured by the "fall of a chimney. The only decision by the commissioners "was that the deduction claimed was not allowable. Lord "Davey[10] expressed the view that the words 'for the purpose "'of the trade' mean 'for the purpose of enabling a person "'to carry on and earn profits in the trade. . . . It is not "'enough that the disbursement is made in the course of, or "'arises out of, or is connected with, the trade or is made out "'of the profits of the trade. It must be made for the purpose "'of earning the profits.' I do not myself find in these dicta a "completely satisfactory answer to the present problem. The "language that we have to construe is the language of the rule, "and there is always the risk of finding oneself construing not "the rule but a paraphrase of the rule expressed in a previous "judgment. I should have thought that in *Strong and Com-*"*pany's* case[11] it might have been said that an innkeeper who "did not compensate a guest when the chimney of the inn fell "upon him and injured him would be likely to suffer in his trade. "But the House did not accept this argument. Lord Davey's "formula, however, at once confronts us with the question: "What is the meaning of the phrase 'for the purpose of enabling "'a person to carry on and earn profits in the trade' as applied "to the present case? It is said, and said, I think, with some "force (and Atkinson J. agreed) that the ascertainment of a "trader's liabilities is essential for the successful carrying on "of his trade, whether they be trading liabilities in the strict

[5] [1948] A.C. 508; [1948] 2 All E.R. 367; (1948) 64 T.L.R. 430; 30 T.C. 267.

[6] [1948] 2 All E.R. 378; 30 T.C. 298, 316, 320.

[7] [1906] A.C. 448; 22 T.L.R. 754; 5 T.C. 215.

[8] 30 T.C. 316.

[9] 5 T.C. 215.

[10] Ibid. 220.

[11] Ibid.

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" sense or tax liabilities imposed upon him as a trader in respect " of his trade. I find, however, in *Strong and Co.'s* case [12] what " appears to me to be a clear answer to the present appeal. It " is, I think, a matter not of dictum but of decision in that case " that an expense is not deductible if it falls on a trader in some " character other than that of a trader. This was the ground " of the opinion of Lord Loreburn, L.C., with which Lords Mac- " naghten and Atkinson agreed.". So, says Mr. Senter, in this case the capacity in which the payment is made and the payment is received has nothing to do with the trading operations.

On the other side, Mr. Cross, for the Crown, says that the cardinal question to be asked, and in that I think he is right, is: is this payment when received a profit or gain of a trade? One has to see whether it is. If it is such a profit or gain it does not matter that the contribution was made because the taxpayer was the owner of the property. It does not matter that the payment is received because he is the owner of property which has been destroyed.

He relied on two cases to support his view that this was in fact a profit or gain. The first one was *J. Gliksten & Son Ltd.* v. *Green.*[13] In that case the appellants, who were timber merchants, owned a very large quantity of timber (which at that time was very high in price) which had been destroyed. They received no less than £477,000 from the insurance company under their policies of indemnity against fire. The timber stood in their books at a sum of only £160,000. The question was whether they had to bring in out of the receipts from the insurance £160,000—that was admitted by the appellants—or the whole sum of £477,000. I think I can go straight to the speech of Lord Dunedin. He says [14]: " My Lords, I agree. In these " income tax cases one has to try, as far as possible, to tread " a narrow path, because there are quagmires on either side into " which one can easily be led, and I think into one of these " quagmires we were tempted to be led when the argument " turned upon the question of what you were entitled to debit " or not. I do not think this case has anything to do with " debiting losses. The whole point is that the business of the " company is to buy timber and to sell timber, and when they " sell timber they turn it into money. This particular timber was " turned into money, not because it was sold, but because it was " burned and they had an insurance policy over it. The whole " question comes to be whether that is a turnover in the ordinary " course of their business. I think it was. They had that " amount of timber, which they got rid of and for which they " got a certain price, and then they could begin again. The more " times you have a turnover—that is to say, the more sales you " can get, provided that you are carrying on business at " remunerative prices—the better for you. The result of this

[12] Ibid.
[13] [1929] A.C. 381.
[14] [1929] A.C. 381, 385.

" fire was that they got rid of so much timber and got the insur- " ance money at that figure, and that seems to me precisely in the " same position as if they got rid of it by giving it to a customer. " If that is so, that is exactly the view of Rowlatt J., and I think " he arrived at the right result." So here, says Mr. Cross, the stock-in-trade is property. The appellant's business is to sell property. If it is realized otherwise than by sale through the misfortune of enemy action and they receive the money, it is just as though the property had been insured against such risks and they had received the insurance money. He says that these particular houses were turned into money, not because they were sold, but because they were destroyed by enemy action. He says they had that amount not of timber but of houses which they got rid of and for which they got a certain price, and then they could begin again. There is no doubt that, had it been possible for them to have had a policy of insurance against enemy action, this case of *Gliksten & Son* v. *Green* [15] would exactly cover this case, but they did not have a policy of insurance as such a thing was impossible in the circumstances.

The next case is the well-known case of *Newcastle Breweries Ltd.* v. *Commissioners of Inland Revenue*,[16] which was strongly relied on by the Crown. In that case certain stocks of incompletely treated rum belonging to the Newcastle Breweries had been requisitioned by the Admiralty who had finished its treatment and had paid a price as compensation. Lord Cave said this [17]: " Two points are made on behalf of the appellants. First, it is " said that the £5,300 is not a profit from the appellants' business " at all, but is a sum payable by way of compensation for the " compulsory taking by the Crown of a part of the appellants' " capital. I cannot agree with that contention. It is true that " the rum taken by the Crown had not been refined or blended " and was not, therefore, in the state in which rum was usually " sold by the appellants; but it was rum which they had bought " for the purposes of their business, and the cost of the rum was " no doubt treated as an outgoing of the business. If the raw " rum had been voluntarily sold to other traders, the price must " clearly have come into the computation of the appellants' profits, " and the circumstance that the sale was compulsory and was " to the Crown makes no difference in principle. Both the sums " received for the rum—the £10,300 and the £5,300—were in " fact brought into the appellants' books under the heading " ' Sales of Rum '; and although that entry may not be binding " upon the appellants, it seems to me to have been correct. The " transaction was a sale in the business, and although no doubt " it affected the circulating capital of the appellants it was none " the less proper to be brought into their profit and loss account." So here, although this was a compulsory transaction, in the sense

[15] [1929] A.C. 381.
[16] 43 T.L.R. 476; 12 T.C. 927.
[17] 12 T.C. 927, 953.

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that everyone had to make a contribution, the payment when received was part of the trading profits, and ought, accordingly, to be brought into computation. That is how the argument runs.

Mr. Cross submits that the result of those authorities and of *Lincolnshire Sugar Co. Ltd.* v. *Smart* [18] (which was cited to me by Mr. Senter) is to establish this: First, the fact that a payment is received under a statute does not matter: Secondly, the fact that the transaction is a compulsory one also does not affect the matter.

Mr. Cross put his argument in this way. Here is a realization in course of trade. It is perfectly true that one cannot deduct the expenses of a contribution, but that is because there is an express provision in the Act of Parliament preventing one from doing so. He said that there is nothing really surprising in it, for the converse is frequently true in this sense, that a man who insures his factory against fire or flood is allowed the expense of the premiums in his annual accounts, but if a disaster befalls him and he receives a payment, it is not in dispute that that would be a capital receipt.

He also relies on *Usher's Wiltshire Brewery Ltd.* v. *Bruce*.[19] I do not think I need read the headnote, but I can turn straight to Lord Atkinson's speech [20]: "One must look, therefore, for the "ratio decidendi, the doctrine on which the judgment of the "House was founded, to the judgments of those members of the "House who voted in the negative on the question put, 'that "'the judgment appealed from be reversed.' Stated broadly, I "think that doctrine amounts to this, that where a trader bona "fide creates in himself, or acquires a particular estate or interest "in premises, wholly and exclusively for the purpose of using "that interest to secure a better market for the commodities "which in his trade he vends, the money devoted by him to "discharge a liability imposed by statute on that estate or "interest, or upon him as the owner of it, should be taken to "have been expended by him wholly and exclusively for the "purposes of his trade. I use the word 'creates' advisedly, in "order to meet the case of a trader who lets premises he has, "for instance, inherited to a tenant who covenants to vend his "goods exclusively in them. The trader in such a case by the "letting creates in himself the estate or interest of a lessor wholly "and entirely for the purposes of his trade, namely, to provide "a better market for his goods."

Mr. Cross summarized his argument on this part of the case in this way. He said that the authorities establish this proposition. Where a trader's stock-in-trade is turned into money, that money is a trade receipt, even although the turning into money was not in the ordinary course of business and was involuntary and against the wishes of the trader.

[18] [1937] A.C. 697; 53 T.L.R. 306; [1937] 1 All E.R. 413; sub nom. *Smart* v. *Lincolnshire Sugar Co.*, 20 T.C. 643.

[19] [1915] A.C. 433; 31 T.L.R. 104; 6 T.C. 399.

[20] [1915] A.C. 433, 448.

On section 28, Mr. Cross's argument is this. He invites me to give what he called an equitable or benevolent construction to that section, and he invites me to read in some such words as these, if I may go against to section 28 (4) (*a*): "Expenditure "to which this section applies is—(*a*) any expenditure on repairing "or otherwise making good war damage to land in so far as any "person has received or is entitled to a payment in respect of "the damage", and then add in the words "which does not of "itself fall to be included among trade receipts." He says if that construction be given to it, it is quite sensible because the root of his submission is this, that there was really a casus omissus and the legislature overlooked the case that there are, as is the company in this case, a number of people who are engaged in the trade of property dealing. He submitted that the legislature forgot to deal with that class. But if some such words are read into subsection (4), it would mean that, if and so far as the trader does expend the money he has received in restoring the property, he can bring that into account when the property is ultimately realized in computing his profits and gains. He says that is a just effect. He further says that, if it is impossible to give that construction to the section, the Crown, by way of concession, is prepared in fact to give it that construction. This concession, however, cannot affect the true construction of the Act.

In reply, Mr. Senter submitted that he could distinguish the *Gliksten* [21] and *Newcastle Breweries* cases.[22] If one looks at the report of the *Gliksten* case [21] in the Tax Cases, one finds (he said) that nearly all the judgments pointed out that it was part of the business to insure the goods, the timber, against fire. That appears very clearly in Rowlatt J.'s decision.[23] The judge, having dealt with Sir John Simons' argument, continued: "That "may be a very attractive way of stating the respondents' con-"tention, but the fact is that the respondents' business is to "buy, hold and sell timber, and it is part of their business to "insure timber while they have it, in order that if the timber "is destroyed they may have the insurance money instead of the "timber and, in my judgment, they must treat that money in "the same way as they would have treated the timber, namely, "as an item in their trading account." Similar observations are to be found in the judgment of Sargant L.J., where he says [24]: "The company, trading as a timber company, in the ordinary "course of business insured its timber against loss or damage "by fire. That was an ordinary trade outgoing allowed for, of "course, in the trading account. Fire is an event which has to be "taken into account as an ordinary risk of a company of this "kind, and in consequence of the insurance this very large sum "was recovered." Lord Buckmaster said this [25]: "It is quite

[21] [1929] A.C. 381, 385.
[22] 43 T.L.R. 476; 12 T.C. 927.
[23] 14 T.C. 364, 375.
[24] Ibid. 380.
[25] Ibid. 384.

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" true it has been converted into cash through the operation " of the fire, which is no part of their trade, but loss due to it is " protected through the usual trade insurances, and the timber " has thus been realized." That, Mr. Senter says, is decisive of the distinction between the *Gliksten* case [26] and this case, for it was no part of the company's trading business to make the contribution.

With regard to the *Newcastle Breweries* case,[27] he says that there again, if the judgments are studied carefully, the case establishes this: that it was, at all events, treated as a sale, although a compulsory sale. I think that Lord Reid in the more recent case in the House of Lords of *Kirkness* v. *John Hudson & Co.*[28] did not quite take that view of that case; but, nevertheless, it is quite true that in the *Newcastle Breweries* case [27] it did proceed on the footing that there was a sale, and, although it was a compulsory sale, the sums received for the rum had to be taken into account in computing the profits of the company.

If I may say so, these concise and admirable arguments have much force on either side, and I have to consider which is correct. I first have to consider whether I can give to section 28 the construction sought by Mr. Cross. I have to remember the principles to be applied in taxation cases. They are set out in a well-known passage of Rowlatt J., which was quoted with approval by Lord Simon in the House of Lords in *Canadian Eagle Oil Co. Ltd.* v. *The King* [29]: " In the words of the late Rowlatt " J., whose outstanding knowledge of this subject was coupled " with a happy conciseness of phrasing ' in a taxing Act one has " ' to look merely at what is clearly said. There is no room for " ' any intendment. There is no equity about a tax. There is no " ' presumption as to a tax. Nothing is to be read in, nothing " ' is to be implied. One can only look fairly at the language " ' used.' " Applying that principle to the construction of subsection (4) of section 28, it seems quite clear that I cannot give to it the benevolent construction for which Mr. Cross seeks. Nor do I think I can speculate as to whether there was here a casus omissus, and that the legislature merely forgot to make provision for traders in property. I have to consider the Act as it stands. I have to consider its scheme and its provisions in detail, and then see whether the payment received under it is indeed a trading receipt.

It seems to me, with all respect to Mr. Cross's argument, that his broad proposition that, whenever trading stock is turned into money it is a trading receipt, is too wide. In each case, one must take account of the circumstances. The question to be answered is whether the particular receipt has to be brought into account in computing the profits or gains. There is no doubt that

[26] Ibid.
[27] 43 T.L.R. 476; 12 T.C. 927.
[28] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345.
[29] [1946] A.C. 119, 140; 61 T.L.R. 577; [1945] 2 All E.R. 499; 27 T.C. 206.

the value payment is in a sense a realization, and the case no doubt bears a marked resemblance to the *Gliksten* [30] and *Newcastle Breweries* cases.[31]

But, as I say, I have to consider the nature of the receipt having regard to the War Damage Act. We start, then, with this. There is nothing in the nature of a premium here. A capital payment has to be made in five instalments, and it is to be made by the owner of every acre of land in England and Wales. It seems to me quite clear on the construction of section 28, that, if and when a payment is received, no part of that payment, even if it be expended in restoring the property to its former state, can be brought into account when the property is sold and the net profit is realized as it otherwise admittedly would have been apart from the section. I think those two factors are indications that the legislature was not considering the trading aspect of the matter at all, but was imposing on an owner of land throughout the country the obligation to contribute, with the corresponding benefit, if disaster happened, of receiving a sum of money, a value payment. I think the legislature considered that that would be altogether outside the area of trading operations. It would be very remarkable, as Lord Atkin pointed out in the *Seaham Harbour* case,[32] if half of this money, which was plainly intended to be applied in rehabilitating the property —although it did not have to be so applied, that was the intention—should be instantly taken away in tax. I think Parliament did not intend that result.

On the whole, I have come to the conclusion, although I think the case is a very difficult one, that this is not a trading receipt. It was a contribution made and a payment received by the taxpayer, not as a part of his trading operations at all, but because he was compelled under the war damage scheme to make payments with the corresponding right of receiving the benefit in his capacity, not as a trader, but as an owner of the land. The scheme was brought into existence to enable owners of property to resort to a common purse to rebuild war damaged property for their benefit and the benefit of the country as a whole. I do not think that it is proper to regard the receipt of this payment as a trading profit.

Accordingly, I must allow the appeals and the matter must be sent back to the commissioners to adjust the figure. The appellant company must have the costs of the appeal and of the cross-appeals. I allow the company's appeals and I dismiss the Crown's appeals with costs.

Solicitors: *R. C. Bartlett & Co.; Solicitor of Inland Revenue.*

J. L. D.

[30] [1929] A.C. 381.
[31] 43 T.L.R. 476; 12 T.C. 927.
[32] 48 T.L.R. 91; 16 T.C. 333.

[COURT OF APPEAL.]

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May 29, 30;
June 6.

Lord Evershed M.R., Jenkins and Hodson L.JJ.

* *In re* TENNANT'S APPLICATION.

Bankruptcy — Salary or income — Husband and wife — Maintenance — Maintenance payments "income" of the bankrupt — Payable to bankrupt although vesting in trustee — Application to court required for payment to trustee — Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 51 (2).

By an agreement made in 1940 on dissolution of marriage, a husband covenanted to pay his former wife a monthly sum of £50 in consideration for which the wife agreed to accept such provision "in satisfaction of all rights or claims in respect of maintenance "or otherwise which she would otherwise be entitled to enforce "under the provisions of the Judicature (Consolidation) Act, 1925." In 1952 the wife was adjudicated bankrupt; she obtained her discharge in 1955 subject to two years' suspension. The husband took out an interpleader summons asking for the direction of the court as to how, as between the wife and her trustee in bankruptcy, he should dispose of the monthly payments under the deed of 1940:—

Held, (1) that the monthly sums payable under the deed were "income" within the meaning of section 51 (2) of the Bankruptcy Act, 1914.

(2) That section 51 (2) applied to such income whether the right to receive it had or had not become vested in the trustee under the general vesting provisions contained in the Act, and that, accordingly, the maintenance payments remained payable to the wife unless and until an order was made in respect thereof under the subsection.

In re Huggins, Ex parte Huggins (1882) 21 Ch.D. 85 (C.A.) and *In re Landau* [1934] Ch. 549; 50 T.L.R. 403 (C.A.) applied.

Passage in the speech of Lord Parker of Waddington in *Hollinshead* v. *Hazleton* [1916] 1 A.C. 428, 458; 32 T.L.R. 177 considered.

Quaere, whether in view of *Bennett* v. *Bennett* [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413 (C.A.) the wife's promise to accept the provisions of the deed in satisfaction of all claims under section 190 of the Judicature (Consolidation) Act, 1925, was wholly unenforceable.

Decision of Upjohn J. [1956] 1 W.L.R. 128; [1956] 1 All E.R. 425 affirmed.

APPEAL from Upjohn J.[1]

The bankrupt, Mrs. Hermione Willis, an actress (professionally known as Miss Hermione Baddeley), was married to David Francis Tennant (the husband) in 1926. That marriage was dissolved in 1937. By a deed of covenant dated May 21, 1940, the husband covenanted to pay his former wife the sum of £50 a month for life.

On April 3, 1952, a receiving order was made on Mrs. Willis, and she was duly adjudicated bankrupt during 1952. On April 29, 1955, she was discharged from bankruptcy subject to

[1] [1956] 1 W.L.R. 128; [1956] 1 All E.R. 425.

a suspension of two years. On her adjudication in 1952 Mrs. Willis had agreed that her trustee in bankruptcy should receive her maintenance payments for the benefit of her creditors as a voluntary gesture. Owing to her financial position in June, 1955, she had given the trustee notice of revocation of that arrangement, which the trustee refused to accept.

The husband took out an interpleader summons asking for the direction of the court as to how, as between his former wife and her trustee, he should dispose of the maintenance payments under the deed of 1940.

Upjohn J. made a declaration that the income payable to Mrs. Willis under the deed of covenant of May 21, 1940, continued to be payable to her unless and until an order was made in respect thereof under section 51 (2) of the Bankruptcy Act, 1914.[2]

The trustee appealed.

The facts are fully set out in the judgment of Lord Evershed M.R.

Raymond Jennings Q.C. and *Peter Oliver* for the trustee in bankruptcy.

I. J. Lindner Q.C. and *Edward Grayson* for Mrs. Willis.

Gilbert Beyfus Q.C. and *D. H. Mervyn Davies* for the husband.

Cases cited in argument which were not referred to in the judgments: *Randall* v. *Lithgow*[3]; *Harrison* v. *Harrison*[4]; *Watkins* v. *Watkins*[5]; *Simmonds* v. *Simmonds*.[6]

Cur. adv. vult.

[2] Bankruptcy Act, 1914, s. 18: "(1) Where a receiving order is "made against a debtor, then . . . "the court shall adjudge the debtor "bankrupt; and thereupon the property of the bankrupt shall become "divisible among his creditors and "shall vest in a trustee."

S. 38: "The property of the "bankrupt divisible amongst his "creditors . . . shall not comprise ". . . (1) Property held by the bankrupt on trust for any other person; "(2) The tools (if any) of his trade "and the necessary wearing apparel "and bedding of himself, his wife "and children . . . not exceeding £20 "in the whole: But it shall comprise "[inter alia] the following particulars:—(*a*) All such property as "may belong to or be vested in the "bankrupt at the commencement of "the bankruptcy . . . (*b*) The "capacity to exercise and to take "proceedings for exercising all such "powers in or over or in respect of "property as might have been exercised by the bankrupt for his own "benefit at the commencement of his "bankruptcy or before his discharge. . . ."

S. 51 (2): "Where a bankrupt is "in receipt of a salary or income ". . . the court, on the application "of the trustee, shall from time to "time make such order as it thinks "just for the payment of the salary, "income . . . or of any part thereof, "to the trustee, to be applied by him "in such manner as the court may "direct."

[3] (1884) 12 Q.B.D. 525.

[4] (1888) 13 P.D. 180, 181, 185; 4 T.L.R. 646.

[5] [1896] P. 222, 230, 231; 12 T.L.R. 456.

[6] [1956] P. 47; [1955] 3 W.L.R. 129; [1955] 2 All E.R. 481.

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LORD EVERSHED M.R. I have come to the clear conclusion that Upjohn J. was right in this case.

The facts may be briefly stated. The applicant, Mr. Tennant, to whom I will hereafter refer as "the husband," and the respondent, Mrs. Hermione Willis, to whom I will hereafter refer as "the wife," were married in the year 1926. In 1937 the marriage was dissolved on the petition of the wife, the decree absolute being dated November 22, 1937. On December 16, 1937, application was made under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, by the wife for an order for permanent maintenance. As no doubt is liable to happen in such cases, the application was followed by negotiations between the legal advisers of the husband and the wife, and these negotiations resulted in the execution of a deed of covenant dated May 21, 1940.

The parties before us appeared, until the case was actually in our court, to think that, as contemplated by the deed, the wife's application had been dismissed or otherwise disposed of by the Divorce Division of the High Court; in which case the deed would or might have been approved by that court. In fact, however, this was not so: the application remains, in theory at least, still pending. On the view that I take, I need not take time to refer in detail to the terms of the deed of 1940 or to the terms of the supplemental deed of November 1, 1941. Suffice it to say that by the former deed the husband covenanted to pay to the wife during her life a sum of £50 per month, the covenant being secured by the transfer by him of certain shares to trustees. The covenant was subject to the proviso that, if the wife remarried (as has in fact happened), she should bring into account by way of deduction from the monthly sums in any calendar year any income to which she became entitled under any settlement made in her favour by a future husband. By clause 10 of the deed the wife accepted the provisions of the deed in satisfaction of all claims for maintenance or otherwise under the Judicature Act of 1925. The wife has remarried; but it does not appear that she has become entitled to any annual sum by virtue of any settlement made by her present husband. The husband (that is, Mr. Tennant) has always paid to the wife, and has said that he is willing and ready to continue to pay, the full sum of £50 per month.

In the year 1952 the wife was adjudicated bankrupt. By agreement between the wife and the trustee in her bankruptcy (the appellant), the sums payable under the deed of covenant were paid to the trustee until the month of May, 1955, when, following the discharge of the wife in April of that year (subject to a two years' suspension) the wife revoked her authority to the husband to make his payments to the trustee. In the result, the trustee has claimed that the benefit of the deed of covenant is vested in him according to the terms of sections 18 and 38 of the Bankruptcy Act, 1914, and that he is accordingly now

entitled to sell or dispose of the whole of the wife's rights to receive monthly sums for the rest of her life for the benefit of the creditors in the bankruptcy.

The husband thereupon issued the present proceedings in the form of an interpleader summons under R.S.C., Ord. 57, making the wife and the trustee in bankruptcy respondents to the summons. It is to be noted that, in order to bring himself within the rule, it was necessary for the husband to say (as he in fact said in his affidavit in support of the summons) that he was willing to pay the monthly sums to whichever of the two persons, the wife or the trustee in bankruptcy, the court held entitled to receive them.

The wife's answer to the contention of the trustee has been that the sole rights of the latter are to apply under section 51 (2) of the Bankruptcy Act for a direction for payment of the whole or some less part of the monthly sums to the trustee, to be applied by him according to the court's direction. The view of Upjohn J., upon the authorities cited before him, was in favour of the wife. He accordingly made a declaration in the following terms: "This court doth declare that the income payable to the "respondent Hermione Yolande Ruby Clinton Willis under the "said deed of covenant dated 21st May, 1940, continues to be "payable to the respondent Hermione Yolande Ruby Clinton "Willis unless and until an order is made in respect thereof "under section 51 (2) of the Bankruptcy Act, 1914." From that order the trustee has appealed, making both the husband and the wife respondents in his notice of appeal.

On the case coming on first before us, the husband was not represented. He took the view, implicit in his making the application under R.S.C., Ord. 57, that the matter was one exclusively between the wife on the one hand and her trustee in bankruptcy on the other. It seemed, however, to this court then that the husband's interest was or might be somewhat greater, for example, in the event of the trustee succeeding in this court and the wife then attempting, notwithstanding her promise in clause 10 of the deed of covenant, to obtain an order from the court for her maintenance. The case was accordingly stood over to give an opportunity to the husband to be represented before us; and he has now appeared by Mr. Beyfus. I shall refer later to the nature of the argument which Mr. Beyfus put before us.

The well-known vesting provisions of the Bankruptcy Act are found particularly in sections 18 (1) and 38 of that Act and are to the effect that, upon adjudication, all the property of the debtor (and the widest significance is given to the word "property" by section 167) becomes divisible among the creditors, and vests in the bankrupt's trustee. Section 51 of the Act (on subsection (2) of which the issue in this case turns) occurs in a group of sections headed in the present Act "Realisation of property." I observe that by section 55 (being one of the sections in this group) the trustee's power to sell the

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bankrupt's property is expressed to be "subject to the provisions of the Act." Section 50 provides, in the case where the debtor is a beneficed clergyman, for application being made by the trustee for sequestration of the profits of his benefice. Section 51 (1) empowers the trustee similarly, where the debtor is an officer in the Army or the Navy, or an officer or clerk in the service of the Crown, to make application to the court so as to enable him to receive the whole or part of the debtor's pay or salary.

Section 51 (2) is as follows: [His Lordship read the subsection and continued:] The questions, then, before this court are two: first, are the monthly sums paid by the husband under the deed of covenant of May, 1940, "income" within the meaning of section 51 (2) of the Bankruptcy Act? Second, if so, are the trustee's rights in regard to those monthly sums limited to his rights to apply to the court under that subsection?

As Upjohn J. observed, if the matter were res integra there would be much to be said, to put it no higher, for the view that "salary or income" in section 51 (2) referred only to salary or income which, by reason of their being non-assignable, could not and did not vest in the trustee, and were not receivable by him under the other provisions of the Act, and therefore incapable of realization by him for the benefit of the creditors.

But, in my judgment, the decisions of this court on the meaning and effect of the relevant sections of the present Bankruptcy Act or of analogous provisions of the earlier legislation preclude us from so deciding; and preclude us also from accepting Mr. Jennings's argument that section 51 (2) is an enabling provision, so that, in the case of property or rights vesting in the trustee by virtue of sections 18 or 38 of the Act (and Mr. Jennings says that the benefit of the husband's covenant under the deed in question is within that description), the trustee may either dispose of such property or rights outright by sale or otherwise, or he may apply under section 51 (2), as may be most appropriate or advantageous to the creditors.

The first of the cases is *In re Huggins, Ex parte Huggins.*[1] This was a case of a retired Chief Justice of the colony of Sierra Leone, who was in receipt of a pension from the Colonial Office but who had gone bankrupt as a result of a business venture. As appears from the facts stated in the report, the Secretary of State had refused to recognize any assignment of the pension, and the trustee had applied accordingly for an order under section 90 of the Bankruptcy Act, 1869, a section now represented by section 51 (2), and not in any material respect or in its context different from the latter subsection. This court held that, notwithstanding the refusal of the Secretary of State to recognize the assignment, the pension was the property of the bankrupt which vested in the trustee; but the court held also

[1] (1882) 21 Ch.D. 85.

that the effect of section 90, and the effect also of the two preceding sections, sections 88 and 89, corresponding to sections 50 and 51 (1) of the present Act, was that the vesting in the trustee by virtue of the earlier sections of the Act was controlled and limited by the later sections; in other words, in the case before the court that section 90, so far from being merely an enabling section, conferring additional powers to those inherent in the vesting, controlled and qualified the effect of the vesting as regards cases within its scope to the powers contained in section 90. The point and the argument in *In re Huggins, Ex parte Huggins* [2] were different from those in the present case, for the argument for the bankrupt in the former was that the pension was altogether outside the scope of the bankruptcy; but the ratio of the decision undoubtedly, as I think, was as I have stated it.

I refer to a passage in the judgment of Sir George Jessel M.R. where he said [3]: "Therefore, in the case of a beneficed "clergyman, sections 15 and 17 must be read as subject to the "provisions of section 88, and the benefice does not vest in an "unqualified way in the trustee. Then comes section 89, which "provides for the cases of officers in the army or navy, and "officers or clerks in the civil service of the Crown. In such "cases section 15 is controlled by section 89, and a person who "holds such a position and who becomes a bankrupt, is not "necessarily to be left to starve, however improvident he may "have been, but a discretion is given to the court to fix how "much of his pay and salary is to be made available for the "payment of his creditors. If this be so, why do not the cases "which are dealt with by section 90 stand in a similar position? "Section 90 applies to a bankrupt 'who is in the receipt of a "salary or income other than as aforesaid.' The present appel-"lant's income is not a 'salary,' but it is 'income.' The word "'income' is as large a word as can be used. It is not the "less 'income,' because it has to be voted every year by the "Colonial Legislature. The court is empowered to 'make such "'order as it thinks just for the payment of such salary or "'income, or of any part thereof, to the trustee.' That means "that, though the salary or income would vest in the trustee "by virtue of sections 15 and 17, the court may order that only "a part of it shall be set aside for the benefit of the creditors. "This is a specific provision which to that extent controls the "operation of sections 15 and 17."

To that citation I add one short sentence from the judgment of Lindley L.J., who says [4]: "As I understand them, these "sections"—meaning sections 88, 89 and 90—"are modifica-"tions and qualifications of section 15." The third member of the court, Bowen L.J., expressed concurrence with the other members of the court.

[2] 21 Ch.D. 85.
[3] Ibid. 92.
[4] Ibid. 93.

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Notwithstanding what might have been at first sight the contrary implication of the language which I have quoted, later decisions have established clearly that section 51 (2) is not limited to income vested in the trustee. So much clearly appears from the later decision of this court in *In re Landau*,[5] to which I shall come presently; but I need not pursue that aspect of the matter, since Mr. Jennings' whole case rests on the premise that the benefit of this covenant under the deed of 1940 is vested in the trustee; and for the purpose of the present appeal it is unnecessary to decide, and I do not decide, whether the benefit of that covenant is or is not, as Mr. Lindner says it is not, assignable or is or is not vested in the trustee.

Before coming to the case of *Landau*[5] I should refer to the case in the House of Lords of *Hollinshead* v. *Hazleton*,[6] a case which arose under the corresponding provisions of the Irish bankruptcy legislation. I make the reference because Mr. Jennings much and naturally relied on one passage in the opinion in that case of Lord Parker of Waddington. I think that the nature of the case sufficiently appears from the headnote, which reads as follows: "The annual payment of £400 to members of Parliament under the resolution of the House of Commons of August 10, 1911, is 'salary or income' within section 51 of the Bankruptcy (Ireland) Amendment Act, 1872, and, therefore, where a bankrupt is a member of Parliament, the court may make an order appropriating a portion of his salary for the benefit of his creditors."

The passage in Lord Parker's speech to which Mr. Jennings particularly referred is as follows[7]: "It"—that is, section 319 of the Irish Bankruptcy (Amendment) Act—"enables the salaries or periodic payments with which it deals to be made available to some extent for the creditors of a bankrupt notwithstanding the policy of the common law. The 51st section of the later Act deals with all salaries or income not falling within the provisions of section 319 of the earlier Act"; section 319 of that Act corresponds in substance, though not closely in terms, with section 50 (1) of the present English Act. "It"—again that refers to section 319—"enables the salaries or income with which it deals to be made similarly available. The only difference between the two sections is that the extent to which salaries or periodic payments falling within section 319 can be made available depends on the discretion of the judge in bankruptcy, to be exercised with the consent of the public official therein referred to, whereas the extent to which salaries or income falling within section 51 can be made available depends on the discretion of the judge in bankruptcy alone." Then comes the most important sentence: "If the sections be read together it is reasonably clear that the 51st section

[5] [1934] Ch. 549; 50 T.L.R. 403.
[6] [1916] 1 A.C. 428; 32 T.L.R. 177.
[7] [1916] 1 A.C. 428, 458.

" embraces all salaries which were not assignable or capable of " being taken in execution by common law other than those " specified in section 319."

If that language of Lord Parker was the only authority relevant to the present case, then it would plainly lend support to the view which I have earlier stated would to my mind have a strong appeal to conviction if the matter was res integra, namely, that the salary or income comprehended in section 51 (2) is limited to salary or income not by the vesting provisions or otherwise made available to or receivable by the trustee; but, if Lord Parker's dictum has that meaning, it was unnecessary to the decision before the House, and is not to be found reflected in the other speeches. See, for example, the language of Lord Sumner, where he says [8]: " As section 319 proceeds by enumera- " tion of departments, and necessarily does not name this salary, " and as the respondent is not a subordinate in any department, " the case does not fall within section 319. The two sections " read together clearly mean that all salaries or incomes not " brought in by the first shall be comprehensively brought in by " the second." Finally, it is inconsistent with the conclusion of this court in *In re Huggins, Ex parte Huggins* [9] (to which the House was referred in *Hollinshead* v. *Hazleton*,[10] and which was cited in the speeches in that case with approval) and with the later case of *In re Landau*,[11] to which I now come.

In the *Landau* case [11] the debtor was, like the wife in the present case, a lady who had divorced her husband. She had then proceeded to obtain an order against her husband under section 190 of the Judicature Act, 1925, for payment, inter alia, during their joint lives of an annual sum for maintenance; and the question was whether the trustee could obtain an order in regard to that annual sum under section 51 (2)—in other words, whether such annual sums were income within the meaning of that subsection. This court held that they were, and that an order could accordingly be made under the subsection.

It is sufficient for this purpose to read one passage from the judgment of Romer L.J.[12]: " The only other question which " remains is whether the payments in question in this case can " properly be described as income within the meaning of section " 51 (2). I confess that, even after hearing Mr. Tindale Davis's " interesting argument, I have not the least idea now why this " annual sum paid by the husband to the wife under the direc- " tion contained in the order of the Divorce Court is not her " income. It is true that Lord Esher in *Ex parte Benwell* [13] " said that income in the old section corresponding to section " 51 (2) was income ejusdem generis with salary; but, with all " respect to that learned judge, I do not think such a statement

[8] Ibid. 463.
[9] (1882) 21 Ch.D. 85.
[10] [1916] 1 A.C. 428, 431.
[11] [1934] Ch. 549.
[12] Ibid. 560.
[13] (1884) 14 Q.B.D. 301.

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" assists us very much unless the statement goes on to tell us to " what genus the salary payment belongs."

I do not forget that the question raised in *In re Landau* [14] was, again, not the same as the question raised in the present case. None the less, it is quite impossible, in my view, for this court to distinguish for present purposes the monthly sums payable under the deed of covenant of 1940 in this case from the maintenance ordered to be paid by the Divorce Court in *In re Landau*.[14] It therefore, in my judgment, inescapably follows from the combined effect of *In re Huggins, Ex parte Huggins* [15] and *In re Landau* [16] that the monthly sums with which we are here concerned constitute income within section 51 (2), and that if the property in these sums did vest in the trustee (as I do not decide) then the effect of the vesting is controlled and qualified by section 51 (2), so that the trustee's rights and powers in regard to them are limited to those stated in that subsection.

I desire to emphasize that I am confining my decision in this appeal to the facts of this case and the questions raised in it. It was said by Mr. Jennings that, if Upjohn J. was right, then the same result would follow in the case, for example, of a person who is absolutely entitled to income as life tenant under a settlement of some fund or to an annuity under a testator's will. Those cases are not before us, and I express no view upon them. Income of those kinds may or may not be within section 51 (2), and, if they are, the trustee in bankruptcy may or may not, nevertheless, be able to exercise other rights or powers in regard to the income concerned. All I decide is that sums payable under the deed of 1940 by the husband in this case are within section 51 (2), and that such subsection controls any vesting thereof which there may be in the trustee.

I turn, finally, to Mr. Beyfus's argument. It was to the effect that, particularly as the result of the decision of this court in *Bennett* v. *Bennett*,[17] the covenant in the deed of 1940, or at least the wife's promise to accept the provisions of that deed in satisfaction of all claims under section 190 of the Act of 1925 (which promise, he said, was the sole consideration for those provisions), are or is wholly unenforceable. On this matter also it is unnecessary to express any view, and I do not do so. Our decision in this case cannot bind in this respect either the husband or the wife if the question of enforceability should hereafter arise. As I stated at the beginning of this judgment, the present position is that the husband has always regularly paid the monthly sums, and he has sworn in his affidavit—and has very properly and very naturally said the same thing through his counsel—that he is ready and willing, at any rate as things now are, to continue so to do.

[14] [1934] Ch. 549.
[15] 21 Ch.D. 85.
[16] [1934] Ch. 549.
[17] [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413.

The result is, I think, that Upjohn J.'s declaration was right; and I would dismiss this appeal.

JENKINS L.J. I agree. In *In re Huggins, Ex parte Huggins* [18] it was held by the Court of Appeal that section 90 of the Bankruptcy Act, 1869 (corresponding to section 51 (2) of the Bankruptcy Act, 1914), applied to property which vested in the trustee in the bankruptcy, provided that it was income within the meaning of the section, and that the section controlled and qualified the operation of the vesting provisions of the Act with respect to any income to which the section applied. In *In re Shine* [19] the Court of Appeal held that section 53 (2) of the Bankruptcy Act, 1883 (corresponding to section 51 (2) of the Bankruptcy Act, 1914), applied to property which did not vest in the trustee in bankruptcy, provided that it was income within the meaning of the section. In *In re Garrett*,[20] Farwell J., citing *In re Huggins, Ex parte Huggins* [21] and *In re Shine*,[22] held that section 51 (2) of the Bankruptcy Act, 1914, "applies both to "property that vests in the trustee under section 18 (1), and "also to property not so vesting." In *In re Landau* [23] the Court of Appeal came to the same conclusion as Farwell J. had reached in *In re Garrett* [24] and expressly approved that decision. Further, in *In re Landau* [25] the Court of Appeal held that a yearly sum payable to the bankrupt by her former husband for maintenance under an order made by consent in divorce proceedings between them was income within the meaning of section 51 (2).

In this state of the authorities, and apart from the question raised before us as to the validity of the deed of May 21, 1940, to which I will return, I think that we are bound to hold that the monthly sum payable under the deed of May 21, 1940, is "income" within the meaning of section 51 (2) (for I see no distinction for the present purpose between maintenance payable under a consent order and maintenance payable under a covenant in a deed), and that we are also bound to hold that section 51 (2) applies to such income whether the right to receive it has or has not become vested in the trustee under the general vesting provisions contained in the Act.

On the footing that the income now in question has not vested in the trustee, the effect of section 51 (2) in regard to it must, I think, clearly be that it is payable to the bankrupt unless and until the court on the application of the trustee orders it, or some part of it, to be paid to the trustee.

On the footing that the income now in question has vested in the trustee, I think we are bound by *In re Huggins, Ex parte*

[18] 21 Ch.D. 85.
[19] [1892] 1 Q.B. 522; 8 T.L.R. 279.
[20] [1930] 2 Ch. 137, 141; 46 T.L.R. 464.
[21] 21 Ch.D. 85.
[22] [1892] 1 Q.B. 522.
[23] [1934] Ch. 549.
[24] [1930] 2 Ch. 137.
[25] [1934] Ch. 549.

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Huggins [26] to hold that the effect of section 51 (2) in regard to it is the same as if it had not so vested, that is to say, it is, notwithstanding such vesting, payable to the bankrupt unless and until an order for its payment wholly or in part to the trustee is made by the court on the application of the trustee. Indeed, given acceptance of the view, which we are bound on the authorities to accept, that section 51 (2) does apply to property vested in the trustee as well as to property not so vested, it is difficult to see what other effect can be attributed to the subsection so far as property vested in the trustee is concerned. As pointed out by Upjohn J., the trustee is the only person who can make an application under the subsection; and plainly he would never apply if the alternative was open to him of asserting his title to the whole of the property in question by virtue of the statutory vesting of it in him. The subsection would thus be to all intents and purposes futile so far as property vested in the trustee is concerned, unless it is treated as controlling or qualifying the operation of the general vesting provision in relation to the particular kinds of property to which it refers.

I confess that had the question been res integra I would have been inclined, as I think the judge would have been inclined, to hold that section 51 (2) only applied to cases where the salary or income did not vest in the trustee under the general vesting provisions, and therefore would not, apart from a special order under the subsection, be recoverable by the trustee for distribution amongst the creditors. But that view, whether right or wrong, is not open to us on the authorities; and I think that on the authorities, and on the admission necessarily made by Mr. Tennant for the purposes of the interpleader summons that he was liable under the deed to pay the monthly sum in question either to the bankrupt or to the trustee, the judge came to a right conclusion in holding as he did that the monthly sum in question continued to be payable to the bankrupt unless and until an order was made in respect thereof under section 51 (2) of the Bankruptcy Act, 1914.

When the matter first came before this court, Mr. Tennant was not represented. In the course of the hearing a suggestion fell from the court that his covenant to pay the monthly sum might, on the principles discussed in *Bennett* v. *Bennett*,[27] be void on the ground that the consideration for it, in the shape of the bankrupt's agreement to accept the provision made for her "in satisfaction of all rights or claims in respect of maintenance "or otherwise which she would otherwise be entitled to enforce "under the provisions of the Judicature (Consolidation) Act, "1925," was void as contrary to public policy. The case was accordingly adjourned to give Mr. Tennant an opportunity of making such submissions on the question of the validity of the deed as he might be advised. At the resumed hearing, Mr. Tennant was represented by Mr. Beyfus, who submitted that on

[26] 21 Ch.D. 85. [27] [1952] 1 K.B. 249.

the ground I have stated Mr. Tennant was under no valid obligation to pay the monthly sum, which accordingly was in the nature of a mere voluntary payment.

I find it unnecessary to embark on this question for the purpose of disposing of the present appeal. There is no appeal by Mr. Tennant, and there could not well have been any appeal by him inasmuch as he necessarily for the purposes of the summons assumed the role of a mere stakeholder, who admitted liability either to the bankrupt or to the trustee and asked the court to decide to which of them payment should be made. Dealing with the matter on this footing—the only footing on which he could deal with it in view of the form of the proceedings—Upjohn J. declared that the monthly sum in question continued to be payable to the bankrupt unless and until an order was made in respect thereof under section 51 (2).

The only question in this appeal is whether the judge, instead of making a declaration in those terms, ought to have declared that the monthly sum in question was payable to the trustee. I have already given my reasons for holding that this question should be answered in the negative. In these circumstances, I think that the only course open to this court is to dismiss the appeal. If and when the trustee applies for an order under section 51 (2) Mr. Tennant will be able, if so advised, to seek to raise the question of invalidity, and it will then be for the court hearing the application to decide whether it is open to him to take the point, and if so whether in all the circumstances of the case the point is well taken. The bankrupt on her part might, I suppose, conceivably be advised herself to seek to raise the same point with a view to defeating the claim of the trustee, though she might over-reach herself in so doing. As to the outcome of any submissions, whether by the bankrupt or by Mr. Tennant, on any application under section 51 (2), I say nothing. So far as the present proceedings are concerned, in my judgment, all we can do is to dismiss the appeal.

HODSON L.J. I am of the same opinion.

Appeal dismissed.

Solicitors: *Stafford Clark & Co.; C. Butcher & Simon Burns; Vizard, Oldham, Crowder & Cash.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

1956
June 11, 12, 13.

Pilcher J. with a jury.

* BOAKS *v.* REECE.

Justices—Remand—Jurisdiction—Summary offence not punishable by a sentence of imprisonment—Remand for medical report—Power of magistrates' court to remand in custody—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 14 (3) (4), 26 (1), 105 (1) (*a*).

The plaintiff, having been convicted of causing an obstruction under section 72 of the Highway Act, 1835, was remanded in custody for a medical report pursuant to an order made by a magistrate under section 14 (3) of the Magistrates' Courts Act, 1952, and was detained in Brixton Prison hospital ward for seven days. The plaintiff claimed damages against the magistrate for wrongful imprisonment:—

Held, that the general power granted to the magistrate under section 14 (3) to remand in custody for inquiries entitled him to remand the plaintiff in custody for inquiries of a medical character to be made.

JURY ACTION.

On October 10, 1955, the plaintiff, William George Boaks, was convicted by the Bow Street magistrate of offences under section 72 of the Highway Act, 1835, and regulations 89 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955, neither of which offences carried a sentence of imprisonment. The plaintiff, who was conducting a Road Courtesy Campaign, had a number of previous convictions for similar offences, some of them before the same magistrate. Before passing sentence the magistrate remanded him in custody for seven days for a medical report. Pursuant to the magistrate's order the plaintiff was taken in custody to Brixton Prison where from October 3 to October 10, 1955, he was detained in the prison hospital ward.

The plaintiff now claimed damages against the magistrate for wrongful imprisonment, alleging that he had been held in custody in Brixton Prison from October 3 to October 10, 1955, as a convicted person under section 26 of the Criminal Justice Act, 1948,[1] and section 26 of the Magistrates' Courts Act, 1952, for offences none of which were punishable by imprisonment.

[1] Criminal Justice Act, 1948, s. 25 (1): "It is hereby declared "that the powers of a court of summary jurisdiction under section 16 "of the Summary Jurisdiction Act, "1848, to adjourn the hearing of a "case includes power, after a person "has been convicted and before he "has been sentenced or otherwise "dealt with, to adjourn the case for "the purpose of enabling inquiries to "be made or of determining the most "suitable method of dealing with his "case . . ."

S. 26: "(1) Without prejudice to "any powers exercisable by a court "under the last foregoing section, "where a person is charged before a "court of summary jurisdiction with "an offence punishable on summary "conviction with imprisonment, and "the court is satisfied that the "offence has been committed by that "person but is of opinion that an "inquiry ought to be made into his "physical or mental condition before "the method of dealing with him is "determined, the court shall remand "him in custody or on bail . . . for "such period or periods, no single

By his defence the magistrate alleged that the order remanding the plaintiff in custody had been made pursuant to, and was authorized and rendered lawful by, sections 14 (3) and (4) and 105 (1) (*a*) of the Magistrates' Courts Act, 1952.

The questions put to the jury and their answers were as follows:

(1) Did the defendant, in remanding the plaintiff, mention in open court any particular section of the Magistrates' Courts Act, 1952? No.

(2) When the defendant signed the committal warrant, which section had been written and not erased in the right-hand top corner of the warrant? Section 14 (3).

(3) In making the order was the defendant acting vindictively? No.

(4) What damages, if any? £100.

The plaintiff appeared in person.

H. J. Phillimore Q.C. and *Rodger Winn*, for the defendant, submitted that it was clear that the defendant had acted under section 14 (3), and that the powers contained in that section authorized the remand of the plaintiff in custody for a medical report.

Section 16 of the Summary Jurisdiction Act, 1848, gave magistrates a general power to adjourn the hearing of an information and to remand in custody during the adjournment. Section 25 of the Criminal Justice Act, 1948, sought to define the power and under that section a magistrates' court had a

"period exceeding three weeks, as "the court thinks necessary to "enable a medical examination and "report to be made."

[Note.—These sections were repealed by the Magistrates' Courts Act, 1952, s. 132 and Sched. 6.]

Magistrates' Courts Act, 1952, s. 14: "(3) A magistrates' court "may, for the purpose of enabling "inquiries to be made or of determining the most suitable method "of dealing with the case, exercise "its power to adjourn after convicting the accused and before sentencing him or otherwise dealing "with him; but, if it does so, the "adjournment shall not be for more "than three weeks at a time. (4) On "adjourning the trial of an information the court may remand the "accused and . . . shall do so if— "(*a*) the offence is not a summary "one; or (*b*) the court has proceeded "under section 18 (3) of this Act to "summary trial . . . and, where the "court remands the accused, the time "fixed for the resumption of the trial "shall be that at which he is "required to appear or be brought "before the court in pursuance of "the remand."

S. 26: "(1) If, on the trial by a "magistrates' court of an offence "punishable on summary conviction "with imprisonment, the court is "satisfied that the offence has been "committed by the accused, but is "of opinion that an inquiry ought to "be made into his physical or "mental condition before the method "of dealing with him is determined, "the court shall adjourn the case to "enable a medical examination and "report to be made and shall "remand him; but the adjournment "shall not be for more than three "weeks at a time."

S. 105: "(1) Where a magistrates' "court has power to remand any "person, then, subject to any enactment modifying that power, the "court may—(*a*) remand him in "custody, that is to say, commit him "to custody to be brought before the "court at the end of the period of "remand . . ."

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general power to adjourn a case after conviction and before sentence for inquiries to be made; and where the offence carried a sentence of imprisonment and a medical report was thought advisable, section 26 of the Act made the exercise of that power mandatory. There is no question but that, prior to 1952, magistrates dealing with an offence, whether it carried a sentence of imprisonment or not, had power to adjourn the case for a medical report, and it is clearly desirable that they should have the same powers under the Act of 1952 as they had from 1948 to 1952. The Magistrates' Courts Act, 1952, is a consolidating Act, and the intention of section 14 (3) is that, if in the course of a trial it is thought desirable that inquiries should be made into the physical or mental health of the accused, there should be power to adjourn for that purpose; it would be extraordinary if, unless the offence carried a sentence of imprisonment, that power was lost after conviction. The ground on which magistrates can adjourn a case after conviction "for the purpose of "enabling inquiries to be made" is stated in wide terms. Section 26 (1) of the Act of 1952 is in narrower terms, but it does not derogate in any way from the powers given by section 14 (3), which can be used for any inquiries, including medical inquiries.

The plaintiff in reply: Had Parliament intended that a medical report could be called for no matter what the offence, no qualifying clause in the terms "punishable on summary conviction with "imprisonment" would have been necessary in section 26 (1) of the Magistrates' Courts Act, 1952. The insertion of that qualifying clause is clearly intended to limit a remand for a medical examination to offences punishable by imprisonment. Therefore the practice, if it exists at all, of remanding offenders as convicted persons for a medical report under section 14 (3) is clearly against the will of Parliament.

PILCHER J. On the answers given by the jury the only remaining question is whether or not the defendant, in making the order which he did under section 14 (3) of the Magistrates' Courts Act, 1952, was acting within the powers conferred upon him by that section. I have heard argument on this question and I am quite satisfied that the defendant was entitled under section 14 (3) to make an order remanding the plaintiff in custody. [His Lordship read section 14 (3) and continued:] The section is general in its terms, and it is quite clear that there must be many cases where the offences committed do not carry a prison sentence but where it is desirable for, in the words of the section, "inquiries to be made," and those inquiries may often necessarily be inquiries into the mental and physical health of the person who has been convicted. The argument addressed to me was that inasmuch as section 26 (1) of the Magistrates' Courts Act, 1952, which deals with remand for medical examination, only covers cases in which the accused person could be sentenced to imprisonment, it follows that the words of section 14

(3) " for the purpose of enabling inquiries to me made " must be limited to inquiries which are not of a medical character or into the physical or mental health of the accused. Mr. Phillimore reminded me of the previous statutory enactment, relating to powers of remand in magistrates' courts, starting with the Summary Jurisdiction Act, 1848, and continuing with sections 25 and 26 of the Criminal Justice Act, 1948. Section 25 of the Criminal Justice Act, 1948, was general in its terms, and subsection (1) read as follows: " It is hereby declared that the " powers of a court of summary jurisdiction under section sixteen " of the Summary Jurisdiction Act, 1848, to adjourn the hearing " of a case includes power, after a person has been convicted and " before he has been sentenced or otherwise dealt with, to " adjourn the case for the purpose of enabling inquiries to be " made or of determining the most suitable method of dealing " with his case." That section, I think, was worded as it was to make it clear that even after the accused person had been convicted an adjournment might still be given, and the accused person remanded in custody if necessary for inquiries to be made.

Section 26 of the Criminal Justice Act, 1948, was headed " Remand for inquiry into physical or mental condition " and is as follows: " Without prejudice to any powers exercisable by a " court under the last foregoing section,"—that is section 25— " where a person is charged before a court of summary juris- " diction with an offence punishable on summary conviction with " imprisonment, and the court is satisfied that the offence has " been committed by that person but is of opinion that an inquiry " ought to be made into his physical or mental condition before " the method of dealing with him is determined, the court shall " remand him in custody or on bail. . . ." That section, where the necessary facts were present, was, in a sense, mandatory. It is quite clear, on the facts of this case, that the conduct of the plaintiff, which was known to the defendant, was such as might well cause him to think that an inquiry into the plaintiff's mental condition was desirable, and I have no doubt whatsoever that, inasmuch as the Act of 1952 is a consolidating Act, and in spite of the fact that no such words appear in that Act as appeared in section 26 of the Act of 1948, namely " without " prejudice to any powers exercisable by a court under " another section, none the less the defendant still had powers under that section, being satisfied, as he was, that it was desirable that inquiries should be made, to order inquiries and a report on the mental and physical health of the plaintiff.

The result, therefore, is that there must be judgment for the defendant.

Judgment for the defendant.

Solicitor: *The Treasury Solicitor.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1956
June 13.

Ormerod J.

* J. LANGLANDS (SWANLEY) LTD. *v.* BRITISH TRANSPORT COMMISSION.

[1956 J. No. 1207.]

Railway—Fire—Damage to agriculture—Sparks damaging agricultural crops—Damages recoverable—Loss of deficiency payments—Railway Fires Act, 1905 (5 *Edw.* 7, *c.* 11), *s.* 1 (1)—*Cereals (Deficiency Payments) Order*, 1955 (*S.I.* 1955, *No.* 962).

The emission of sparks and cinders from locomotives running on a railway track resulted in two fires arising in a crop of wheat which was growing in an adjoining field. The plaintiff farmers, in claiming under section 1 (1) of the Railway Fires Act, 1905,[1] against the British Transport Commission for the loss of the marketable value of the wheat burnt, included certain sums which they alleged would have been payable to them as deficiency payments under a scheme drawn up in pursuance of the Cereals (Deficiency Payments) Order, 1955. The defendants paid the sums claimed in respect of the crop burnt but contended that the loss of the deficiency payments was not damage which could be claimed by the plaintiffs under the Act of 1905:—

Held, that on the proper construction of section 1 (1) the purpose of the Act of 1905 was to place a plaintiff in the position in which he would have been (subject to the monetary limits laid down) were it not that the defendant authority was acting under statutory powers; that the loss of the deficiency payments was part of the damage directly flowing from the defendants' nuisance; and, accordingly, the plaintiffs were entitled to the sums claimed.

ACTION.

The plaintiffs, J. Langlands (Swanley) Ltd., were the owners of property known as Home Field Farm, Sutton-at-Hone, in the county of Kent, adjacent to which was situate a railway under the authority of the defendants, the British Transport Commission. In August, 1955, a crop of wheat growing in one of the fields adjoining the railway track was damaged by fire, which occurred on two separate occasions, due to the emission of sparks and cinders from the defendants' locomotives.

The plaintiffs claimed, not only a sum of £127 18s. 9d. in respect of the loss of the selling price of the wheat burnt, but also the sum of £49 11s. in respect of the loss of the deficiency

[Reported by Miss J. EPHRON, Barrister-at-Law.]

[1] Railway Fires Act, 1905 (as amended by s. 1 of the Railway Fires Act (1905) Amendment Act, 1923), s. 1: "(1) When . . . damage is "caused to agricultural land or to "agricultural crops, as in this Act "defined, by fires arising from sparks "or cinders emitted from any loco- "motive engine used on a railway, "the fact that the engine was used "under statutory powers shall not "affect liability in an action for such "damage. . . . (3) This section shall "not apply in the case of any action "for damage unless the claim for "damage in the action does not "exceed two hundred pounds."

payments which they claimed would have been payable to them as registered cereal growers under a scheme drawn up in pursuance of the Cereals (Deficiency Payments) Order of 1955.

The defendants paid the sums claimed in respect of the damage caused by the fires, but contended that, on the proper construction of the Act of 1905, the damages which the plaintiffs were entitled to recover were limited to the damage done to the agricultural crops alone and did not include such consequential damage as loss of the deficiency payments.

F. W. Beney Q.C. and *M. R. Nicholas* for the plaintiffs.
E. S. Fay Q.C. and *J. R. Main* for the defendants.

The following cases, in addition to the one cited in the judgment, were referred to in the argument: *Attorney-General* v. *Great Western Railway Co.*[2]; *The Argentino*[3]; *In re Polemis and Furness, Withy & Co.*[4]; *Weld-Blundell* v. *Stephens*[5]; *Moss* v. *Christchurch Rural Council*[6]; *Emsley* v. *North-Eastern Railway Co.*[7]; *Martin* v. *Great Eastern Railway Co.*[8]; *Swansea Corporation* v. *Harpur*[9]; *Hadley* v. *Baxendale.*[10]

Ormerod J. stated the facts, and continued: The position under which this case arises appears to be as follows: Before 1905 there was no liability on a railway company for damage done to crops by fire caused from sparks from locomotives, provided that there was no negligence on the part of the railway company. It was laid down in *Vaughan* v. *Taff Vale Railway Co.*[1] that, if a railway operated under statutory sanction and there was no negligence, the railway company could not be liable in an action for nuisance. Therefore, up to 1905, if no negligence could be established on the part of the railway the owner of land adjoining the railway had no recompense if damage was done to his crops by sparks from locomotives. But in 1905 the Railway Fires Act, 1905, was passed. [His Lordship read section 1 (1), and continued:] That, I think, is the only part of the Act to which I need refer, except to point out that subsection (3) of section 1 limited the amount which could be recovered under those circumstances to the sum of £100. In 1923 an amending Act was passed, which extended the limit of claim from £100 to £200 and laid down certain provisions for the time in which notice of claim and particulars of claim should be given to the railway company. But no point arises on those matters, because it is not suggested that, so far as the plaintiffs were concerned, there was any deficiency in those respects.

[2] [1924] 2 K.B. 1; 40 T.L.R. 255.
[3] (1889) 14 App.Cas. 519.
[4] [1921] 3 K.B. 560; sub nom. *Polemis* v. *Furness Withy & Co.*, 37 T.L.R. 940.
[5] [1920] A.C. 956; 36 T.L.R. 640.
[6] [1925] 2 K.B. 750.
[7] [1896] 1 Ch. 418; 12 T.L.R. 219.
[8] [1912] 2 K.B. 406.
[9] [1912] 3 K.B. 493.
[10] (1854) 9 Ex. 341.
[1] (1860) 5 H. & N. 679.

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In 1947 the Agricultural Act, 1947, was passed. Section 4 of that Act gave the appropriate Minister power to make regulations dealing with matters relating to guaranteed prices. In accordance with that power the Cereals (Deficiency Payments) Order, 1955, was made. That order came into operation on July 1, 1955, some six weeks or so before the fires which are the subject-matter of this action occurred.

The effect of that order, and the scheme which was drawn up in consequence of the order, was that either for a statutory period of one year, or for such shorter periods as should be decided by the Minister, the average market price of wheat should be determined, and any registered grower of wheat who had sold and delivered his millable wheat to a miller or to some other appropriate purchaser was entitled, on certain formalities being completed and certain certificates having been given, to the payment of a sum of money known as a "deficiency payment," which was the difference between the standard price of wheat (whatever it was at the time), and the average market price fixed from time to time in accordance with the provisions of the scheme.

The plaintiffs say that because this crop was damaged under these circumstances, where a fire was caused by a spark from a locomotive, they are entitled, within the limits of £200, not only to the market price of their wheat, but also to the deficiency payment which is, say the plaintiffs, a part of the value of the wheat and, therefore, a part of the damage which has been done to their crop.

Mr. Beney, for the plaintiffs, puts his argument in this way: he says that the effect of section 1 (1) of the Act of 1905 does no more than to deprive the railway company a defence to an action for nuisance which occurs under these circumstances when damage by fire is caused to agricultural land or to agricultural crops by sparks from a locomotive. In other words, it puts the grower of the crops, or the owner of the land adjacent to a railway, in the position that he would be in were it not for the fact that the railway is operating under statutory authority, and that under those circumstances an action for nuisance having arisen (to which there is no defence within the limits of £200 as applied by the statute) they, the plaintiffs, are entitled to such damage as directly flows from the consequences of the defendants' nuisance. In this case that damage is assessed at the loss which the grower has sustained or is liable to sustain by reason of the nuisance, that is to say, not only the loss of the value of the wheat but the loss of the deficiency payment. Mr. Beney regards this section as being one which removes a shield which the defendants would have been able to use if this Act in fact had not been passed and, that shield having been removed within the limits of the £200, the plaintiffs have all the rights that they would have had if the shield had never been there.

If that is the proper construction of section 1 (1) then I think

there can be no doubt that the plaintiffs would be entitled to succeed in this action, because, although Mr. Beney did go to the trouble of dealing with the authorities on the question of remoteness of damage, I do not think that Mr. Fay questions the damage, so far as remoteness is concerned, and I do not think he questions that, if in fact the plaintiffs are entitled to recover damages for nuisance in that way, as put by Mr. Beney, then this deficiency payment is anything other than a direct consequence of the defendants' nuisance and therefore cannot be regarded as remote.

But the argument which was put by Mr. Fay on behalf of the defendants which, on the face of it, appears to be an attractive one, is that on the real construction of the Act, which is or should be quite a narrow construction, the damage which the plaintiffs are entitled to recover is limited, and strictly limited, to the damage "to agricultural land"—I use the words in the section—"or to agricultural crops," and cannot include damage which is only consequential to that damage either to land or to crops. In other words, he says the action is almost in the nature of an action in rem in respect of the damage to the land or crops, and in no way an action for any personal damage which the owner of the land, who may have grown the crops, may have sustained.

The argument which Mr. Fay uses is derived from the words in the section which runs as follows: "When, after this Act "comes into operation, damage is caused to agricultural land or "to agricultural crops, as in this Act defined, by fires, . . . the "fact that the engine was used under statutory powers shall not "affect liability in an action for such damage." The argument is that the words "for such damage" must relate back to, and be strictly confined to, the terms used in the earlier part of the section and can only relate to damage to "agricultural land or to "agricultural crops"; in other words, to use the words of Mr. Beney in his reply, Mr. Fay seeks to set up that the Act not only limits the quantity of damage in limiting the amount to £200, but defines and limits the quality of the damage which the plaintiffs are entitled to recover.

I cannot accept that contention. I think it is much too narrow a construction to place on the section, and I do not think that it is the construction which was intended by the legislature. Had the railways not been operating under statutory powers and had a nuisance of this kind existed, quite clearly the plaintiffs would be entitled to damage, and they would be entitled not only to the actual market price of the crops that were damaged but also to such consequential damages as directly flow from that act of nuisance, whatever it might be. I am satisfied that the proper construction of this section is that within the limits of £200, as set up by this Act and the amending Act, the purpose of the Act is to place a plaintiff in the position in which he would be were it not that the defendant authority was acting

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under statutory powers. I think it follows from that that if that is the construction the plaintiffs must succeed.

There has been a good deal of argument whether, in any event, the plaintiffs would be entitled to succeed if the defendants' construction of the section is the correct one. Having regard to the decision I have come to on the construction of the section, it does not appear to me to be necessary to go into the question whether in any event the loss of the deficiency payment would be damage within the restricted meaning which Mr. Fay seeks to put on the words of the section. But had I been of a different opinion, so far as the construction of the section is concerned, I would still have been disposed to the view that the plaintiffs would be entitled to recover the deficiency payments in question. It seems to me that they are so closely a part of the value of the crops that it would not be right to say that they could not be recoverable as damages, even on the restricted construction of the section which the defendants submit is the correct one. In these circumstances there must be judgment for the plaintiffs for £49 11s.

Judgment for the plaintiffs.

Solicitors: *Kenneth Brown, Baker, Baker; M. H. B. Gilmour.*

[PROBATE, ETC., DIVISION.]

1956
June 11.

Lord Merriman P.

* USHER *v.* USHER.

PRACTICE NOTE.

Husband and Wife — Divorce — Insanity — Evidence — Evidence from mental hospitals—Treatment delegated to consultants—Nature of evidence required—Affidavits from mental hospitals.

PETITION for divorce on the ground of incurable insanity.[1]

On March 17, 1950, the Ministry of Health, explaining the responsibilities of medical superintendents under S.I. 1948, No. 419, sanctioned the delegation by medical superintendents to psychiatric consultants upon their staff of responsibility for the clinical treatment of patients, the general care remaining vested in the medical superintendent in accordance with the regulation. As a result of this ruling medical superintendents were sometimes unable to give first-hand evidence about a respondent's mental

[1] Matrimonial Causes Act, 1950, s. 1: "... a petition for divorce "may be presented to the court either "by the husband or the wife on the "ground that the respondent—... "(*d*) is incurably of unsound mind "and has been continuously under "care and treatment for a period of "at least five years immediately "preceding the presentation of the "petition ..."

illness, and the nature of the treatment he had been undergoing, in affidavits prepared for the hearing of the suit in accordance with the practice initiated in November, 1940.[2]

In the present case the clinical treatment of the respondent had been delegated to consultants during the relevant period.

The petitioner gave evidence, and application was made under the relevant directions [3] for leave to read the medical evidence on affidavit.

Charles Lawson for the petitioner.

Roger Ormrod for the Official Solicitor as guardian ad litem of the respondent in the first suit.

LORD MERRIMAN P. This case affords a convenient opportunity for calling attention to a change in the practice in connexion with the affidavits of medical superintendents of mental hospitals in suits based upon incurable insanity. I am speaking after consultation with the judges of this Division and with the Official Solicitor, who in the majority of such cases—as in this case—is the guardian ad litem of the respondent.

Owing to the fact that the Ministry of Health has sanctioned a certain amount of delegation by the medical superintendent of a mental hospital to consultants upon his staff of responsibility for the clinical treatment of patients (as distinct from the

[2] The initiation of the practice is reported in the Times, November 29, 1940, as follows: "During the hearing of a divorce suit presented on the ground of incurable insanity, Sir Boyd Merriman P. announced a new practice with reference to the attendance of medical superintendents in court in cases where the Official Solicitor appeared as guardian ad litem for the respondents.

"The President said that, at the instance of the Official Solicitor, who acted as guardian ad litem in a great many such cases, he had instituted a practice whereby medical superintendents might in certain circumstances be allowed to give their evidence as to the state of the mind of the respondent by affidavit. That would save inconvenience to very busy and responsible men, and would also save costs to petitioners.

"The procedure leading to the acceptance of such an affidavit should only be used where the medical superintendent was able to express, with reasons, an unqualified belief in the incurable unsoundness of mind of the respondent, as well as in the continuance of the care and treatment during the relevant period. The medical superintendent should also deal in the appropriate cases with the question of extra comforts for the patient, and, generally, with any matters relevant to the issue.

"The words 'It is my belief that the respondent is unlikely to recover,' were not expressing an unqualified belief in the respondent's incurable unsoundness of mind. Unlikelihood or improbability of recovery might be a very different thing from incurability. It was only when a medical superintendent felt himself able to express reasons for an unqualified belief in the unsoundness of mind of a respondent that the new procedure was apt."

The matters now required by the court in such affidavits are embodied in pro forma letters sent to petitioners by the Official Solicitor when the answer is filed.

(Criticism of faulty affidavits is reported in [1948] W.N. 90.)

[3] February 18, 1946, as revised in drafting detail on April 14, 1949. See [1946] W.N. 68. This practice note has now been cancelled and the practice note of July 3, 1956 (post, p. 896) substituted.

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general care, which remains vested in the medical superintendent) he is sometimes unable—as in this case—to give first-hand evidence about the diagnosis of the respondent's mental illness and the nature of the treatment which the respondent is undergoing. Accordingly, in addition to the matters usually covered by the affidavit of the medical superintendent, in so far as he is able to deal with them, he should state, if it be the fact, that he has delegated the responsibility for the respondent's treatment to a consultant upon the staff of his hospital, giving the full name of the consultant presently vested with this responsibility and the date of the delegation.

In such cases an affidavit will also be required from the consultant giving the diagnosis of the respondent's mental illness and the nature of the treatment prescribed, whether the respondent has received any special treatment, and, if so, what form of treatment and the effect thereof, also, it it be the fact, that in the opinion of the deponent and in the light of present-day medical knowledge, the respondent is incurably of unsound mind, and the deponent's reasons for this opinion; also whether the respondent is able to appreciate extra comforts, and if so to what amount, and any other matters relevant to the issue.

If for any reason the period of the delegation to the consultant who has most recently treated the respondent before the presentation of the petition is, on the face of it, insufficient to enable him to depose with certainty, the deponent should be the consultant who has treated the respondent for an earlier period of sufficient duration, but in that case the evidence must be brought up to the date of presentation of the petition, either by the consultant then treating the respondent or by the medical superintendent, whichever is more appropriate. The date of the assumption of responsibility by each and every consultant, and its duration, must be specifically stated.

[His Lordship then heard the affidavit evidence of the medical superintendent and consultants, and pronounced a decree nisi.]

Solicitors: *Jaques & Co.; The Official Solicitor, The Law Society (A. J. H. Powell); The Official Solicitor.*

J. B. G.

1956
July 3.

* PRACTICE NOTE.

(DIVORCE : EVIDENCE.)

Husband and Wife—Divorce—Insanity—Evidence.

It is directed by the President that in proceedings for divorce on the ground of incurable unsoundness of mind, application for leave to read affidavit evidence from medical officers may, with

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PRACTICE NOTE.

the consent of the respondent's guardian ad litem, be made to the judge at the trial. Any affidavit which is to be the subject of such an application shall be lodged in the registry in which the cause is proceeding and, if in order, will be endorsed by the registrar and filed.

Where the Official Solicitor is acting as guardian ad litem of the respondent, it should be ascertained whether he consents to the reading of affidavit evidence, and, if so, what is the nature of the evidence required.

The Practice Note of February 18, 1946,[1] entitled "Evidence "upon Affidavit," is hereby cancelled.

B. LONG,
Senior Registrar.

July 3, 1956.

[1] See [1946] W.N. 68.

[COURT OF APPEAL.]

C. A.

1956
June 15.

Lord Evershed M.R., Jenkins and Hodson L.JJ.

* *In re* SONGEST, DECD.
MAYGER AND ANOTHER *v.* THE FORCES' HELP SOCIETY AND LORD ROBERTS' WORKSHOPS AND OTHERS.

[1954 S. No. 2648.]

Charity—Cy-près doctrine—Bequest to non-existent association—Clear charitable intention—Description equally applicable to two institutions — Cy-près application — Equal division between the two possible beneficiaries.

A testatrix gave the residue of her estate "upon trust for the "Disabled Soldiers', Sailors' and Airmen's Association absolutely." There was no association of that name either when the will was made or when she died, but there was an unincorporated body known as "The Star and Garter Home for Disabled Sailors, "Soldiers and Airmen" and an incorporated body, which at all material times was known as "The Incorporated Soldiers', Sailors' "and Airmen's Help Society":—

Held, (1) that the testatrix had shown a clear charitable intention but that it was impossible to say with certainty which of the two possible beneficiaries she had intended.

(2) That as the claims of the two institutions were equally balanced, the residue should be applied cy-près by way of scheme directing equal division between them subject to the approval of the Attorney-General.

In re Alchin's Trusts (1872) L.R. 14 Eq. 230 considered.

Decision of Vaisey J. varied.

APPEAL from Vaisey J.

Florence Songest, by her will dated September 15, 1943, after making a number of gifts and provision for her husband, who predeceased her, gave the residue of her estate as follows: "upon

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" trust for the Disabled Soldiers', Sailors' and Airmen's Associa-
" tion absolutely and I direct that the receipt of the secretary
" or treasurer for the time being of the said association shall be
" a good and sufficient discharge to my trustees upon making
" such payment or transfer." On July 27, 1946, the testatrix made a codicil revoking a specific legacy but in all other respects confirming her will. She died on February 21, 1947.

There was not at the date of the will or thereafter an association in existence having the name of the " Disabled " Soldiers', Sailors' and Airmen's Association," and the trustees of the will, having made inquiries as to possible claimants, took out an originating summons asking, inter alia, whether on the true construction of the will the residue was to be held on trust for " the Forces' Help Society and Lord Roberts' Work-
" shops " (which at the date when the will was made and when the testatrix died was known as " The Incorporated Soldiers', " Sailors' and Airmen's Help Society "), " The British Legion," or Geoffrey Anderton on behalf of " The Star and Garter Home " for Disabled Sailors, Soldiers and Airmen " (of which he was the commandant for the time being). At the hearing before Vaisey J. no argument was put forward on behalf of the British Legion, and the judge decided that of the two effective competitors for the gift, the testatrix had intended the Forces' Help Society and Lord Roberts' Workshops. The commandant of the Star and Garter Home for Disabled Sailors, Soldiers and Airmen appealed.

Nigel Warren for Geoffrey Anderton, the commandant of the Star and Garter Home for Disabled Sailors, Soldiers and Airmen.

Ian Campbell for the Forces' Help Society and Lord Roberts' Workshops.

G. M. Parbury for the trustees.

In addition to the cases referred to in the judgments the following were cited in argument: *In re Preston's Estate* [1]; *In re Bateman* [2]; *Buxton* v. *Blakiston* [3]; *In re Doane.* [4]

Lord Evershed M.R., having stated the facts, said: As I ventured to observe during the argument, it is indeed much easier to criticize the arguments put forward on one side or the other than to formulate a convincing reason for a preference in either direction. It must, however, first be pointed out that at the date when the testatrix made her will (and, indeed, at the date when she died) the name of Mr. Campbell's clients was not the Forces' Help Society and Lord Roberts' Workshops, but was the Incorporated Soldiers', Sailors' and Airmen's Help Society. Mr. Campbell has argued with force that the description given by the testatrix, " Disabled Soldiers', Sailors and Airmen's Associa-
" tion," at any rate bears a marked affinity to the formula

[1] [1951] Ch. 878; [1951] 2 T.L.R. 258; sub nom. *In re Preston, decd.* [1951] 2 All E.R. 421.
[2] (1911) 27 T.L.R. 313.
[3] (1886) 2 T.L.R. 293.
[4] (1892) 9 T.L.R. 2.

"Incorporated Soldiers', Sailors' and Airmen's Help Society," and he includes the small, but not wholly insignificant point, that the word "soldiers" precedes "sailors" in that collocation. He says, by way of criticism of the claim by Mr. Warren, that the word "association" is in any case inapt to describe the body which Mr. Warren represents, the unincorporated body, known properly as the "Star and Garter Home for Disabled "Sailors, Soldiers and Airmen." Mr. Campbell points out that in truth this body which I have just described is an institution; it exists as a hospital, in bricks and mortar, carried on in Richmond, and, save for what appears to be one branch activity in Kent, carries on there and only there in effect a hospital for disabled soldiers, sailors and airmen. He points out, moreover, that although the activities of his clients are not by any means confined to looking after disabled men who have been in the service of the Crown, still that is one of their best-known activities. It is perhaps most famed in connexion with the so-called Lord Roberts' Workshops, originally a separate organization, but taken over by the Incorporated Soldiers', Sailors' and Airmen's Help Society in about the year 1904. In connexion with the particular collocation, he also points out that in the title of the Star and Garter Home for Disabled Sailors, Soldiers and Airmen the Royal Navy does take the usual precedence over the Army. He says that if the testatrix really had meant that institution she would have referred to it by its well-known institutional name of the Star and Garter Home. The Forces' Help Society has branch organizations in various parts of the country, and they include a branch organization at or near the place where the testatrix lived; but unhappily the organizing secretary of that branch appears now to have died and can throw no light on the question whether the testatrix in fact had any knowledge of the society's operations or expressed any interest at any time in it.

So much for the argument on Mr. Campbell's side, which was the argument that appealed to Vaisey J. Mr. Warren, on the other side, has (with no less force, as it seems to me) fastened particularly upon the use of the word "disabled." He says that it is plain in the formula "upon trust for the Disabled Soldiers', "Sailors' and Airmen's Association" that the real emphasis was upon some body which the testatrix had in mind which existed for the exclusive purpose of looking after disabled ex-service men or women. It is quite true (says Mr. Warren) that the institution, the Star and Garter Home, would properly be described by a reference to that name. On the other hand, the home, the institution, exists for a specific purpose, namely, for disabled sailors, soldiers and airmen, and it is (says he) no more irrational, if one is not going to refer accurately to the full title, to mention the purposes for which the institution exists than to refer to the place, the building, whereon those purposes are carried out. The emphasis upon the word "disabled" was, I think, not very

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impressive in the mind of Vaisey J. At any rate, he does not appear to have attached significance to it. But, for my part, I confess that I think it is of real and very appreciable importance.

In the circumstances, what ought the answer of the court to be? Both Mr. Warren and Mr. Campbell have asked us to assume that the testatrix had in mind one specific organization, that she misdescribed it, and that the function of the court, therefore, is to decide as best it can, and in the absence of any relevant evidence, which one of the two competing organizations she intended to benefit. I am not entirely satisfied in my own mind that the premise on which that reasoning rests is necessarily correct. Once it is established (and this much is clear) that a mistake has been made in stating the intention, I am not persuaded that we are bound to assume that the mistake does not extend to the assumption that there was more than one body and that she intended to pick one of the two. In other words, I think it is at any rate a possible view that she thought that disabled ex-service men were looked after at Richmond at the Star and Garter and elsewhere in the Lord Roberts' Workshops by some body which comprehended the activities of both. At any rate, I think that her intention clearly was to benefit disabled ex-service men.

Once one gets that far, it seems to me possible to proceed to say that if her intention is to be carried out, the best way to do it is to put her funds into the hands of those who do primarily look after that particular obligation of our society; and that would not exclude either the one or the other of the two competing claimants. Expressed in another way, after listening to the arguments, I feel that this is a case in which it may be said (and I am citing from Vol. 4 of the 3rd ed. of Halsbury's Laws of England at p. 282): "it is impossible to determine which of "several charities the testatrix meant to benefit." If that conclusion is reached, that it really is impossible with sufficient certainty to determine which of the two, what can the court do and what ought it to do?

We were referred to Jarman on Wills, 8th ed., Vol. 1, at p. 267, where it is said: "It sometimes happens that a legacy is "given to a particular institution by a description equally applic- "able to more than one. It cannot here be presumed that the "testator did not intend to select one in particular; for he may "have known, and, considering the terms of the bequest, probably "did know, only one answering the description; yet, as it cannot "be ascertained which, the particular purpose fails;" and then it continues: "nevertheless it is clear that the legacy will be "applied *cy-près*, or divided between the two institutions."

The authority for the last sentence is to be found in *In re Alchin's Trusts*.[1] In that case, a testator had made a gift nominatim to "Kent County Hospital," and it was proved that

[1] (1872) L.R. 14 Eq. 230.

there was no such institution, that is, no institution called by that name; but there were two institutions with names like it, namely, first, the "Kent and Canterbury Hospital," and, second, the "West Kent General Hospital." Malins V.-C., having rejected the claims of hospitals of a more specific and limited character, such as an ophthalmic hospital (for there was a "Kent "County Ophthalmic Hospital"), decided that he had jurisdiction to divide the legacy equally between the two general hospitals. He said [2]: "I think that the West Kent General is "also entitled to share. I am satisfied the testator intended the "legacy for one hospital only, but neither of the institutions "completely answers the description. It must therefore, at all "events, be divided between the two, as I considered to be the proper course in" another case [*In re Kilvert's Trusts* [3]], which he referred to, and in regard to which, as Mr. Warren informed us (though upon somewhat different grounds) the Vice-Chancellor's view had afterwards been criticized.

I think that the jurisdiction in such a case as this, assuming it exists, must rest upon the jurisdiction which the Chancery Division of the High Court has, in the case where a clear charitable intention is shown, to make a cy-près application; and the normal method of doing it would be to direct a scheme. In the present case, it seems to me that that is the right course to follow, though in the circumstances I think it proper and possible to simplify the consequence. I have said more than once that, in the circumstances, there are but two possible beneficiaries, and I have also said (and I now assume) that the claims of both of them are nicely and indeed equally balanced. It would, therefore, as I think, follow that any cy-près application would inevitably be by way of equal division.

In the course of the argument, I gave an example which I venture to repeat. If a testator made a gift to "the Inn of Court "known as the Temple"; or again, if a testator made a gift to "the society for the prevention of cruelty to children and "animals"; there being no relevant evidence which would assist the solution in either case, it would appear that the consequence inevitably of a cy-près application would be equal division, in the first case between the Inner Temple and the Middle Temple, and in the second case between the Society for the Prevention of Cruelty to Children and the Society for the Prevention of Cruelty to Animals.

So I think in this case the best answer, and the only way by which we can redeem the mistake that unfortunately was made in the drafting of this will, is by way of scheme to direct that the residue be equally divided between the two institutions which are represented by Mr. Campbell and Mr. Warren respectively—that is to say, the Forces' Help Society and Lord Roberts' Workshops, on the one hand, and the Star and Garter Home for

[2] Ibid. 233.

[3] (1871) 7 Ch.App. 170.

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Disabled Sailors, Soldiers and Airmen, on the other—that direction being subject to the approval (as I think would be proper, and as Jenkins L.J. suggested) of the Attorney-General. I should assume, in the circumstances, that the approval would be readily given and that, therefore, no further application will be necessary in order to give effect to what we suggest.

I would, therefore, set aside the decision of Vaisey J. exclusively in favour of the Forces' Help Society and Lord Roberts' Workshops, and substitute an order such as I have proposed; and I think, in the circumstances of this case, that we should also direct that all the costs of the parties, as between solicitor and client, should be paid out of the residuary fund.

JENKINS L.J. I agree.

HODSON L.J. I also agree.

Appeal allowed.

Solicitors: *Charles Russell & Co.; Cunliffe & Airy for Shenton, Pain & Brown, Winchester; Gordon Gardiner Carpenter & Co. for John R. C. Miller, Portsmouth.*

E. D.

[CHANCERY DIVISION.]

1956
May 11.
Harman J.

* *In re* ROPNER'S SETTLEMENT TRUSTS.
In re ROPNER'S WILL TRUSTS.
ROPNER AND OTHERS *v.* ROPNER AND OTHERS.

[1955 R. No. 2935.]

Trust and Trustee—Power of advancement—Exercise of power—Settlement—Will—Express power contained in settlements to advance for the advancement, preferment or benefit of beneficiaries—Statutory power of advancement applied in will—Powers to be exercised in full—Voluntary settlements in terms approved by trustees to be executed by beneficiaries — Infant beneficiary — No difference in position—Whether avoidance of estate duty valid consideration in establishing what is beneficial—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 32.

Under four voluntary settlements and the will of a settlor, who died on April 3, 1933, his son, R., had a protected life interest. The settlements each contained a power in trustees with the consent of R. to advance up to one quarter of the trust funds for the advancement, preferment or benefit of R.'s children. The will contained no such express power and the statutory power under section 32 of the Trustee Act, 1925, therefore applied for their benefit.

The present trustees of the settlements and the will applied to the court to ask, inter alia, whether or not it would be a valid

[Reported by Miss JENNIFER L. WEST, Barrister-at-Law.]

application of the powers of advancement to apply aliquot parts of the trust funds up to the full amounts allowed by the settlements and by statute under the will to trustees of three voluntary settlements, the terms of which the trustees in their discretion should approve, to be executed by the two daughters of R. and by him on behalf of his son who was still an infant. One of the considerations which gave rise to the summons was the desire to avoid, if possible, heavy estate duty which would be payable upon the death of R.:—

Held, that the fact that an exercise of a power of advancement would lighten the burden of estate duty was a legitimate consideration and the trustees could properly make such advances provided that they were satisfied in their discretion that the proposed voluntary settlements were for the benefit of the three children and, further, that no distinction should be made between the case of the infant and his adult sisters.

In re Vestey's Settlement [1951] Ch. 209; [1950] 2 All E.R. 891 applied.

ADJOURNED SUMMONS.

By this summons the plaintiffs, Sir Emil Hugo Oscar Robert Ropner, Thomas Coke Squance and George Medwell Johnson, who were among the present trustees of four voluntary settlements made by Emil Hugo Oscar Robert Ropner (hereinafter called "the settlor") in the years 1924 and 1925 and of the settlor's will dated November 30, 1922, asked, inter alia, whether or not they should exercise or join with the first defendant, Richard Ropner, the life tenant (hereinafter called "Richard Ropner"), in exercising the powers of advancement under the settlements and will to the full extent allowed thereby by transferring investments then subject to the trusts thereof to trustees of settlements, the terms of which the trustees in their discretion should approve, the settlements to be made for the benefit of the children of Richard Ropner, namely Alison Margaret Ropner, Pamela Christine Ropner and Richard John Ropner (an infant), the second, third and fourth defendants respectively.

The settlor died on April 3, 1933. Under the settlements and will, Richard Ropner had a protected life interest and the class of persons who might be interested under the discretionary trusts taking effect upon forfeiture of his life interest were, in the events which had happened, besides the first four defendants, the settlor's eldest son, Sir Emil Hugo Oscar Robert Ropner, and his children, Robert Douglas Ropner, Diana Joan Elliot and Patricia Macdonald Hull, the fifth, eighth and ninth defendants respectively; the children of Robert Douglas Ropner, namely, Robert Clinton Ropner and Serena Gay Ropner, the infant sixth and seventh defendants; the children of Patricia Macdonald Hull, namely, Susan Patricia Macdonald Hull and Fiona Elizabeth Macdonald Hull, the infant tenth and eleventh defendants; the children of the settlor's third son, namely, Vivian Anne Ropner, George Maurice Ropner and Caroline Jane Ropner (an infant), the twelfth, thirteenth and fourteenth defendants.

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ROPNER'S SETTLEMENT TRUSTS, *In re.*

The settlements each contained express power in the trustees to advance up to one quarter of the trust funds with the consent of Richard Ropner, and to apply the same for the "advancement, "preferment or benefit," as the trustees should think fit, of beneficiaries who included the children of Richard Ropner, the second, third and fourth defendants. The will contained no express power of advancement and the statutory power under section 32 of the Trustee Act, 1925, to advance up to one half of the trust funds therefore applied. Both the settlements and the will provided that consent to the exercise of any power of advancement should not cause a forfeiture of Richard Ropner's life interest.

A. A. Baden Fuller for the plaintiffs.

G. A. Rink Q.C. and *J. B. Morcom* for the first, second and third defendants. A power of advancement for the benefit of an adult can, at his request, be exercised by the trustees in paying funds to the trustees of a new settlement under which the adult is the main beneficiary and which both he and the trustees of the original settlement regard as being for his benefit. [They were stopped.]

E. Milner Holland Q.C. and *M. G. Johnston* for the sixth, seventh, tenth, eleventh and fourteenth defendants. We feel unable to suggest that handing money to trustees of a new settlement is an improper exercise of the power of advancement for the benefit of beneficiaries in the wide terms of this power, provided that the trustees of the original settlement have come to the conclusion after a proper consideration of all the circumstances that such exercise is for the benefit of the objects of the power. It is understood that the trustees in this case do not surrender their discretion to the court.

If the trustees were to surrender their discretion, it would be submitted that they must have some immediate object in mind when exercising the power. Here the beneficiaries are amply provided for at present and the benefit from the new settlement is merely a contingent and potential benefit in the future, i.e., the saving of estate duty if the settlor lives long enough and there is no change in the law. The expected saving of estate duty has never been regarded as a ground justifying the making of a settlement in exercise of a power of advancement. In any event the proposed settlements would not be benefical to the objects of the power since they will thereby be prevented from obtaining more than a small part of their capital.

Geoffrey Cross Q.C. and *E. G. Wright* for the fourth defendant. By exercising the power of advancement in favour of an infant, the trustees appropriate to him indefeasibly (subject to a settlement in liberal form in order to be for his benefit) investments or money which would not otherwise come to him until the death of the life tenant and of which he might otherwise be wholly deprived by an exercise of the life tenant's power

of appointment: see *In re Vestey's Settlement.*[1] Moreover, the proposed settlement is likely to result in a very large saving of estate duty for the infant's benefit. Since, therefore, the proposal is for his benefit, it is immaterial that the infant cannot consent thereto. [Harman J. Will the exercise of the statutory power of advancement cause a forfeiture of Richard Ropner's protected life interest?]

The statutory power of advancement applies despite protective trusts and its exercise will not lead to a forfeiture of the protected life interest: *In re Rees.*[2]

Rink Q.C. in reply. There is an unreported decision, *In re Tetley's Settlement*,[3] where on similar fact Wynn-Parry J. held that trustees could properly exercise a power of advancement by making a settlement on infant objects of the power.

The eighth, ninth, twelfth and thirteenth defendants were not represented.

HARMAN J. stated the facts and continued: Richard Ropner is 58 years of age, and is therefore likely to live a long time, but life is uncertain and estate duty, since he is a wealthy man, will be a very heavy impost on his death. One of the considerations, therefore, which has moved the trustees to their present position is that if they exercise the power of advancement in favour of Richard Ropner's three children they will lighten the burden of duty in the event of Richard Ropner surviving the next five years. That is a perfectly legitimate consideration, in my judgment. It is not suggested that either of his two daughters, who are over 21, or his son, who is well under it, are in need of money spent on them or spent for their immediate advancement; but it is suggested that it will be for their benefit that the power of advancement shall be exercised.

The proposal made is that settlements shall be executed by each one of them, that is, by the infant's father, Richard Ropner, on his behalf and by the infant's two sisters, and that the method of exercising the power of advancement shall be by a transfer of aliquot parts of the funds, one quarter in the case of each settled fund and one half in respect of the will fund, to the trustees of these settlements. The trustees come here to ask whether the various powers of advancement justify them in making such a transfer on such settlements being made.

Mr. Milner Holland whose duty it was to argue against the course proposed found himself unable to do so. In my opinion that concession was rightly made.

In my judgment, having regard particularly to the decision of the Court of Appeal in *In re Vestey's Settlement*,[1] where it was held to be an application of money merely to set it aside

[1] [1951] Ch. 209; [1950] 2 All E.R. 891.

[2] [1954] Ch. 202; [1954] 2 W.L.R. 59; [1954] 1 All E.R. 7.

[3] Unreported. Wynn-Parry J., March 31, 1952.

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to accumulate for a child's eventual benefit, it must be an application of money to transfer it to trustees of a settlement to be made for the child's benefit, and I do not think that there is any difference, on consideration, in the position of an infant from that of an adult. It is true that the infant cannot consent or request the trustees to make the advance, but the transfer of a part of his contingent share to the trustees of a settlement for him must advance his interest and thus be for his benefit provided the settlement, on consideration, is thought to be a beneficial one. It is, of course, only proper for trustees to make an advance if they consider that the terms of the settlement into which the money is to be paid are such as will benefit the child. The trustees here inform me, through their counsel, that they do not surrender their discretion to the court, and therefore it is not for me to interfere with it, because it is not suggested that they are not taking into consideration all the factors which they ought to take into account.

I, therefore, feel that the court has no power to interfere, but should confine itself to saying that provided the trustees are of opinion that the proposed settlements are for the benefit of the objects of the power, it will be an application for their benefit of the fractions of their shares in the fund to apply those fractions by transferring them to the trustees of proper settlements.

Declaration accordingly.

Solicitors: *Gibson & Weldon for Archer, Parkin & Townsend, Stockton-on-Tees.*

[QUEEN'S BENCH DIVISION.]

1956
June 28.

Lord Goddard C.J., Ormerod and Donovan JJ.

*REGINA *v.* CORNWALL QUARTER SESSIONS. *Ex parte* KERLEY.

Food and Drugs — Food — Unfit for human consumption — Meat condemned by a justice and ordered to be destroyed — Whether an appeal lay to quarter sessions—Food and Drugs Act, 1938 (1 & 2 *Geo.* 6, *c.* 56), *s.* 10.

A justice of the peace, having condemned a carcass of meat as unfit for human consumption, and ordered it to be destroyed under section 10 of the Food and Drugs Act, 1938, the owner gave notice of appeal to quarter sessions against the justice's order. On an application by the local inspector for an order of prohibition directed to quarter sessions to prohibit them from hearing the appeal:—

Held, that a justice condemning food and ordering it to be destroyed under section 10, was not sitting as a court of summary jurisdiction, but was acting in an executive capacity, and, accordingly, there was no right of appeal from his decision.

White v. *Redfern* (1879) 5 Q.B.D. 15 considered.

Per curiam. It is doubtful whether it is necessary for a justice acting under section 10 to draw up any official order, although it is no doubt convenient to have a minute of the order for destruction.

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APPLICATION for prohibition.

The applicant, William Kerley, sanitary inspector for the Wadebridge Rural District Council, and meat and food inspector for the council, by his affidavit stated that on October 1, 1955, he inspected the carcasses, organs and viscera of two dead cows belonging to the respondent, Richard Peter Montague Whittington, at the abattoir. The applicant found that the meat of one of the cows was not fit for human consumption and informed the respondent. At the respondent's request, the applicant caused arrangements to be made for the meat in question to be dealt with by justices of the peace in accordance with the provisions of section 10 of the Food and Drugs Act, 1938.[1] On October 10, 1955, two justices of the peace examined the meat at the abattoir and after hearing evidence from the medical officer of health and the applicant, the justices, being satisfied that the meat was unfit for human consumption, condemned the same and one of the justices made an order in which he stated: "It appears "to me that the said food is unfit for human consumption. "And I do therefore condemn the same and I do hereby order "that the said food be destroyed. . . ." Thereafter the applicant received from the respondent's solicitors a notice of appeal to quarter sessions, who had given leave to appeal out of time. The grounds on which the applicant sought an order of prohibition were that the order appealed against was an executive order of justices of the peace, made in pursuance of section 10 (3) of the Food and Drugs Act, 1938, that the respondent had no right of appeal against the order to quarter sessions and that accordingly the appeals committee had no jurisdiction to hear the respondent's appeal.

[1] Food and Drugs Act, 1938, s. 10: "(1) An authorised officer of a "council may at all reasonable "times examine any food intended "for human consumption which has "been sold, or is offered or exposed "for sale, or is in the possession of, "or has been deposited with or con- "signed to, any person for the pur- "pose of sale or of preparation for "sale, and, if it appears to him to "be unfit for human consumption, "may seize it and remove it in order "to have it dealt with by a justice "of the peace. (2) An officer who "seizes any food under the preceding "subsection shall inform the person "in whose possession it was found "of his intention to have it dealt "with by a justice of the peace, "and any person who under the last "preceding section might be liable to "a prosecution in respect of the food "shall, if he attends before the "justice upon the application for its "condemnation, be entitled to be "heard and to call witnesses. (3) If "it appears to a justice of the peace "that any food brought before him, "whether seized under the provisions "of this section or not, is unfit for "human consumption, he shall con- "demn it and order it to be "destroyed, or to be so disposed of "as to prevent it from being used for "human consumption. (4) If a "justice of the peace refuses to con- "demn any food seized under this "Part of this Act by an authorised "officer of a council, the council shall "compensate the owner of the food "for any depreciation in its value "resulting from its seizure and "removal."

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The respondent, by his affidavit, stated that on October 3, 1955, he attended the abattoir with a veterinary surgeon and they both inspected the material carcass and came to the conclusion that it was fit for human consumption. It was agreed between the clerk to the council and the respondent that the matter should be dealt with by the justices on October 7. On October 7, the original veterinary surgeon, a second veterinary surgeon and the respondent inspected the carcass again and came to the same conclusion as before. They then went with the applicant and the medical officer to the court, but the justices did not attend and no fresh date was fixed for hearing. On October 10 at about 11.55 a.m. the respondent received a telegram from the clerk stating that the carcass was to be dealt with by the justices at 2 p.m. that afternoon. It was impossible for the respondent to get his witnesses to court at such short notice and he telephoned the clerk to ask for an adjournment which was refused. The respondent's solicitor also telephoned and asked for an adjournment without success. Thereafter the respondent gave notice of appeal to the court of summary jurisdiction only to discover that no such appeal lay. He then applied for leave to appeal out of time to Cornwall Quarter Sessions pursuant to section 88 of the Food and Drugs Act, 1938, and section 84 of the Magistrates' Courts Act, 1952, which was granted.

Norman Skelhorn Q.C. and *A. L. Mildon* for the applicant.
Edmund Davies Q.C. and *J. B. Worsley* for the respondent.

The following cases were cited in argument: *Huish* v. *Liverpool Justices*[2]; *White* v. *Redfern*[3] and *Newman* v. *Foster*.[4]

LORD GODDARD C.J. Mr. Skelhorn moves for an order of prohibition directed to the appeals committee of the quarter sessions for the County of Cornwall to prohibit them from hearing an appeal of which notice has been given by Richard Peter Montague Whittington against an order, as it is called, of justices of the peace condemning a carcass of an animal as unsound and unfit for human consumption under section 10 of the Food and Drugs Act, 1938.

An appeal is a statutory remedy. Unless a statute gives a right of appeal, there cannot be any appeal against any order whether it is done administratively or judicially. By section 88 of the Food and Drugs Act, 1938, it is provided: "Where a "person aggrieved by an order, determination or other decision "of a court of summary jurisdiction under this Act, or under "any regulation made under this Act, is not by any other enact- "ment authorised to appeal to a court of quarter sessions, he "may appeal to such a court." Therefore, the question here is whether this is an order of a court of summary jurisdiction.

[2] [1914] 1 K.B. 109; 30 T.L.R. 25.
[3] (1879) 5 Q.B.D. 15.
[4] (1916) 86 L.J.K.B. 860.

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[His Lordship read section 10 of the Act of 1938 and continued:] Subsection (3) is the material subsection in the present case. Prior to the Act of 1938, or at any rate when this procedure was governed by the Public Health Act, 1875, it is perfectly clear and is conceded by Mr. Edmund Davies that an appeal could not be allowed because it was held in *White* v. *Redfern* [1] that a justice acting in this respect was not acting judicially, but was acting administratively. The court in that case called attention to the fact that it would seem wrong that a man's property should be seized and condemned without his being heard on the subject. It is quite possible in a case of this sort that a man might be able to say: "I was not exposing this food for sale, and I had "no intention of exposing it for sale," or: "This food appears "to be bad but it is not bad." Accordingly, when the Act of 1938 was passed, the matter to which Field J. had referred in *White* v. *Redfern* [1] was put right by section 10 (2), which requires the officer to give notice to the owner of the food and to allow a person who may be liable to be prosecuted for having food in his possession an opportunity of coming before the justice who is asked to condemn it and to state his case as to why it should not be condemned. But this is a matter in which it is essential that it should be dealt with in a rapid manner. The court in *White* v. *Redfern* [2] said that a rapid and summary proceeding should be taken, and then went on to say this: "It "is necessary therefore that the power to take these measures "should be entrusted to some person of authority, who will not "be likely to abuse them, and who will be in a position to act "promptly." So here, you have the person authorized to seize the food, an authorized officer who may be supposed to be regarded by the local authority as a sensible person and one who can be relied on to act properly, and also there is a provision that a justice must examine it. One knows in practice how often there are seizures in markets like Smithfield and Billingsgate and even Covent Garden, I daresay from time to time, and no doubt also in country markets; the sanitary inspector or whoever is entrusted with the duties under section 10 finds food which in his opinion is putrid, stinking, or going bad. He seizes it and carries it before a justice, and it is clear now that persons affected under the Act have to be warned, but these things cannot as a rule be kept in suspense for a long time. Think, for instance, of a cargo of fish; it must be brought quickly to the justice, and the justice would look at it and form his own opinion as to whether the fish was bad or not. I daresay in some cases it may be necessary for a justice to be informed why it is said that the food is bad, but I cannot think that the justice is acting judicially. He is really acting as a sort of superior inspector of nuisances, and in saying that I do not mean any disrespect to justices. The inspector carries the food before the justice and

[1] (1879) 5 Q.B.D. 15. [2] Ibid. 17.

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says: "In my opinion this is bad, do you agree?", and if the justice says he does he then says: "I condemn it, take "it away and destroy it." It may be taken out to sea or buried or burned. Section 10 (3) says that the justice shall condemn it and order it to be destroyed or so disposed of as to prevent it being used for human consumption. In acting so, it does not seem to me that the justice is acting in any more elevated position than a superior inspector. He is somebody to check, no doubt, the action of the ordinary officer of the local authority and to give a safeguard to people so that their property is not likely to be improperly destroyed. But at the same time he is exercising very much the same sort of jurisdiction as a local authority can exercise with regard to statutory nuisances. They find a statutory nuisance, they deal with it and, if necessary, they abate it.

One thing I have very considerable doubt about here is whether, when the justice condemns the food and orders it to be destroyed, there is any necessity to draw up any order. I have no doubt that it is convenient to have a minute of the destruction, but the clerk need not be there. The food can be taken to the justice's house or a justice can be found if he is in the street or square, and I have no doubt in places like London that very often happens. The food is not taken to the police courts. One finds a justice wherever one can and asks him to look at the food and form his own opinion upon it. To say that the justice is there acting as a court of summary jurisdiction, I think, is impossible. A court of summary jurisdiction in the ordinary way assumes jurisdiction to try matters which are brought before them on information or complaint, information if it is a criminal matter, complaint if it is civil jurisdiction. No information or complaint has to be laid here. The justice is invited on sight and on hearing the person whose property has been taken, if he chooses to be present with any witnesses, simply to say whether or not he thinks the food ought to be condemned. If he does condemn it, he tells the inspector how to deal with it. I do not think in so doing he is acting as a court of summary jurisdiction. It is exceedingly rare, in fact I do not think that there is any case in which one justice sitting alone as a court can convict anyone of any offence. In this case power is given to one justice to condemn food. In my opinion the justice is simply acting administratively and it is quite impossible to say that he is acting as a court of summary jurisdiction. One has to remember that this must largely be done on the view; you cannot keep food necessarily until the next quarter sessions. I do not know where it is to be kept. Is diseased or stinking food to be taken to a public cold store? What is to be done with it? Here, this carcass was seized in October of last year, and now this matter is coming before the court of quarter sessions who will be sitting next month, in July. Of course, it is impossible for the meat to be kept, and the justices who will have to sit in quarter sessions would not be able to see the meat as the justice here did. For

all these reasons, I think the justice was not sitting as a court of summary jurisdiction, and no appeal is given by any statute.

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ORMEROD J. I agree.

DONOVAN J. I agree. The mere fact that there is a dispute and witnesses may be called and heard does not of itself show that the proceeding is judicial or that there is a lis between the parties. One has to consider also just what the tribunal is actually doing: compare *Sneath* v. *Commissioners of Inland Revenue*.[3] In this case it is deciding whether meat is fit for human consumption, a matter to be dealt with by inspection, assisted in some cases by evidence that the party objecting requires to be called. In my opinion, that is not a judicial process but an executive act, and the justice, in deciding it, is really an agent of the executive and not a person exercising judicial office, although he has to bring qualities of impartiality and fairness to bear upon the problem.

Order of prohibition.

Solicitors: *Robbins, Olivey & Lake for Stephens & Scown, St Austell; Champion & Co. for Spencer, Gibson & Son, Sutton.*

C. J. E.

[3] [1932] 2 K.B. 362.

[COURT OF APPEAL.]

* *In re* G. (AN INFANT).

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[1954 G. No. 2226.]

Lord Evershed M.R., Morris and Romer L.JJ.

Infant—Ward of court—Illegitimate child—Claim of father to access—Order directing infant to cease to be ward of court—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 100), *s.* 9.

Legal Aid—Ward of court—Whether applications discouraged—Legal Aid and Advice Act, 1949 (12 & 13 *Geo.* 6, *c.* 51), *s.* 1 (7) (*b*).

A girl of four and a half years of age, the illegitimate child of a coloured man and a white woman, had been in the care of her father, who applied under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (2) that she might be made a ward of court and that he might be appointed to be her guardian. Her mother applied to have the care and control of the infant given to her. Both parents were legally aided. Wynn-Parry J., on the mother undertaking not to have any contact with the father, ordered that the infant be handed over to the mother and further ordered that the infant should cease to be a ward of court immediately upon being handed over to the mother. The father appealed against so much of that order as directed that the infant

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should cease to be a ward of court and he sought an order giving him access to the infant:—

Held that, in the case of an illegitimate child the limit of the father's obligation was to make financial provision for it and the only parent which the law regarded as responsible for the upbringing of the child was its mother; therefore, the view which the courts generally took that it was in the interests of the child to know both its parents was not necessarily applicable in the case of an illegitimate child; that although cases might arise in which the court might regard it as being in the best interests of the illegitimate child that it should have some relationship with its father, on the facts, the court should not interfere with the way in which the judge had exercised his discretion.

In re M. (*An Infant*) [1955] 2 Q.B. 479; [1955] 3 W.L.R. 320; [1955] 2 All E.R. 911 considered.

Semble, that the Court of Appeal has jurisdiction, where the Chancery Court has made an order under section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, either determining or continuing a wardship, to substitute its own view of the right order for that of the judge appealed from.

Per curiam. Where parties are of small means and provided the interests of an infant are not adversely affected, the court will discourage the parties from dissipating their resources on frequent or unnecessary applications to the court. That was applicable generally and not to legally aided cases in particular. Legally aided cases were, having regard to section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, on the same footing as other cases in this matter.

Decision of Wynn-Parry J. affirmed.

Appeal from Wynn-Parry J.

The appellant, a coloured man, the father of a girl aged 4½, who was in fact in his care, had applied by summons dated September 29, 1954, under section 9 (2) of the Law Reform (Miscellaneous Provisions) Act, 1949,[1] that the infant should be made a ward of court and that he should be appointed her guardian and provision made for access to her. The respondent to the application was the child's mother, a white woman. She applied in the proceedings to have the care and control of the infant given to her. Wynn-Parry J., on the mother's undertaking not to have any contact of any kind with the father, ordered that the infant should be handed over to the mother on November 26, 1955, and further ordered that the infant, having become a ward of court on September 29, 1954, should cease to be a ward of court immediately on being handed over to the mother.

[1] Law Reform (Miscellaneous Provisions) Act, 1949, s. 9: "(1) Subject "to the provisions of this section no "infant shall be made a ward of "court except by virtue of an order "to that effect made by the court.

"(2) Where application is made for "such an order in respect of an "infant, the infant shall become a "ward of court on the making of the "application, but shall cease to be a "ward of court at the expiration of "such period as may be prescribed by "rules of court unless within that "period an order has been made in "accordance with the application.

"(3) The court may, either upon an "application in that behalf or with-"out such an application, order that "any infant who is for the time being "a ward of court shall cease to be a "ward of court."

The father appealed from so much of that order as directed that the infant should cease to be a ward of court and he asked that directions should be given enabling him to have reasonable access to the infant.

The facts are fully stated in the judgment of Lord Evershed M.R.

The following cases were referred to in argument in addition to that cited in the judgment: *Barnardo* v. *McHugh* [2]; *In re Aster* (*An Infant*).[3]

Ingress Bell Q.C. and *M. O'Connell Stranders* for the appellant, the father.

Raymond Jennings Q.C. and *J. A. Wolfe* for the respondent, the mother.

Lord Evershed M.R. This appeal relates to a small girl child who was born on January 17, 1952; she is, therefore, now about 4½ years old. Her parents were not married. Her father (who is the appellant here) comes from the Gold Coast, and he is what is called a coloured man. The child's mother, on the other hand, is an English girl and a white woman; so that the child is the result of a union of a white woman with a coloured man. I mention that fact because of certain of the arguments put forward on the father's behalf by Mr. Ingress Bell.

The proceedings arose out of these circumstances: the father and the mother of this child, having lived together as man and wife for a time, quarrelled violently. The child was sent to a Mrs. Perrott, in Wales, who, with great kindness, looked after the child—as she also looked after the legitimate child of the father. The mother, however, during the Long Vacation of 1954, applied to the vacation judge, Glyn-Jones J., for a habeas corpus order directed to obtaining delivery up to her (the mother) of this child. As the child was illegitimate, according to the common law of the land the mother was, and is, the person responsible for the upbringing of the child. Glyn-Jones J. did not, however, make the order. He expressed the view that the child was attached to its father and the father was attached to it, a point which he desired should be brought to the attention of any judge exercising the equitable jurisdiction of the court, if and when (as later happened) application was made to make the child a ward of court. That application was made in September, 1954, and those are the proceedings with which we are now concerned.

The matter came before Wynn-Parry J. in November, 1955, and the form of the order which he made was as follows. After reading a great volume of written evidence and after hearing the

[2] [1891] A.C. 388; 7 T.L.R. 726.

[3] [1955] 1 W.L.R. 465; sub nom. *In re A.* (*An Infant*) [1955] 2 All E.R. 202.

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evidence (orally) of the father, the mother, and a Dr. Isaacs, the order proceeds: "And [the mother] by her counsel undertaking not to have any contact of any kind with the applicant in the future It is ordered that [the infant] be handed over to the respondent at the office of the applicant's solicitors," at a time and on a day stated. The order proceeds: "And the said infant having become a ward of this court . . . by virtue of section 9 (2) of the Law Reform (Miscellaneous Provisions) Act, 1949, . . . order that the infant do cease to be a ward of this court immediately upon being handed over to the respondent in accordance with the direction hereinbefore contained."

The appellant here, the father (and I will continue so to call him), has not appealed from that part of the order which directed the delivery over to the mother of the infant on the date stated in the order; nor, of course, has he (because it did not affect him) complained of the undertaking which was obtained from the mother, though he has suggested that the form of that undertaking and its indefinite duration indicated that the judge was overmuch concerned with the interests of the mother instead of the interests of the child. I do not agree with that criticism. It is quite true (as Mr. Bell has pointed out) that the undertaking is indefinite in duration; but I have no doubt whatever that the judge thought it right to request and obtain (and acted upon) that undertaking, because he thought that such an undertaking would serve the best interests of the little girl. The reasons for that view I will come to presently.

I will next read a note which was taken of the reasons for Wynn-Parry J.'s judgment. No shorthand note was made of the judgment, and we have been supplied with the endorsements made on their briefs by the four counsel concerned, which in one respect give rise to a divergence; but the part of the judgment which I shall now read (substantially in full) is agreed by all to represent what the judge said. He said that he had no doubt that he had the jurisdiction to accede to the course which he had had put before him. "The authorities" (says he) "also make it clear that I ought to give primary consideration to the wishes of the mother. The view of the courts for many years has been that it is preferable that the infant should be with a parent rather than strangers"; and then, after having given well-merited praise to Mrs. Perrott, he continues: "So far as the mother is concerned, I have had the supreme advantage of seeing her and hearing her cross-examined. I have carefully considered the whole evidence and taken into account satisfactory testimonials of the mother. I have doctor's evidence that for some time past she has been suffering from a nervous trouble due to anxiety as to the outcome of these proceedings. He has told me that there is nothing wrong with the respondent not attributable to these proceedings and being parted from the child and that she will soon be able to take a post. Until then

" she will have enough money to keep the child but only just " enough. In addition it will be borne in mind by her that in " the interests of the infant she should press such rights as she " has against the applicant for maintenance. I have come to " the conclusion that I cannot possibly regard her as an unsatis- " factory mother or that the circumstances are sufficient to " take the strong and unusual course of separating mother and " daughter. I have decided to exercise my discretion by accepting " the mother's undertaking not at any time hereafter to have " any contact with the applicant. I regard that as vital. On " that undertaking, I direct that the infant be handed over to " the mother."

The last few lines that I have read make it, to my mind, quite plain that the judge's view was broadly this: first, that, particularly since this was an illegitimate child, prima facie the child should be with its mother; and, secondly, that, in order to give the child the best chance of obtaining the benefits of its mother's upbringing and affection, there must be a break between the mother and the father.

There then follows in one note of the judgment a reference to access, which I shall not read, but what (it is suggested) emerges from that note is that the judge expressed the view that, since this was a legally aided case, acting in accordance with what it was suggested was the concerted view of the Chancery judges, the court would order that the wardship should cease; and, consequentially, that no order for access should (or, indeed, could) be made. The recollections (as recorded in the endorsements) of Mr. Jennings and Mr. Wolfe do not at all accord with that line of reasoning; and I am myself satisfied that there must have been a misunderstanding on the part of Mr. Bell and Mr. Stranders in regard to that matter. During the adjournment Romer L.J. took the opportunity of consulting with certain of the Chancery judges, and it is quite plain that the Chancery judges have not arrived at any such concerted conclusion. That fact seems to me to make it plain that Wynn-Parry J. could not have so said and that, therefore, there must have been in this matter some misapprehension. I add that any such view would appear to be contrary to the express Parliamentary intention: for, by section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, it is clearly stated that " the rights conferred by this Part of " this Act on a person receiving legal aid "—that is, to litigate with the advantage of legal aid—" shall not affect . . . the " principles on which the discretion of any court . . . is normally " exercised."

It no doubt is true enough that, where parties are persons of small means, and provided that the interests of the child are not adversely affected, the court would naturally discourage the parties from dissipating their resources on frequent or unnecessary applications; but that is applicable generally and not to cases in which legal aid may be invoked. I, therefore, am satisfied that

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the latter part of the order, particularly the order that the wardship should cease, did not proceed upon some misapprehended view of the duty of the Chancery judges in legally aided cases.

It is against that part of the order and that part of it exclusively that Mr. Bell appeals, and he naturally enough desires that the wardship should continue as a means whereby he can obtain for the father directions entitling him to access to the child. He puts his case for such access with great force, under four heads. First, he says that, in the interests of the child, it is desirable that there should be at any rate some sort of supervision: the mother is the sole reed on which the child's life rests and, therefore, continuance of the wardship would give the supervision. Secondly, he says that it is not to be forgotten, whatever the common law rights of the father may be, that he in fact is providing maintenance for the child, and it is to the child's advantage that she should continue to receive that financial help; that being so, it is ordinary common sense and human reason that the father would be more inclined to make provision for this child if he had some opportunity of seeing it. Thirdly, it is said that, bearing in mind the paternity of the child, it will be in its interests that it should know the father, a coloured man, and that it should therefore be brought up under circumstances which would create less likelihood of being affected by colour prejudice or things of that kind. And, last, he says that there is the natural affection which a parent has for a child and the child has for a parent, a feeling which nature has implanted as a result of the community of blood.

On those grounds, therefore, Mr. Bell urges that this direction for terminating the wardship should be reversed. At this stage it is perhaps convenient just to mention the question of jurisdiction, which was intimated in argument. It was said: has this court any jurisdiction, where the Chancery Court has made an order either determining or continuing a wardship (as the case may be), to interfere? In the view that I take it is unnecessary to express a final view about it; but my present view certainly is, on general principles, that this court, as the Court of Appeal under the Rules of Court made under the Judicature Act, has the usual powers to substitute (if it thinks it right) its own view of the right order for that of the judge appealed from; and not less so in a case where the order appealed from was one under the Law Reform Act of 1949.

I do not think it necessary in this case to attempt to express general propositions about the duty of a court in cases of this kind, except to assert once more the rule which has long governed the jurisdiction of the courts exercising the equitable jurisdiction which it has in regard to infants, namely, that the court will consider as the paramount concern the interests of the child. That being so, it is clear that cases might well arise in which the court would regard it as being in the best interests of the child that it should have some relationship with its father.

although the father is not the lawful father, as that phrase is understood by our law. But at the same time it is not to be forgotten that the position of the so-called putative father under our law is widely different from the position of the father of a child born in lawful wedlock, as was pointed out by this court in *In re M.* (*An Infant*)[1]; and it may broadly be stated (and accurately, too, I think) that in the case of an illegitimate child the limit of the obligation of the father will be to make financial provision for it in order to relieve other people, and particularly the general public, of such obligation. But the father has no such obligation to bring up the child as has a lawful father. The only parent in that respect which the law regards as responsible for the child is its mother. That being so, I think that the view which the courts generally take in regard to the interests of a child of lawful wedlock is not at any rate by any means necessarily applicable in the case of an illegitimate child: I mean the rule that the courts regard it as in the child's interests to know both parents. For I think that proceeds upon the premise that the parents mentioned are its legitimate, lawful parents.

I return, however, to the facts of this case; for the points alleged by Mr. Bell are points (as I said) of force, deserving (as I do not doubt that they received in the court below) close consideration. But the judge in this case (to use his own language), in the exercise of his discretion, came to the conclusion that the proper course, the course most in the interests of the child, was that it should be handed over to its mother and that the mother should be left exclusively responsible for it, the wardship provisions ceasing. I clearly conclude in my own mind that, in arriving at that conclusion, the judge thought (and, since he heard the witnesses whom I have mentioned, it is not for this court to doubt in this respect the validity of his conclusion) that here the interests of the child required the exclusive care of its mother and a clean break of the connexion with its father; and that in order to achieve that it must follow, as the night the day, that the mother herself ought to cease to have any connexion of any kind with the father. That (as I am quite sure in my own mind) was the basis of his conclusion and of his requiring, or accepting, the mother's undertaking not at any time to have any further contact with the father. As he said, "I regard that as "vital." In other words, bearing in mind what the doctor had said, he concluded that in this case what the child needed was the exclusive care of the mother, the mother being herself free from the emotional disturbance to which she had been subjected as a result of contact with the father.

It is naturally a sad matter for the father. I do not doubt that he has a true affection for this child. But it is, I am afraid, the consequence of the relationship, and the nature of the relationship, that he had with the mother, and of the view which

[1] [1955] 2 Q.B. 479; [1955] 3 W.L.R. 320; [1955] 2 All E.R. 911.

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the courts take in such cases of illegitimate children. At any rate, I think that the conclusion rested, and properly rested, upon an apprehension of the facts of this case, which the judge was able to enjoy, having seen and heard the witnesses.

That being so, I am satisfied that it would not be right for this court to interfere with the exercise of the judge's discretion. I think it undesirable that I should say any more about the case; but I hope that the result will be (as the judge intended it to be) that this unfortunate child should be given the best chance she can have of a happy and useful life. In my judgment this appeal must therefore be dismissed.

MORRIS L.J. I find myself in complete agreement with the judgment which my Lord has just delivered, and I do not desire to add anything.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors: *Curwen, Carter & Evans; Edward F. Iwi for Armstrong & Co., Forest Hill.*

B. A. B.

[CHANCERY DIVISION.]

1956 *June* 15.

Danckwerts J.

* *In re* BARR'S CONTRACT. MOORWELL BUILDINGS LTD. *v.* BARR.

[1956 A. 665.]

Vendor and Purchaser—Completion—Date of—Failure to complete on date fixed—Notice making time essence of contract and requiring completion within 28 *days—Reasonableness—Validity—National Conditions of Sale,* 16*th ed., cond.* 23 (1).

By condition 23 (1) of the National Conditions of Sale (16th ed.) it is provided as follows: "At any time on or after the completion date, the vendor, being himself able, ready and willing to complete, may (without prejudice to any other right or remedy of the vendor against the purchaser) give to the purchaser or his solicitor notice in writing requiring the purchaser to complete within such period (not being less than 28 days) as the notice shall prescribe. And if the purchaser shall not complete accordingly, the vendor may at any time after the expiration of the notice, without previously tendering a conveyance, forfeit the deposit and resell the property by public auction subject to such conditions as he shall think fit."

By a contract dated January 19, 1956, which incorporated the above condition, vendors agreed to sell to purchasers certain property for £50,000, receiving a deposit, completion being fixed for January 31. At the time, as the vendors well knew, the purchasers were relying on carrying out a sub-sale to provide the money necessary to complete, in the negotiations for which the vendors were acting as the purchasers' agents. On February 1, completion

not having been effected, the vendors served on the purchasers a notice under condition 23 (1) requiring the purchasers to complete within 28 days. On the purchasers failing to comply with the notice, but later seeking to complete:—

Held, that on its true construction the condition required the notice to allow such a time as in all the circumstances was reasonable, which might not be less than 28 days but might well be more; and that, in the circumstances, 28 days was not reasonable, so that the notice was of no effect and the vendors had not effectively rescinded the contract.

ADJOURNED SUMMONS.

By a contract dated January 19, 1956, the vendors, George Rudolph Barr and Herbert Rawnsley Barr, agreed with Moorwell Buildings Ltd. (hereinafter called "the purchasers") for the sale to them of a freehold property in King Street, Covent Garden, London, together with a piece of land used as nursery gardens at Burnham in Buckinghamshire. The sale was for a total sum of £80,000, of which £50,000 related to the property in London and £30,000 to the property at Burnham. A deposit of £3,500 was paid, and the provisions as to completion in clause 7 of the contract were as follows: "The date for completion of the "purchase of the property first hereinbefore described [i.e., the "London property] shall be January 31, 1956, when upon pay- "ment by the purchaser to the vendors of a sum of £50,000 (no "credit being given for the deposit paid on the signing hereof) "the vendors will assure such property to the purchaser. The "date for completion of the property secondly hereinbefore "described shall be May 31, 1956, when upon payment by the "purchaser to the vendors of the sum of £30,000 (credit being "given for the said deposit) the vendors will assure such "property to the purchaser." Clause 9 contained a reference to an appeal against the refusal of the local planning authority to grant planning permission for the erection of residential dwelling-houses on the land at Burnham and provided that the purchaser should take over and prosecute the appeal with the assistance of the vendors.

Clause 10 provided: "In the event of the planning permission "being granted within five years from the date hereof enabling "the purchaser or its successors in title to develop the land "secondly hereinbefore described for residential or industrial "purposes or in the event of the said land within the said period "being zoned under the Town and Country Planning Acts for "residential or industrial purposes the purchaser or its successors "in title as the case may be will pay to the first named vendor "hereto personally or to his personal representatives as the case "may be the sum of £5,000 and the purchaser shall in the con- "veyance of such land to him enter into a covenant to this effect "such covenant to be framed so as to bind not only the purchaser "but its successors in title." Clause 12 provided for the continuance by the vendors as the agents for the purchasers of a contemplated sub-sale to a sub-purchaser, at the price of £45,000;

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and the National Conditions of Sale, 16th ed., were deemed to be incorporated in the contract.

On February 1, 1956 (the day after the date for completion in regard to the London property) the vendors, by their solicitors, served a notice on the purchasers requiring them to complete the contract with regard to the London property, that is as regards the price of £50,000, within 28 days from the date of the notice. This notice was served on the purchasers by the vendors in reliance on condition 23 (1) of the National Conditions of Sale as set out above.

Circumstances had arisen, which are fully stated in the judgment, showing that the purchasers were desirous of completing the contract, but that there were difficulties in the way of their producing the sum of £50,000 within 28 days of the date of the notice.

A summons was, therefore, taken out by them, asking for a declaration that the vendors had not rescinded and were not entitled to rescind the contract, and that the notice of February 1, 1956, was of no effect.

Samuel Stamler for the purchasers.
Peter Foster for the vendors.

The case cited in argument is referred to in the judgment.

DANCKWERTS J. stated the facts above set out and continued: This is an application by the purchasers for a declaration, in effect, that the vendors are not entitled to rescind the contract, as they claim, and forfeit the deposit; and the vendors are relying on condition 23 (1) in the 16th edition of the National Conditions of Sale as giving them the right, which they claim to have exercised, to determine the contract and forfeit the deposit of £3,500. The facts as regards that particular clause, which I shall have to go into in detail later, are that on February 1, 1956—that is the day after the date fixed for completion in regard to the London property—the vendors by their solicitors served a notice on the purchasers requiring them to complete the contract with regard to the London property, that is, as regards the price of £50,000, within 28 days from the date of the notice given to complete.

The facts in more detail are as follows. The negotiations for the purpose of the contract began about September of 1955. At that time planning permission which was required for the erection of dwelling-houses on the land at Burnham had been refused, but there was an appeal pending against that decision. Subsequently the purchasers sent a cheque for £200 to the vendors for the purpose of paying counsel's fees in regard to the conduct of that appeal. That cheque was, unfortunately, dishonoured when it was presented, but this appears to have been, so far as I can see from the account of the purchasers, an accident, because

when the cheque was re-presented it was duly paid and apparently there was no difficulty in obtaining payment for the cheque which was given for the deposit of £3,500.

Negotiations continued, but, although the price had been agreed at a comparatively early date (I think in November), the contract was not signed until January 19, 1956. I think it is right to say that this was not due entirely to any delay on the part of the purchasers, because the vendors undoubtedly introduced some new provisions in regard to the contract at a comparatively late date and consequently they cannot be entirely acquitted of some responsibility for the delay in the eventual signing of the contract; but when the contract was signed on January 19, 1956, there was obviously a very short time before the date for completion in regard to the London property would occur. At that time the negotiations for the subsale of the London property appeared to be going perfectly well, and it was not until the last moment, when the subpurchasers found that they had difficulty in financing their £45,000 purchase, that the subcontract failed to result in the signing of an actual contract. Of course, if the subsale had gone through, the purchasers would have been able to obtain a large part of the price, which they had to find on completion, through the payment by the subpurchasers which would be made to them under the subcontract. That came to an end just before the date fixed for completion, it seems to me, and thereupon the purchasers were faced with the formidable task (which as everybody knows is more formidable in present conditions of restricted credit) of finding a sum of no less than £50,000—because they could get no credit for their deposit—on January 31, 1956. Thereupon they found themselves faced with what I can only describe as this sudden demand for completion within 28 days with, as I have pointed out, the task of finding a sum of £50,000.

The clause which is relied on by the vendors is a clause which differs from the corresponding clause (25 (1)) in the 15th edition of the National Conditions of Sale, and is in these terms: [His Lordship read condition 23 (1) in the 16th edition of the National Conditions of Sale and continued:] It is admitted, and it is plain, that under the terms of the contract of January 19, 1956, time was not of the essence as regards the completion of the contract. But it is contended that this clause allows the vendors unilaterally, by a notice under this clause, to make time of completion of the essence; and it is contended that the clause operates, according to one construction that might be put on it, although the purchaser is not in the least in default, because the notice may be given on the very day when completion is due, when it is still open to the purchaser to complete in accordance with the terms of the contract and he is therefore not in default in any way at all. In this case the notice in question was not given actually on the date fixed for completion; it was given on February 1, when, I suppose, the purchasers might be said to

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be possibly one day in default. It requires completion to be within 28 days "from the date hereof," "the date hereof" being the date at the end of the notice, that is, February 1, 1956.

A point was taken on behalf of the purchasers in regard to that. It was argued that this notice did not give a minimum time of 28 days required by the paragraph in the National Conditions of Sale because it was not in fact received, as appears from the receipt endorsed on it, until February 2, 1956, and therefore, it is said, that 28 days from the 1st would not be more than 27 days and therefore less than the minimum. It is, however, notice to complete within 28 days "from the date "hereof," and there is authority in regard to tenancies and the like for saying that "from" excludes the actual day of the date of the notice, so that the time starts from the following day, and, on that construction, it may be there is a full time of 28 days allowed by the notice for completion by the purchaser. But I am bound to say that when I first saw the proposition which was made on behalf of the vendors I was amazed to find that there was a condition of sale in a common form of conditions of sale of this type apparently, if the construction contended for on the part of the vendors is right, enabling the vendors to forfeit the deposit and determine the contract immediately on the date for completion falling due or being exceeded. It is a very startling proposition and one which obviously most purchasers would be well advised not to accept, and one which might be very difficult to comply with in conditions, at any rate, in regard to a substantial sale.

The question which really has to be considered is whether this condition is to be effective according to the stark nature of its terms, or whether it must be construed in such a way as to give it a reasonable effect according to the circumstances of the case. Apart from the provisions of any plain and clear conditions of sale, the law about making time of the essence of the contract for the purpose of completion, as I think is accepted on both sides, is subject to the following conditions: First of all, the vendor must be able, ready and willing to proceed to completion; and it is not contested that the vendors were able and ready to proceed with the completion of the sale of the London land in the present case, because they were registered with the possessory titles from a date in 1921, and consequently there was very little difficulty in ascertaining their title. Secondly, at the time when the vendor purports to make time of the essence, the purchaser must be guilty of such default as to entitle the vendor to rescind the contract subject to its being done by a reasonable notice. Thirdly, once the right to serve a notice of the kind in question has arisen, the time allowed by the notice must be a reasonable time.

Certainly, down to the introduction of the 16th edition of the National Conditions of Sale, those propositions applied not only to an open contract of sale, or a contract which did not include

conditions of this type, but also to a contract which incorporated the 15th edition of the National Conditions of Sale. The point came before Harman J. in *Smith* v. *Hamilton*.[1] I do not think I need read the facts of that case except to refer to condition 25 (1) of the National Conditions of Sale, 15th edition, which provided, in obviously different terms from the present edition, the following: "If the purchaser shall neglect or fail to complete "his purchase according to these conditions, his deposit shall "thereupon be forfeited (unless the court otherwise directs) to "the vendor . . . and the vendor may, with or without notice or "without previously tendering a conveyance, re-sell the property "at such time, and in such manner and subject to such conditions "as he shall think fit."

The law is expressed by Harman J.[2] as follows: "If time be "not of the essence of the contract initially, it follows, in my "judgment, that one party cannot, of his own motion, make it "so; to say that by writing a letter one party can make time of "the essence when it was not so before, may be a convenient "but is an inaccurate way of putting it. That has been pointed "out on many occasions, and amongst others by Fry, J., in *Green* "v. *Sevin*.[3] Fry, J., said: 'What right then had one party to "'limit a particular time within which an act was to be done "'by the other? It appears to me that he had no right so to do, "'unless there had been such delay on the part of the other "'contracting party as to render it fair that, if steps were not "'immediately taken to complete, the person giving the notice "'should be relieved from his contract. It has been argued "'that there is a right in either party to a contract by notice "'so to engraft time as to make it of the essence of the contract "'where it has not originally been of the essence, independently "'of delay on the part of him to whom the notice is given. "'In my view there is no such right. It is plain upon principle, "'as it appears to me, that there can be no such right. That "'which is not of the essence of the original contract is not to "'be made so by the volition of one of the parties, unless the "'other has done something which gives a right to the other to "'make it so. You cannot make a new contract at the will "'of one of the contracting parties. There must have been such "'improper conduct on the part of the other as to justify the "'rescission of the contract sub modo, that is, if a reasonable "'notice be not complied with. That this is the law appears to "'me abundantly plain.'" In the case before him, Harman J. held that the purchaser had not been guilty of impropriety, and therefore the notice by the vendors purporting to determine the contract was not effective. It was argued in the present case that condition 23 (1) in the 16th edition of the National Conditions of Sale was framed with particular regard to that decision of Harman J., and was intended to alter the law, drastically as it

[1] [1951] Ch. 174; 66 T.L.R. (Pt. 2) 937; [1950] 2 All E.R. 928.

[2] [1951] Ch. 174, 181.

[3] (1879) 13 Ch.D. 589, 599.

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seems to me, in favour of the vendor, with, it may be, disastrous results to a purchaser who may not be in default at all, at any rate until the date when the notice had been given. But it is said that this condition (which, of course, has been accepted by the purchasers in the present case, whether or not they appreciated the dangers implicit in it) enables a vendor to give notice at once on the date for completion and fix the unfortunate purchaser with the necessity of completing within a given time named by the vendor at his option and being not less than the period of 28 days. That may be so, but it seems to me that that provision is subject to this important consideration, that it still requires the vendor, in giving such a notice as this, to give a notice which must not in any case be less than 28 days, and must be reasonable having regard to all the circumstances of the case. It may cut out the need for the purchaser to be guilty of improper conduct and guilty of such delay that the law, apart from any special condition, would give the vendor a right to rescind the contract; but in my view, giving the condition its proper construction, it still requires the notice to allow such a time as in all the circumstances is reasonable, which might not be less than 28 days but might well be more.

It has been contended by Mr. Foster on behalf of the vendors that the notice of 28 days' completion in the present case was reasonable because there were no particular conveyancing difficulties and therefore it was simple, so I think he argued, for the purchasers to complete within the time named of 28 days from February 1, 1956. But, in my view, that is not the right consideration. It is true that conveyancing difficulties may be some of the circumstances; but it seems to me that, in naming a period which suddenly gives a definite requirement for completion and makes time of the essence in this way, regard must be had to all the circumstances of the case, and to the practical considerations of the ability in the circumstances of the purchaser to find the money, having regard to reasonable behaviour as well as to mere conveyancing matters. In the present case, until a few days before the date fixed for completion, the purchasers were anticipating that they would be not fixed with the necessity of finding £50,000 cash down, but of finding perhaps a balance of £5,000 by reason of the provision of part of the price by a sub-sale of the property; and the facts of the negotiations of the sub-sale were within the knowledge of both parties as, indeed, the vendors were negotiating the sub-sale as agents for the purchasers and were, of course, one might observe, under a duty to use their best endeavours to secure a successful outcome to those negotiations. Suddenly those negotiations come to an end. The situation is entirely changed from the point of view of the purchasers and, indeed, also from the point of view of the vendors, because instead of getting part of the price by virtue of the sub-sale they will now have to look to the purchasers to find £50,000; and, in these circumstances, it does not seem to me to be reasonable to fix

such a short time as 28 days for a purchaser to find a sum of £50,000.

It seems to me, therefore, that the attempt of the vendors to rely on a condition of this type in such circumstances was mistaken; accordingly, in my view, the condition does not enable the vendors to act in the way in which they did and their notice was ineffective. The purchasers desire to complete the contract now, and therefore they are, in my view, entitled to have that opportunity, and the vendors were not entitled to rescind the contract and forfeit the deposit.

I, therefore, declare that the vendors' notice to complete was of no effect and that they have not effectively rescinded the contract between the parties, dated January 19, 1956.

Declaration accordingly.

Solicitors: *C. Butcher & Simon Burns; J. D. Langton & Passmore.*

J. L. D.

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[QUEEN'S BENCH DIVISION.]

* BASSETT *v.* EVANS.

1956 *June* 28.

Lord Goddard C.J., Ormerod and Donovan JJ.

Mines and Minerals—Coal—Colliery manager—Contravention of Coal Mines Act during manager's absence on leave—Under-manager properly appointed as manager in his place—Whether both of them liable for contraventions of Act—Whether manager took reasonable precautions—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 3, 75.

An information preferred against the defendant alleged that he, on June 27, 1955, was the manager of a coal mine into which an oxyacetylene burner had been taken without authorization, contrary to the Coal Mines Act, 1911, as amended. An under-manager had been duly appointed to act as manager under section 3 [1] of the Act during the defendant's absence on leave.

[1] Coal Mines Act, 1911, s. 3 (2): "In cases where, on account of the absence of the manager or under-manager on leave or from sickness or any other temporary cause, such daily personal supervision as is required by this section cannot be exercised, arrangements shall be made for the duties of the manager or under-manager, as the case may be, in respect of daily personal supervision being performed—(*a*) in the absence of the manager, by the under-manager, if any, or by a person not under the age of 25 years and holding a first or second-class certificate of competency under this Act valid with respect to that mine, appointed in writing by the owner or agent . . . any person performing the duties of a manager . . . whether under this or under the last preceding section, shall have the same responsibility, and shall be subject to the same liability, as the person whose duties he is performing."

S. 75: "Any person who contravenes or does not comply with any of the provisions of this Part of this Act shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever, the owner, agent, and manager of the

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Prior to leaving, the defendant gave oral instructions for certain work to be carried out in the colliery and said: "We will pull "these half rings out and then those that are in the cement I "will have burnt out." On June 27, during the defendant's absence, an acetylene burner was used for burning out "rings." The justices were of the opinion that as a contravention of the Act had occurred, the defendant was guilty of an offence under section 75. They also held that when the defendant gave his instructions he failed to give them with sufficient clarity and that if a contravention of the Act occurred as a result of the act or default of a manager, who had temporarily relinquished his managerial duties, the manager could not claim immunity from liability by virtue solely of the fact that he was not the de facto manager at the time of the contravention and that another person was discharging the duties of manager. On appeal:—

Held, (1) that if a manager, for any of the reasons provided for in section 3, was unable to act, and properly appointed another person to act in his place, he ceased to be clothed with the responsibilities of a manager under the Act, which were taken over by the person who, having been properly appointed, was the de facto manager, and was liable to be convicted under section 75 unless he could make out a defence under that section.

(2) That, in any event, he had taken all reasonable steps to prevent contraventions of the Act during his absence, and, accordingly, the defendant would have established a defence under section 75.

Case stated by Port Talbot justices.

The defendant, William Bassett, was charged on an information preferred by Thomas John Evans, Her Majesty's Senior District Inspector of Mines, alleging that the defendant on June 27, 1955, was the manager of Glenhafod mine in which there was on that day a contravention of section 35 (1) of the Coal Mines Act, 1911, as amended by article 2 of the Coal Mines (Lighting and Contraband) General Regulations, 1949 (S.I. 1949, No. 924), in that in the mine in which safety lamps were required, a person had in his possession an article, prohibited under that section, which was capable of producing a flame, to wit, an oxyacetylene burner, such burner not having been authorized to be taken below ground by that Act or by the Minister of Fuel and Power or by the inspector of the division contrary to sections 35, 75 and 101 of the Act.

The justices found the following facts. On June 27, 1955, an acetylene burner was used at a point ten or twelve yards inside the entrance of Glenhafod mine, a cutting into a hillside, by two persons employed there, for the purpose of burning out "rings." Glenhafod was then a mine in which safety lamps were required to be used. No application was made for permission to use the acetylene burner to the prosecutor, the person competent to grant such authority. No safety precautions were carried out during the burning operation, when 88 workmen were at work in the

"mine shall each be guilty of an "offence against this Act, unless he "proves that he had taken all reasonable means by publishing and to "the best of his power enforcing "those provisions to prevent that "contravention or non-compliance."

mine. The defendant was the manager of Glenhafod colliery. He was with permission away on leave from the colliery when the operation was performed. By a letter dated June 22, 1955, the under-manager was duly appointed to act as manager of the colliery for the period of the defendant's absence on leave. On June 24, 1955, the defendant gave oral instructions for certain work to be carried out at the entrance to the colliery, and in the course of his instructions said: "We will pull these half rings "out and then those that are in the cement I will have burnt out."

On behalf of the defendant it was contended that there was no evidence to support the justices' decision; that there was no proof that the work executed on June 27 was done by the order or direction of the defendant, and that he had no knowledge that that work was being carried out or contemplated on June 27. The defendant proved that the provisions mentioned in section 75 were published and enforced to the best of his power. The work complained of was done while the defendant was away on leave and his intended absence was notified to the prosecutor, which notification complied with section 6 of the Act. The daily supervision required by section 3 of the Act could not be exercised by the defendant during his absence as provided for in the section and therefore enforcement of the provisions referred to in section 75 could not be exercised by the defendant and that he was exempted from carrying out the duties of manager by reason of section 3 (2). By virtue of that subsection the defendant was relieved of his responsibilities during the time of his legitimate absence from the mine. Section 2 of the Act provided that the mine should be under one manager who should be responsible for the control, management and direction of the mine, and it was contended that at the time of the alleged offence the defendant was not the manager for the purpose of the Act. From the first day that he was granted leave of absence to the date when he resumed work after his leave, the defendant was not responsible for the management of the mine and that all steps in accordance with section 6 had been taken to inform the inspector of the position with respect to the management of the mine.

On behalf of the prosecutor it was contended that the defendant was at all material times the manager of the mine; that there had been a contravention of section 35 and that the defendant had not proved that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of Part II of the Act to prevent that contravention.

The justices were of the opinion that: (1) for the purpose of the Act the place where the acetylene burner was used was a part of the Glenhafod colliery and was in that mine; (2) as no permission had been obtained, a contravention of section 35 occurred on June 27, 1955; (3) as a result of the contravention the defendant was guilty of an offence by virtue of section 75; (4) when, on June 24, the defendant gave certain instructions to

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his workmen, he failed to give them with sufficient clarity; (5) although the defendant was not the de facto manager on June 27, the initial cause of the contravention was his failure; (6) section 3 of the Act, although assigning to any person the same responsibilities as to the person whose duties he was performing, did not make their respective responsibilities mutually exclusive and that either might be guilty of an offence against the Act; (7) if a contravention of the Act occurred as a result of the act or default of a manager, who had temporarily relinquished his managerial duties, the manager could not claim immunity from liability by virtue solely of the facts that he was not the de facto manager at the time of the contravention and that another person was discharging the duties of manager; (8) that in the circumstances of this particular case the defendant was the manager for the purposes of the Act and was, therefore, guilty of an offence.

Accordingly the justices convicted the defendant and fined him £5.

The defendant appealed.

Edmund Davies Q.C. and *Alun T. Davies* for the appellant.
Rodger Winn for the prosecutor.

No cases were cited in argument.

ORMEROD J. stated the facts and continued: The scheme of the Coal Mines Act, 1911, is, that by section 2 there shall be in every mine a manager, and section 3 (1) requires that in every mine required to be under the control of the manager there shall be daily personal supervision exercised by the manager, and if there is an under-manager, by him also. [His Lordship read subsection (2) of section 3 and continued:] There is no doubt that in this case the under-manager, who was appointed to act as manager in the defendant's absence, was a competent person so to be appointed, and all the necessary formalities were complied with so far as his appointment was concerned.

The defendant's contention is that during the time of his leave the duties and responsibilities, which normally fell upon him as manager, were taken over by the under-manager by virtue of the defendant's compliance with the provisions of subsection (2) of section 3 of the Act. [His Lordship read section 75 and continued:] There is no doubt that there was a contravention or non-compliance with the provisions of the Act. There was an offence against section 35 (2) of the Act and, under those circumstances, the responsibility is not only on the person who actually contravenes the section, but on the other persons mentioned in section 75, the owner, agent and manager, unless they can prove that they have taken all reasonable means by publishing and to the best of their power enforcing those provisions to prevent that contravention or non-compliance.

What the defendant says here is simply this: "I did all that "was necessary when I went on leave after June 24. I appointed "a competent manager who is qualified in accordance with the "Act, and there is nothing else I could have done and, under "those circumstances, when I was away on leave I had ceased "temporarily to be manager. The man appointed to take my "place was manager in my place, and if anyone is responsible "the responsibility is his, unless he can show he had taken "all reasonable steps to prevent this contravention." Further, the defendant's case is, that even if that is not a sound contention in law, there is no evidence at all of any lack of care, and that on the facts found by the justices they should have found that the defendant had taken all reasonable means by publishing and to the best of his power enforcing the provisions to prevent contravention or non-compliance.

Mr. Winn, so far as the first point is concerned, argues that this conviction must stand because at the time of the contravention the defendant was in fact the manager of the mine; it is true that he was away on leave, it is true that he had properly delegated his duties to his under-manager, but nevertheless he was still the manager of the mine and therefore was still liable in the terms of section 75 unless he could prove he had taken the reasonable means set out in the proviso to that section. I do not accept that contention. I think the position is that under section 3 the intention of the legislature is that if a manager for any of the reasons in section 3 is unable to act, that is to say, by reason of leave or sickness or any other temporary cause, if he properly appoints another person, he does for the time being cease to be the manager. He ceases to be clothed with the responsibility which a manager has in the terms of the Act, and this responsibility is taken over by the man who is appointed in his place, and the person who is de facto the manager having been properly appointed is the person liable to be convicted under section 75 unless he discharges the burden that is upon him.

But even if that is wrong, I find it difficult to see how this conviction can be upheld. The justices appear to have found that when the defendant, before he went on leave on June 24, said: "We will pull these half rings out and then those that are "in the cement I will have burnt out," he was giving instructions to the workpeople to burn out these rings, and that he had not made those instructions sufficiently clear, with the result that he had not taken reasonable steps to prevent a contravention of this kind happening, and that this particular contravention had happened because of the lack of clarity in his instructions. It is on that and that alone that the justices come to the conclusion here, as I read the facts found by them in the case and the conclusions to which they have come, that the defendant is liable because he has not adopted the reasonable means set out in section 75 to prevent a contravention of this kind from happening. What it really means, I think, is that he has appointed another

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man not fully qualified to take over his duties, and it is suggested that because he has not anticipated that some contravention of this kind might happen, and has not for some reason or other instructed this substitute of his that he must not allow this contravention to happen, has not said: "It may be the men will "start burning out these rings, and, of course, under no "circumstances must you allow them to do that unless you first "of all give the proper notice to the inspector." Under those circumstances, say the justices, he has in fact not discharged this burden. In my view, even if in law he is liable as manager—and I do not think that he is—it is abundantly clear that he has on the evidence amply discharged the burden which is laid upon him by section 75, and that the justices had no reason for finding otherwise. Under those circumstances this appeal, in my view, must be allowed and the conviction quashed.

DONOVAN J. I will assume for the purpose of the argument that Mr. Winn is right when he says that the defendant was manager, and that there being a contravention, the defendant is made liable under the drastic provisions of section 75, despite being on leave, unless he proved that he had taken all reasonable means to prevent the contravention. Even so, the defendant had ensured, or helped to ensure, that a properly qualified person was appointed manager in his place for the period of his leave, and by section 3 (2) that deputy has the same responsibility as the defendant. Prima facie, therefore, it seems to me that the defendant had taken all reasonable steps to prevent contraventions of the Act during his absence; but the justices have said that he had not because he did not give instructions sufficiently clearly about a particular operation. He said: "I will have the rings "burned out." Apparently he should have said to his deputy: "Do not take a naked light into the mine while I am away," but why should he have to assume such an act of insanity on the part of anybody, let alone a properly qualified deputy? He was reasonably entitled to assume that the deputy manager would never do any such thing. That being so, I think he establishes his defence under section 75, and I agree with the course proposed.

LORD GODDARD C.J. I agree with both judgments, and I need not add anything.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for T. D. Windsor, Williams, Neath; Treasury Solicitor.*

C. J. E.

[CHANCERY DIVISION.]

* TEMPERLEY (INSPECTOR OF TAXES) *v.* SMITH.

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June 20;
July 3.

Vaisey J.

Revenue — Income tax — Profits of profession — Doctor—Insurance policies taken out by voluntary hospital for medical staff—National Health Service inaugurated—Policies assigned to doctor—Surrender value taxable—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D.*

Under a scheme adopted by a voluntary hospital before the inauguration of the National Health Service, the board of management of a voluntary hospital took out insurance policies on the lives of the members of its medical staff, and paid the premiums on the policies. The scheme was intended as a recognition of the services which had been given voluntarily by the staff, and not as a means of remuneration. On the inauguration of the National Health Service no further premiums on the policies were paid by the hospital, which entered into contracts on a salary basis with the members of the medical staff, to whom the policies were assigned. A doctor was assessed to income tax under Schedule D on the provisional surrender value of his policies:—

Held, that the crucial test whether such a benefit was taxable was whether the recipient took it in virtue of his office or profession and not as a mere present; and that as the doctor's services at the hospital were within the scope of his profession as a medical practitioner, the value of the policies was received by him in virtue of his profession and, accordingly, subject to tax.

In deciding whether such payments were subject to tax the same principles were applicable in respect of Schedule D as in respect of Schedule E.

Herbert v. *McQuade* [1902] 2 K.B. 631; 4 T.C. 489 and *Blakiston* v. *Cooper* [1909] A.C. 104; 25 T.L.R. 164; sub nom. *Cooper* v. *Blakiston,* 5 T.C. 347 applied.

APPEAL from the Commissioners for the General Purposes of the Income Tax for the Rugby Division of Warwickshire.

Dr. Ronald Edward Smith appealed against additional assessments to income tax made upon him under Schedule D to the Income Tax Act, 1918, for the years 1947–1948 and 1948–1949 each in the sum of £650 in respect of profits as a physician, these amounts being the provisional surrender value of two life policies taken out by the board of management of the Hospital of St. Cross at Rugby.

The following facts appeared in the case stated:

Before the inauguration of the National Health Service, the Hospital of St. Cross was carried on by voluntary subscriptions from the inhabitants of Rugby. The subscribers elected annually a board of management to administer the hospital's affairs. The medical staff of the hospital had been for many years provided by local doctors, who in the earlier years (not material to this appeal), gave their services to the hospital's patients voluntarily and without payment. At all material times Dr. Smith was a member of the honorary medical staff, and he first became a

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member of it in 1931. Evidence was given by Mr. Edyrean-Walker, the chairman of the hospital finance committee in 1937 and thereafter, in the following terms:—(a) In the year 1937 the board of management of the hospital adopted a scheme recommended by their finance committee whereby some recognition of the professional services given voluntarily for so many years previously to patients of the hospital by members of the honorary medical staff should be made. The scheme was not intended as a means of remunerating the members of the honorary medical staff but was intended to be a gesture of appreciation for the work voluntarily undertaken by them.

(b) Under the scheme adopted endowment assurance policies (without profits) were taken out in the name of the board of management on the lives of individual members of the honorary medical staff, and the board paid the premiums for each member insured under the scheme. Membership of the scheme was limited to members of the honorary medical staff who were under 45 years of age at the time of joining the scheme.

(c) The guaranteed sum assured under the policy was to be paid to each member of the honorary medical staff concerned on his attaining the age of 60 years or if he should die while serving on the staff before attaining that age, then to his personal representative.

(d) The scheme adopted contained provisions as to the resignation of members of the honorary medical staff for whom policies had been taken out, namely, that in the case of policies being surrendered the surrender value should be the property of the board of management and should be at its disposal in the following manner:—(1) Members of the honorary medical staff resigning within ten years of becoming members should not participate in the surrender value of the policy. (2) Members resigning after serving more than ten years but less than 15 years should receive a grant equal to 50 per cent. of the surrender value of the policy. (3) Members resigning after serving more than 15 years, but less than 20 years should receive a grant equal to 75 per cent. of the surrender value of the policy. (4) Members completing 20 years' service were to be entitled to a grant of the full surrender value of the policy, or to have the option of maintaining the policy at their own expense.

(e) The scheme further provided that in the event of the hospital ceasing to be a voluntary hospital, and the voluntary system of the management being superseded by a state-controlled organization, the policies should become the sole property of the members of the scheme.

(f) Policies affecting seven members of the hospital's honorary medical staff had been effected, the annual premium payable in respect of Dr. Smith's policy being £74 19s. 3d.

(g) None of the members had attained the age of 60 years, or had resigned, and they were all still living.

(h) In the year 1942 the board of management increased each

doctor's total annual recognition to the sum of £125 to include the premiums paid under the 1937 insurance scheme, the balance of such sum over the amount of the said premium being paid in cash. The Revenue authorities insisted that the cash amounts thus paid to Dr. Smith should be included as income of his profession or vocation for the purposes of assessment to income tax each year.

Evidence which was accepted by the commissioners was given in the following terms by a chartered accountant who was the honorary treasurer of the hospital from 1946 until the National Health Service came into operation: By an agreement dated February 22, 1947, Dr. Smith was granted a new contract of service with an increased salary from January 1, 1947. The other members of the medical staff were granted similar contracts on a new salary basis. No premiums were paid by the board of management in respect of the policies after December 31, 1946, and by resolutions of the board of management and the subscribers (at the time known as the court of governors) of the hospital, dated respectively November 4, 1947, and January 27, 1948, the chairman of the board was authorized to execute assignments of the endowment policies to the members of the honorary medical staff. The deed assigning the policy to Dr. Smith was dated May 19, 1948, Dr. Smith having paid the necessary premiums falling due on and after January 1, 1947. Nothing had been done by the board of management prior to November 4, 1947, by way of assignment of the policy to Dr. Smith.

The National Health Service came into operation on July 5, 1948.

The commissioners also heard evidence by Dr. Smith and were satisfied on his evidence that he did not join the honorary medical staff with a view to obtaining any professional or pecuniary advantage. Following nationalization Dr. Smith did not want to take over the policy, but found himself with no choice but to accept the surrender value or take over the policy and thereafter pay the premiums himself.

The commissioners found that the surrender value of the policy transferred to Dr. Smith was not a profit from his profession, and therefore allowed the appeals against the assessments.

The Crown appealed from that decision.

J. E. S. Simon Q.C. and *Sir Reginald Hills* for the Crown.
F. N. Bucher Q.C. and *H. H. Monroe* for Dr. Smith.

Cases cited in argument are referred to in the judgment.

Cur. adv. vult.

July 3. VAISEY J., having stated the facts, read the following judgment: It is stated in the case that the commissioners were satisfied that Dr. Smith did not join the medical staff with a view

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to obtaining " any professional or pecuniary advantage," and that following nationalization (which had come into force on July 5, 1948), he did not want to take over the policies but found himself with no choice but to accept the surrender value or take over the policies and thereafter pay the premiums himself. I do not follow this, because there was, of course, no reason requiring him to accept the policies or any benefits under them.

Dr. Smith's contentions were that the benefit of the policies did not accrue to him as a result of any organized seeking after emolument, but as a testimonial, it being intended that the benefit should accrue to him on his retirement or on his attaining the age of 60 years or on his previous death, and consequently that it did not form part of the profits of his profession as a doctor.

On the other hand it was urged, on behalf of the Crown, that up to the date of the assignment of the policies to Dr. Smith he had no title to the policies or the surrender value of them, but that he received the policies under the assignment in the course of his professional practice and as a reward or remuneration for his professional services in the form of moneys' worth, the measure thereof being the immediate cash surrender value of the policies at the date of the assignment, and that the amount of the surrender value was therefore income of his profession or vocation and chargeable to tax under Schedule D accordingly.

The commissioners having heard the appeal found that the surrender value of the policies was not a profit from Dr. Smith's profession, and allowed the appeal against the assessments, and from that decision this appeal is brought.

The problem which arises here is, of course, a familiar one. It is exemplified by the cases relating to cricketers' benefits and clergymen's Easter or Whitsuntide offerings. A voluntary payment to the holder of an office or employment is a profit of that office or employment if it accrues to the holder in virtue of his office or employment notwithstanding that there may not be any legal obligation to make the payment. If, however, a payment to the holder of an office or employment is in the nature of a personal gift to him, as in the case of a testimonial or a contribution for a specific purpose such as to provide a holiday, it is not regarded as a payment for services but as a mere present. The cases in the books are very numerous, and a number of them were referred to in the course of the argument. I propose to refer briefly to some of the more important of these.

The assessment in this case is under Schedule D, and the sum in question is alleged to be part of the annual profits or gains accruing to Dr. Smith from his profession of a medical practitioner. Many of the authorities relate to assessments under Schedule E, but in my judgment the authorities under both schedules all rest upon the same general principles.

The nearest case to the present is perhaps *Herbert* v.

McQuade.[1] In the course of his judgment Collins M.R. makes this statement[2]: " . . . a payment may be liable to income tax " although it is voluntary on the part of the persons who made it, " and . . . the test is whether, from the standpoint of the person " who receives it, it accrues to him in virtue of his office. . . ."

That case was followed by the well-known decision of the House of Lords in *Blakiston* v. *Cooper*,[3] and the following words from the speech of Lord Loreburn L.C. are, in my judgment, relevant to the present case, substituting the words " medical " practitioner " for the word " incumbent " and the word " clergyman "[4]: " . . . where a sum of money is given to an " incumbent substantially in respect of his services as an incum- " bent, it accrues to him by reason of his office. Here the sum " of money was given in respect of those services. Had it been " a gift of an exceptional kind, such as a testimonial . . . or a " subscription peculiarly due to the personal qualities of the " particular clergyman, it might not have been a voluntary pay- " ment for services, but a mere present. . . . What you choose " to call it matters little. The point is, what was it in reality? "

I was referred to three Irish cases: *Wing* v. *O'Connell*,[5] *Robinson* v. *Dolan*[6] and *Mulvey* v. *Coffey*,[7] but all of these depend upon their special facts, and I do not think that they are immediately relevant to the present case.

Mudd v. *Collins*[8] contains some useful observations by Rowlatt J., and so does *Seymour* v. *Reed*,[9] in which the question is asked as regards the money in question in that case: Is it in the nature of a personal gift or is it remuneration? In that case the decision of Rowlatt J.[10] was reversed in the Court of Appeal[11] and restored in the House of Lords,[12] but the truth is that the authorities are only really helpful in a case such as the present in so far as they indicate the proper line of demarcation between taxable and non-taxable receipts, and each case has to be dealt with on its own merits, applying well-settled principles to particular facts.

I can find nothing to help me in *Stedeford* v. *Beloe*.[13] *Hawkins* v. *Leahy*[14] is surely rather near the present case, and finally there is *Moorehouse* v. *Dooland*.[15]

The crucial test, in my judgment, is as to the character in which the recipient of a benefit takes it, and if it came to him

[1] [1902] 2 K.B. 631; 4 T.C. 489.
[2] [1902] 2 K.B. 631, 649.
[3] [1909] A.C. 104; 25 T.L.R. 164; sub nom. *Cooper* v. *Blakiston*, 5 T.C. 347.
[4] [1909] A.C. 107.
[5] [1927] I.R. 84.
[6] [1935] I.R. 509.
[7] [1942] I.R. 277.
[8] (1925) 41 T.L.R. 358; 9 T.C. 297.
[9] [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625.
[10] [1926] 1 K.B. 588; 42 T.L.R. 377; 11 T.C. 625.
[11] [1927] 1 K.B. 90; 42 T.L.R. 514; 11 T.C. 632.
[12] [1927] A.C. 554.
[13] [1932] A.C. 388; 48 T.L.R. 291; 16 T.C. 505.
[14] [1952] 2 All E.R. 759; 34 T.C. 28.
[15] [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 36 T.C. 1.

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in virtue of his office or in virtue of his profession or vocation and otherwise than as a mere present I think that it is liable to tax. I cannot accept the view that Dr. Smith's services at the hospital were not within the scope of his profession, and in all the circumstances of the case my decision here must be for the Crown, and the appeal will be allowed.

As regards the question of the proper year of assessment Wynn-Parry J. has already decided that it was not 1949–1950: see *Tait* v. *Smith*.[16] I have not had any argument upon whether it was 1947–1948 or 1948–1949, and the case must be referred back to the commissioners on the question of the proper year in which the assessment is to be made.

Appeal allowed; case remitted to commissioners for year of assessment to be made.

Solicitors: *Solicitor of Inland Revenue; Hempsons.*

I. G. R. M.

[16] (1954) 35 T.C. 79.

[COURT OF APPEAL.]

C. A.

1956
June 11, 12.

DENNING, BIRKETT AND PARKER L.JJ.

* KARSALES (HARROW) LTD. *v.* WALLIS.

[Plaint No. M. 36.]

Contract — Exceptions clause — Breach of fundamental term — Hire-purchase—Car in good condition subject of hire-purchase agreement —Car unusable when delivered—Hirer's refusal to accept—Lender disentitled from relying on exceptions clause.

Hire-purchase—Hirer's refusal to accept—Lender's remedy—Claim for unpaid hiring charges not sustainable—Lender's remedy in damages only.

A garage owner was shown a second-hand Buick car in excellent condition and wished to buy it. Through the seller he applied to a finance company, which neither saw nor inspected the car; but an arrangement was made by which the plaintiff firm bought the car from the seller and sold it to the finance company; and the garage owner then entered into a hire-purchase agreement with the finance company on the terms of printed forms which included an exceptions clause that "No condition or warranty that the "vehicle is roadworthy, or as to its age, condition or fitness for "any purpose is given by the owner or implied herein." After contract forms had been signed and exchanged the seller brought the car to the garage owner's premises at night; but when the garage owner inspected it he found that it was in a deplorable state; it had been towed to his premises, parts were missing, new parts had been replaced by old, and the engine was so defective that the car would not go. The cost of putting it into its original condition was estimated at £150. He refused to accept it, and the

seller removed it; and thereafter the garage owner made no payments under the agreement. Later the hire-purchase company assigned their rights under the agreement to the plaintiff firm, which sued the garage owner as hirer for unpaid hiring charges:—

Held, (1) that the plaintiffs could not rely on the exceptions clause, since under this hire-purchase agreement the delivery of the car in such condition that it would not go was a breach of a fundamental term going to the root of the contract; and accordingly the claim for unpaid hiring charges must fail.

Dicta in *Pinnock Bros.* v. *Lewis and Peat Ltd.* [1923] 1 K.B. 690, 695; *Alexander* v. *Railway Executive* [1951] 2 K.B. 882; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442; and *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co.* (*No.* 1) [1953] 1 W.L.R. 1468; [1953] 2 All E.R. 1471 applied.

Per Denning L.J. The lender under this agreement was under an implied obligation to deliver the car in substantially the same condition as it was in when it was first inspected by the hirer and to keep it pending delivery in suitable order and repair for the purposes of the bailment.

Per Parker L.J. What was here delivered was not what was contracted for. *Andrews Brothers* (*Bournemouth*) *Ltd.* v. *Singer & Co. Ltd.* [1934] 1 K.B. 17; 50 T.L.R. 33 considered.

(2) That where goods were let on hire-purchase and the hirer refused to accept them, the lenders (and a fortiori the plaintiffs as assignees) could not claim rent, the only remedy in such circumstances being a claim for damages.

National Cash Register Co. Ltd. v. *Stanley* [1921] 3 K.B. 292; 37 T.L.R. 776 followed.

APPEAL from Judge Rawlins, sitting at Aldershot County Court.

In December, 1954, the defendant, Frank Ernest Wallis, the owner of a garage at Bagshot, was approached by one Stinton, who wished to sell him a second-hand Buick motor-car at a price of £600. The defendant inspected it and found it to be an excellent car; but as he had not the money to pay the price asked, he said that he would buy it through a hire-purchase finance company if Stinton could make the necessary arrangements. Stinton at first put forward forms for one hire-purchase finance company, which rejected the application. He then suggested Mutual Finance Ltd., and obtained their forms, which the defendant signed in blank over a sixpenny stamp with no details filled in. The defendant did not pay any sum cash down to Stinton nor did he take delivery of the car, thus departing from the usual practice in such matters. Stinton took the forms away and kept the car in his possession. In due course the forms were submitted to Mutual Finance Ltd. through an intermediary, the plaintiff firm, Karsales (Harrow) Ltd. Mutual Finance Ltd. accepted the application; and the transaction was concluded by the plaintiffs, Karsales Ltd., buying the car from Stinton and reselling it to Mutual Finance Ltd., and by Mutual Finance Ltd. then letting it out on hire-purchase terms to the defendant, on the terms of the form which the defendant had signed. Those terms included clause 3 (g), which provided as follows: "No condition or warranty that the

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"vehicle is roadworthy, or as to its age, condition or fitness for "any purpose is given by the owner or implied herein."

No one in the offices of the finance company inspected the car, but details were filled in on the form as to the registration number of the car, the total price, the initial payment, and the instalments; it was dated February 10, 1955, and a copy was sent to the defendant, who accepted the form without objection. As the car had not yet been delivered, the defendant got into touch with Stinton, who said that he would not deliver it because he had not been paid (presumably by the finance company), but that he would make inquiries. About a week later the vehicle was left late at night outside the defendant's garage. He examined it next morning and found that it was the same Buick car which he had previously inspected, in the sense that it had the same body and engine and registration number; but it had been badly damaged. It had evidently been towed in; there was a rope attached to the front bumper; the tyres had been changed, the new tyres being taken off and old ones put on; the wireless set had been removed from it; the chrome strips round the body were missing; and when the defendant had a fitter look at the engine, the cylinder head was found to be off, all the valves were burnt, and there were two broken pistons. The car would not go. The defendant told Stinton that he would not accept the car in that condition; it was towed away to Stinton's place and was never put right. It was estimated that the cost of putting it into the condition in which the defendant had first seen it would be £150.

On November 24, 1955, Mutual Finance Ltd. assigned all their rights under the hire-purchase agreement to the plaintiff intermediary, Karsales (Harrow) Ltd.; and in January, 1956, Karsales brought proceedings against the defendant to recover £161 3s. 4d. as unpaid hiring charges together with interest for ten months, and damages.

By his defence the defendant admitted that there had been an agreement made on February 10, 1955, between himself and Mutual Finance Ltd. to let to him with option to purchase a Buick motor-car registered number KKC 822; but he claimed that it was a term and condition, express or implied, of the agreement that the car to be hired thereunder should correspond with the car submitted by Stinton, either on his own behalf or as the agent of the plaintiffs or Mutual Finance Ltd., to the defendant prior to entering into the agreement. He admitted that in or about February, 1955, after the date of the agreement, the plaintiffs or Mutual Finance Ltd. or the said Stinton delivered to his garage a Buick motor-car index no. KKC 822, but said that same did not correspond with the car submitted to the defendant prior to entering into the agreement and was not reasonably fit for the purpose; that he had refused to accept the car; and that the plaintiffs or Mutual Finance Ltd. or the said Stinton removed the car forthwith from his premises. There followed particulars of the defects as set out above.

The county court judge in his judgment on April 17, 1956, said that the car when handed over was in a deplorable state. He held, however, that all the representations in the contract were covered by the language of the exemption clause 3 (g) and that, accordingly, unfortunate as it might be, any condition or warranty in the transaction must be excluded from his consideration; and that after a party had signed such a contract, then, although a car in a totally different condition was delivered, the party could not complain, but was bound by the agreement. He held further that the agreement dated February 10, 1955, was effective on that date even though the car was not available for the defendant until later; and that Stinton was not the agent of Mutual Finance Ltd., and that, accordingly, they were not liable if he had been guilty of fraud. He gave judgment for the plaintiffs for £173 7s. 4d. and awarded them costs.

The defendant appealed.

John Lloyd-Eley for the defendant.
Marcus Anwyl-Davies for the plaintiff company.

The following cases were cited in argument: *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes* [1]; *National Cash Register Co. Ltd.* v. *Stanley* [2]; *Robertson* v. *Amazon Tug and Lighterage Co. Ltd.* [3]; *Alexander* v. *Railway Executive* [4]; *Smeaton Hanscomb & Co. Ltd.* v. *Sasson I. Setty, Son & Co. (No. 1)* [5]; *Bontex Knitting Works Ltd.* v. *St. Johns Garage* [6]; *Manchester Liners Ltd.* v. *Rea Ltd.* [7]; *Karflex Ltd.* v. *Poole* [8]; *Wright* v. *Melville* [9]; *Pinnock Brothers* v. *Lewis & Peat Ltd.* [10]

DENNING L.J. stated the facts, and continued: Mr. Lloyd-Eley, on behalf of the defendant, says that he agreed to take on hire-purchase terms a Buick motor-car which he had seen a week or two before he had signed these documents. He says that it was the duty of the finance company to see that there was delivered to the defendant a motor-car which corresponded to the car he had seen. He says that, owing to its condition on delivery, there was a fundamental breach by the finance company and that they cannot recover the instalments. In answer, Mr. Anwyl-Davies, on behalf of the finance company, says that there was delivered to the defendant a Buick motor-car of the registration number specified in the agreement, and that they are in no way responsible for its condition on delivery. They rely on clause 3 (g)

[1] [1921] 1 K.B. 377.
[2] [1921] 3 K.B. 292; 37 T.L.R. 776.
[3] (1881) 7 Q.B.D. 598.
[4] [1951] 2 K.B. 882; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442.
[5] [1953] 1 W.L.R. 1468; [1953] 2 All E.R. 1471.
[6] 60 T.L.R. 44; [1943] 2 All E.R. 690; affd. 60 T.L.R. 253; [1944] 1 All E.R. 381n.
[7] [1922] 2 A.C. 74; 38 T.L.R. 526.
[8] [1933] 2 K.B. 251; 49 T.L.R. 418.
[9] (1828) 3 C. & P. 542.
[10] [1923] 1 K.B. 690; 39 T.L.R. 212.

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of the hire-purchase agreement: "No condition or warranty that "the vehicle is roadworthy, or as to its age, condition or fitness "for any purpose is given by the owner or implied herein." The judge held that that clause in this document meant that the hire-purchase company were not responsible in any way for the condition of this car when it was delivered, and that although it was in this deplorable condition, they could still recover the instalments due under the agreement; and that, even though the car was rejected by the defendant, they could still recover them.

In my opinion, under a hire-purchase agreement of this kind, when the hirer has himself previously seen and examined the motor-car and made application for hire-purchase on the basis of his inspection of it, there is an obligation on the lender to deliver the car in substantially the same condition as when it was seen. It makes no difference that the lender is a finance company which has bought the car in the interval without seeing it. The lender must know, from the ordinary course of business, that the hirer applies on the faith of his inspection and on the understanding that the car will be delivered in substantially the same condition: and it is an implied term of the agreement that pending delivery the car will be kept in suitable order and repair for the purposes of the bailment. This is supported by Story on Bailment, articles 383 to 385, and *Robertson* v. *Amazon Tug and Lighterage Co.*[1]

The plaintiffs say that there can be no such implication in this case in view of the express terms of clause 3 (g): but the law about exempting clauses has been much developed in recent years, at any rate about printed exempting clauses, which so often pass unread. Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses. I would refer in this regard to what was said by Roche J. in the "copra cake" case (*Pinnock Brothers* v. *Lewis & Peat Ltd.*[2]) and the judgments of Devlin J. in *Alexander* v. *Railway Executive*[3] and *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co.* (*No.* 1),[4] and the recent case in this court of *J. Spurling Ltd.* v. *Bradshaw*,[5] and the cases there mentioned.

[1] (1881) 7 Q.B.D. 598.
[2] [1923] 1 K.B. 690, 695; 39 T.L.R. 212.
[3] [1951] 2 K.B. 882; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442.
[4] [1953] 1 W.L.R. 1468; [1953] 2 All E.R. 1471.
[5] [1956] 1 W.L.R. 461; [1956] 2 All E.R. 121.

The principle is sometimes said to be that the party cannot rely on an exempting clause when he delivers something "different in "kind" from that contracted for, or has broken a "fundamental "term" or a "fundamental contractual obligation," but these are, I think, all comprehended by the general principle that a breach which goes to the root of the contract disentitles the party from relying on the exempting clause. In the present case the lender was in breach of the implied obligation that I have mentioned. When the defendant inspected the car before signing the application form, the car was in excellent condition and would go: whereas the car which was subsequently delivered to him was no doubt the same car, but it was in a deplorable state and would not go. That breach went, I think, to the root of the contract and disentitles the lender from relying on the exempting clause.

The only real difficulty that I have felt in the case is whether this point is put with sufficient clarity in the pleadings. It is not put as clearly as one could wish. Nevertheless, I have always understood in modern times that it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them. Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded. Looking at this defence, it is quite plain that the defence pleaded all the material facts which I have mentioned, and it is, I think, sufficient.

There is a further point. It is quite plain from the authorities (for example, *National Cash Register Co. Ltd.* v. *Stanley* [6]) that when goods are let on hire-purchase and there is a refusal by the hirer to take them, the proper remedy of the lender is not to claim for arrears of instalments but for damages for failure to accept delivery. In this case, therefore, in any event there could not be a claim for arrears of instalments but only for damages. The assignment by Mutual Finance Ltd. to Karsales (Harrow) Ltd. only covers moneys payable under the agreement. It does not cover a claim to damages. On that ground also the present plaintiffs could not succeed in this action. I am therefore of opinion that the appeal should be allowed.

BIRKETT L.J. The plaintiffs' case against the defendant is that he owes to them certain hire charges on a motor-car and that he would continue to be liable for further charges (I think 23 in all) in these most unusual circumstances. The answer which the defendant makes is that he is not liable at all; and he points to certain matters of extreme importance. He says: "It is quite "true that originally this matter arose because there was a Buick "car owned by a man called Stinton"—and it would appear from all that one has heard in this matter that Mr. Stinton was really the villain of this piece—"it was a good car, and I liked it, and "in my business I would like to have had the car."

[6] [1921] 3 K.B. 292; 37 T.L.R. 776.

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Karsales (Harrow) Ltd. came in by way of assignment from Mutual Finance Ltd.: for it was clearly one of those transactions where some additional finance was needed if the transaction was to be carried through. When the moment came for a purported delivery of this car after the documents had been signed in blank, it is most astonishing that the thing that was brought as a car (of which possession was to be taken by the defendant) was a car which would not travel as a car, but which had to be towed there. It was towed there and left outside the premises late at night, and was ultimately towed away again. It is on that point only that I desire to say a word in support and supplement of what my Lord has already said. The defendant said: "The original Buick "car is the car I had seen before and which I would like to have." Clearly it was the duty of the finance company in those circumstances, having regard to the history, to supply to the defendant a "car," in the ordinary sense of that term, and not something that needed towing, because in the true meaning of words a car that would not go was not a car at all; and on the evidence before the county court judge that was the kind of article which was supplied.

This matter was raised in the court below, and it is the only matter which has occasioned me any anxiety at all. It was said that in the court below Mr. Lloyd-Eley had submitted to the county court judge that the defendant got something he did not contract for. In his judgment the judge said: "Mr. Lloyd-Eley "says that in certain circumstances you can read into a contract a "term similar to that in the Sale of Goods Act dealing with "description of the article hired. He says that the description "given in December or January, 1955, was not complied with, "and that since one can read such a term into a hire-purchase "contract, there was a fundamental breach of the agreement, on "which the defendant is entitled to rely. At one stage in his "argument Mr. Lloyd-Eley submitted that something other than "that contracted for had been delivered but was forced to admit "that this allegation had not been pleaded."

[His Lordship then considered the judge's notes in the submissions made before him, and the pleadings as set out above, and concluded that the submission had been made in the county court, but that the judge had said he was not able to accept the main argument which was being submitted and that then Mr. Lloyd-Eley said he would not press it any further. His Lordship continued:] I agree with what my Lord has said with regard to this matter. I think that it was quite clearly here shown that there was a fundamental breach—indeed, those are the very words that were the words of the submission that was made. It may be put in alternative forms—that the thing delivered was not the thing contracted for, or words of that kind; but it seems to me that the finance company, being in breach, and fundamentally in breach, cannot rely, as they have sought to rely, on the provisions of clause 3 (g) in the written agreement. In those circumstances, therefore, I think that the defendant is entitled to

succeed and should have succeeded in the court below. I would allow the appeal.

PARKER L.J. I have come to the same conclusion. I think it is the duty of a hire-purchase finance company, which is letting out a chattel on hire-purchase, to ascertain that the chattel is reasonably fit for the purpose for which it is expressly hired. It is for that reason that it has become common practice for hire-purchase finance companies to insert exception clauses. In the present case the company had inserted a very extensive clause in their agreement, clause 3 (g). I need not read the whole of it, but the opening words are: "No condition or warranty that the "vehicle is roadworthy, or as to its age, condition or fitness for "any purpose is given by the owner or implied herein." Accordingly, Mutual Finance Ltd. and their assignees, the plaintiffs, said (in effect) that it does not matter what is delivered so long as it bears the appellation of a "Buick" car as described in the agreement, and that the hirer is bound to take it.

But, in my judgment, however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term. We were referred to a number of cases, the most recent of which, I think, is that decided by Devlin J., *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co.* (*No.* 1),[7] in which Devlin J. said[8]: "It is, no doubt, a principle of construc-"tion that exceptions are to be construed as not being applicable "for the protection of those for whose benefit they are inserted "if the beneficiary has committed a breach of a fundamental term "of the contract; . . . I do not think that what is a fundamental "term has ever been closely defined. It must be something, I "think, narrower than a condition of the contract, for it would be "limiting the exceptions too much to say that they applied only "to breaches of warranty. It is, I think, something which under-"lies the whole contract so that, if it is not complied with, the "performance becomes something totally different from that "which the contract contemplates."

Applying that to the facts of this case it seems to me that the vehicle delivered in effect is not properly described (as the agreement describes it) as a motor vehicle, "Buick," giving the chassis and engine number. By that I am not saying that every defect in a car which renders it for the moment unusable on the road amounts to a breach of a fundamental term; but where, as here, a vehicle is delivered incapable of self-propulsion except after a complete overhaul and in the condition referred to by my Lord, it seems to me that it is abundantly clear that there was a breach of a fundamental term and that, accordingly, the exceptions in clause 3 (g) do not apply.

I think the same result is achieved by saying, in effect, that what was delivered was not what was contracted for; and I think

[7] [1953] 1 W.L.R. 1468. [8] Ibid. 1470.

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that *Andrews Brothers (Bournemouth) Ltd.* v. *Singer & Co. Ltd.*[9] might well have been decided on the basis that there had been a breach of a fundamental term. In that case the contract was for the sale of new Singer cars, and again there was an elaborate exception clause. Scrutton L.J. in that case held that, there being an express term that what was sold was a new Singer car, and there having been a breach of that express term, the exception clauses dealing with implied conditions and warranties had no application.[10]

In my view the position is perfectly clear, and my only doubts in this case have arisen by reason of the pleadings. All I desire to say on that is that, for the reasons given by my Lords, I think it is open to this court to decide the case on that ground.

I should add that, in my view, these proceedings for arrears of instalments cannot possibly be sustained on any view. It is clear from the cases to which we were referred (*National Cash Register Co. Ltd.* v. *Stanley*,[11] and *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes*[12]) that, unless delivery of the chattel has been made and accepted, the only possible action is for damages and not for rent. In this case, by reason of the form of the assignment, if delivery was not made and accepted, the plaintiffs must fail. As to delivery, it is, I think, quite plain that no delivery was made until, at the end of February or early in March, the vehicle was towed and left outside the defendant's premises. Mr. Anwyl-Davies has argued that thereafter delivery was accepted because the vehicle was not at once returned to Mutual Finance Ltd.; nor, indeed, were they immediately notified; but it was sent back to Stinton. I do not think that that really amounts to an acceptance of delivery. Stinton, in leaving it outside the defendant's premises, must have been acting as agent of the finance company to deliver the vehicle, and all that the defendant did was immediately to return it to that same agent. For these reasons it seems to me that delivery was never accepted, and the only claim could be a claim in damages. Accordingly, I would allow this appeal.

Appeal allowed.

Solicitors: *Sampson & Co.; Horne, Engall & Freeman, Egham.*

M. M. H.

[9] [1934] 1 K.B. 17; 50 T.L.R. 33.
[10] [1934] 1 K.B. 17, 22–23.
[11] [1921] 3 K.B. 292.
[12] [1921] 1 K.B. 377.

[COURT OF APPEAL.]

* SANSOM *v.* SANSOM.

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1956
July 9.

Denning, Birkett and Parker L.JJ.

PRACTICE NOTE.

Court of Appeal—Notice of appeal—Form—Specifying grounds of appeal—Rules of the Supreme Court (Appeals), 1955, *Ord.* 58. *Costs—New rules—Cause of extra expense.*

On an application to the Court of Appeal by the petitioner in divorce proceedings for leave to appeal notwithstanding that time had expired it was stated that some delay had been occasioned by the necessity for stating the grounds of appeal as required by the substituted R.S.C., Ord. 58, which came into operation on April 10, 1956, and which provides: "Rule 3 (2): Notice of appeal "may be given either in respect of the whole or in respect of any "specified part of the judgment or order of the court below; and "every such notice shall specify the grounds of the appeal and "the precise form of the order which the appellant proposes to "ask the Court of Appeal to make. (3) Except with the leave "of the Court of Appeal, the appellant shall not be entitled on "the hearing of the appeal to rely upon any grounds of appeal, "or to apply for any relief, not specified in the notice of appeal."

John Latey for the petitioner. There has been some puzzlement and concern among members of the Bar as to the detail in which the Court of Appeal will require the grounds of appeal to be set out under the new rule.

Donaldson Loudoun for the respondent.

DENNING L.J. I am sorry that these new rules take more time. This is the second case today in which an application and more expense have been incurred because of the new rules.

It is not intended that there should be elaborate grounds of appeal set out at great length. They should be short and simple. The object of the rule is to eliminate points which are no longer in controversy so that the parties need not go to the expense of copying documents or preparing the case on those points. For that purpose the grounds of appeal should state the broad issues that are to be raised in the appeal, but should not go into the detailed reasons in support of them; otherwise there will be additional expense and delay. If a special point arises later a letter may be written to extend the grounds of appeal. But do not let grounds of appeal get into such a state that they are treated as pleadings and elaborated to extend to many pages. That would be contrary to the intention of the framers of the rule.

Solicitors: *Devonshire & Co.; Huntley, Son & Rowlands.*

M. M. H.

[CHANCERY DIVISION.]

1956
June 19.

Upjohn J.

* SOUTHEY-ROBERTS ESTATES LTD. *v.* ROE.

PRACTICE NOTE.

[1955 S. 1847.]

Practice — Summons for directions — Setting down action for trial — Chancery Division—Standing over of part of order concerning fixing of place and mode of trial until after discovery—R.S.C., Ord. 30, *rr.* 1, 2; *R.S.C., Ord.* 36.

The Annual Practice in Form 3A of Appendix K sets out an extended pro forma for use on summons for directions; and that part of it dealing with setting down was inserted to deal with actions dealt with by R.S.C., Ord. 36, rr. 1A, 1B, 1C,[1] where no

[1] R.S.C., Ord. 30, r. 1: "(1) In "every action to which this rule "applies, the plaintiff shall, with a "view to providing an occasion for "the consideration by the court or a "judge of the preparations for the "trial of the action, so that—(*a*) all "matters which must or can be dealt "with on interlocutory applications "and have not already been dealt "with may so far as possible be dealt "with; and (*b*) such directions may "be given as to the future course of "the action as appear best adapted to "secure the just, expeditious and "economical disposal thereof, take out "within seven days from the time "when the pleadings are deemed to "be closed, a summons (in these rules "referred to as a summons for direc-"tions) returnable in not less than "twenty-one days." By rule 2: "(3) "If, when the summons for directions "first comes to be heard, the court or "judge considers that it is expedient "to adjourn the consideration of all "or any of the matters which are by "the subsequent rules of this order "required to be considered on the "hearing of the summons for direc-"tions, the court or judge shall deal "forthwith with such of those matters "as the court or judge considers can "conveniently be dealt with forthwith "and adjourn the consideration of the "remaining matters and shall en-"deavour to secure that all other "matters which must or can be dealt "with on interlocutory applications "and have not already been dealt "with are dealt with either then "or at a resumed hearing of the "summons for directions. (4) Subject "to the provisions of paragraphs (5) "and (6) of this rule, no order under "rule 1 of Order 36 as to the place "or mode of trial and no order fixing "a date for the trial shall be made "until all the matters which, by the "subsequent rules of this order, are "required to be considered on the "hearing of the summons for direc-"tions have been dealt with."

R.S.C., Ord. 36, r. 1: "The order "made on the summons for directions "in every cause or matter, shall "direct whether the cause or matter "is to be tried with a jury, or without "a jury (whether by a judge or other-"wise), and shall also direct where "the cause or matter is to be tried, "but the mode and place of trial so "directed may be subsequently "altered for sufficient cause on a "summons or a notice under the "summons or order for directions "issued by either party without any "appeal from the former direction. If "the mode or place of trial is so "altered the cause or matter shall "thereupon be transferred to the "appropriate list. . . ."

R. 1A: "(1) Where a cause or "matter is directed under the last "foregoing rule to be tried in the "Queen's Bench Division in London "(otherwise than in the Commercial "List), the order—(*a*) shall contain "an estimate of the length of trial; "(*b*) shall direct the cause or matter "to be set down for trial, within such "period as may be specified in the "order. . . ."

R. 1B: "Notwithstanding anything "in this Order or in any other pro-"visions of these rules:—(*a*) civil pro-"ceedings by or against the Crown in "the High Court shall not, except "with the consent of the Crown, be "directed to be tried elsewhere than

notice of trial is necessary. In those cases where no notice of trial is necessary it is right that the court should make an order concerning entry of trial, but in cases where a notice of trial is necessary, which covers the ordinary action in the Chancery Division, the setting down provisions of the pro forma are inappropriate, and, accordingly, should not normally be used. Further, since in the normal case the court cannot be satisfied, at any rate until after discovery, whether all matters have been dealt with as required by R.S.C., Ord. 30, rr. 1 and 2, the order fixing the place and mode of trial ought not to be made until after conclusion of discovery. The practice of standing over paragraph 29 of the pro forma dealing with the place and mode of trial until after discovery ought to be followed.

PROCEDURE SUMMONS.

Application by the defendant under the summons for directions for an order to set aside the entry for trial of the action by the plaintiff on the ground that inspection of documents not having been completed, the entry for trial was premature.

The facts are set out in the judgment.

E. I. Goulding for the plaintiffs.

G. M. Parbury for the defendants.

The following practice note, not referred to in the judgment, was cited in argument: *Practice Note* [1901] W.N. 94.

UPJOHN J. This summons raises a point of some general importance on the proper procedure on the hearing of a summons for directions. The pleadings were closed seven days after delivery of the defence, which was delivered on January 16, 1956, and on February 27, 1956, a summons for directions was taken out by the plaintiffs which came before the master on March 23, 1956. He ordered affidavits of documents in the usual form and ordered "that the plaintiffs and the defendant respectively do "within 10 days after such affidavit shall have been filed at all "seasonable times upon reasonable notice produce at the offices "of their respective solicitors the documents which by such "affidavits shall appear to be in their possession or power except "such of the said documents (if any) as they may by such "affidavits respectively object to produce And the defendants "and the plaintiff respectively or their respective solicitors and "agents are to be at liberty to inspect and peruse the documents "so produced and to make notes of their contents and are to be

"at the Royal Courts of Justice, "London. . . ."

R. 1c: "Where a cause or matter "is directed under rule 1 of this "Order to be tried at Liverpool or "Manchester the order shall direct "the cause or matter to be set down "for trial within such period as may "be specified in the order. . . ."

R. 11: "Notice of trial may be "given in any cause or matter by the "plaintiff or other party in the posi-"tion of plaintiff as soon as the place "and mode of trial have been fixed."

R. 11A: "Where an order has been "made under rule 1A, rule 1B, or "rule 1c of this Order directing a "cause or matter to be set down for "trial . . . no notice of trial shall be "required. . . ."

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Upjohn J.

" entitled to be supplied with copies thereof and extracts there-
" from as they respectively shall be advised upon payment
" therefor at the prescribed rate. . . . And it is ordered that this
" action be tried in Middlesex before a judge alone and be set
" down for trial within 14 days after such inspection of documents
" as aforesaid shall have been completed."

Pursuant to that order the defendant filed his affidavit of documents on April 12, 1956. That was rather out of time. The plaintiffs were even more out of time, for they filed their affidavit of documents on May 10, 1956. The affidavit contained a very large number of documents indeed. I am told that there are some 600 documents disclosed and numbers of files and numbers of documents described thus " sundry papers and docu-
" ments contained in the top left-hand drawer of desk used by
" the defendant." Nothing further happened, and on June 1, 1956, notice of trial was served. That notice was not accepted and the proceedings took place before the master.

At this stage I must refer to a number of Rules of the Supreme Court. R.S.C., Ord. 30, r. 1 (1), which came into force in 1954, is in these terms: [His Lordship referred to r. 1 (1) and r. 2 (3) and (4) and R.S.C., Ord. 36, r. 1, and continued:] R.S.C., Ord. 36, r. 1A, deals with certain actions in the Queen's Bench Division in London and r. 1B with cases by or against the Crown and r. 1C with actions ordered to be tried at Liverpool and Manchester.

R.S.C., Ord. 36, r. 11, deals with notice of trial: " Notice
" of trial may be given in any cause or matter by the plaintiff
" or other party in the position of plaintiff as soon as the place
" and mode of trial have been fixed." Rule 11A deals with actions in the Queen's Bench Division under r. 1A and under r. 1B and r. 1C. That provides, shortly, that in those actions no notice of trial shall be required, but that the plaintiff may set the action down and if he does not the defendant may apply to set it down or may apply to the court or judge to dismiss the action for want of prosecution. Rule 12 deals with the ordinary case where the action is of a type which requires a notice of trial to be given under r. 11, and provides that if the plaintiff does not set it down within six weeks after the time he first became entitled to give notice under r. 11, the defendant may do so or may apply for the action to be dismissed for want of prosecution. I need not read r. 14, which deals with the length of trial. Rule 15 is in these terms: " Notice of trial shall be
" given before entering the trial: and the trial may be entered
" notwithstanding that the pleadings are not closed, provided
" that notice of trial has been given."

Rule 16 provides: " In London and Middlesex, Manchester
" and Liverpool and such other places as the Lord Chancellor
" shall from time to time direct, unless within six days after
" notice of trial is given, the trial shall be entered by one party
" or the other, the notice of trial shall be no longer in force."

Therefore, the procedure where, in an action such as this, a notice of trial has to be given seems reasonably plain. The plaintiff may give a notice of trial any time after the place and mode of trial has been fixed. If he does not avail himself of that within six weeks, the defendant can do so. When a notice of trial has been given by one party or another, the matter must be entered, and if it is not entered within six days after the notice then the notice itself becomes void.

It is submitted that I must read the master's order in the light of the rules which I have read, and it is said that, reading it in the light of those rules, the plaintiff is entitled to set down the action at any time after the place and mode of trial are fixed, and it is limited only by this, that it must not be later than 14 days after inspection of documents has been completed. If that be right, then the notice of trial is a good one; but, on the other hand, it is said that, complying with the terms of the order, the action can only be set down within a period of 14 days starting after the completion of inspection of documents and concluding 14 days thereafter.

It is therefore a question of construction of the order of March 23, 1956, in the light of those rules. In my judgment the construction of the order is clear. The action is to be tried in Middlesex before a judge alone and is to be set down within 14 days after completion of inspection. That seems to me clearly to mean that it must be set down within a period of 14 days which starts after the completion of inspection and ends 14 days thereafter. The word "within" is, in my judgment, conclusive upon that point.

The question, therefore, is whether inspection of documents was completed when the notice of trial was given. That must necessarily be a question of fact. [His Lordship reviewed the evidence and came to the conclusion that inspection of documents had not been completed when the notice of trial was issued, and continued:] It seems to me that the notice of trial was not in accordance with the master's order because inspection had not in fact been completed. As the notice of trial is not in order, it follows that the action ought not to have been set down.

That is sufficient to dispose of this case, but during the interesting argument a point of some general importance has emerged. As is well known, the relevant R.S.C. Orders were substantially amended as the result of some recommendations made by the Supreme Court Committee on Practice and Procedure, and, as a result of the amendment of the rules, the forms were also amended. There is to be found a form in Appendix K No. 3A on page 2672 of the Annual Practice, 1956, a very greatly extended pro forma for use on summons for directions. It contains no less than 30 paragraphs, and paragraph 29 is this (ibid., at p. 2674): "Trial. Place: —— Mode: —— [Estimated "[length: —— to be set down within —— days and to be tried "[immediately after the action 19—, No. ——]." It appears

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that that form is in current use in the Chancery Division and there is indeed no objection to that; but it must be used in the light of the circumstances of each action.

It seems to me reasonably clear that the part of the pro forma which deals with setting down was inserted to deal with actions dealt with by R.S.C., Ord. 36, r. 1A, r. 1B and r. 1C, where no notice or trial is necessary. In those cases where no notice of trial is necessary it is right that the court should make an order about entry of trial; but in cases where a notice of trial is necessary, and that covers the normal action in the Chancery Division in London, it seems to me that the setting down provisions are inappropriate and, accordingly, should not normally be used. As I have already indicated, R.S.C., Ord. 36, really provides a code for giving notice of trial, and I am at a loss to understand what jurisdiction the court has in such cases to make orders about entry of an action for trial. In the present case the order was made out without objection from either side, and whether made per incuriam or not it is binding on them; but it was suggested that R.S.C., Ord. 64, r. 7, gave the court a power to make such an order. That rule enables the court or a judge to enlarge or abridge a time appointed by the rules and I am at a loss to understand how that can apply to this case.

Support for that view, although it does not cover this case, is to be found in *Saunders* v. *Pawley*.[1] There may well be cases where the plaintiff comes forward and asks, for example, at a rather late stage for leave further to amend his pleadings and it may be right to grant him that indulgence only on terms that he will undertake to give notice of trial and set down the action within a certain time, with the consequence that if he is not prepared to give that undertaking, then the indulgence will not be granted to him. I am not dealing with that case at all.

It was said that the opening words of R.S.C., Ord. 30, r. 1 (1), also gave the master adequate jurisdiction on the matter. I am unable to give such a broad construction to r. 1 (1). That only relates to the issue of a summons for directions.

There is another matter to which I draw attention. In this case the master, on the first hearing of the summons for directions before him, made an order as to the place and mode of trial. In simple cases that may be a proper order to make, and nothing I am saying is intended to fetter the discretion of a court in such cases: see R.S.C., Ord. 30, r. 2 (2); but in cases of any complication it cannot be right at that stage to fix the mode and place of trial for this reason: once that is fixed, then under R.S.C., Ord. 36, r. 11, the plaintiff can give notice of trial and so under r. 12 can the defendant later on. That is contrary to the letter and spirit of this new R.S.C., Ord. 30; the court, carrying out the spirit of those directions, ought to keep the matter under its control until it can see that the matters for consideration which

[1] (1885) 14 Q.B.D. 234.

are cast on the court by R.S.C., Ord. 30, rr. 1 and 2, are really dealt with.

I again refer, without rereading, to the express provisions of R.S.C., Ord. 30, r. 2 (4). Accordingly, in the ordinary case, as the court cannot be satisfied, at any rate until after discovery, whether all the matters have been dealt with, the order fixing the place and mode of trial ought not to be made until after the conclusion of discovery. I am told that in fact in many cases the practice is followed of standing over paragraph 29 of the pro forma dealing with the place and mode of trial until after completion of discovery. The matter is then brought back before the court and then further directions can be given according to circumstances. That seems to me the practice which ought to be followed.

To turn to this case I propose to set aside the notice of trial, and entry of trial must also be vacated.

Order accordingly.

Solicitors: *A. Archdeacon & Co.; Kenneth Brown, Baker, Baker.*

J. A. G.

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[CHANCERY DIVISION.]

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May 15, 16, 17; *June* 14.

Upjohn J.

Revenue — Profits tax — "Distribution" — Winding up distribution — Surplus assets distributed in liquidation — Whether a return of capital — Whether "gross relevant distribution" for purposes of profits tax—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 35 (1), 36 (1)—*Finance Act*, 1951 (14 *&* 15 *Geo.* 6, *c.* 43), *s.* 31 (1) (5).

Company—Winding up—Distribution of assets—Final distribution—Nature.

In 1952 an engineering company, of which the issued capital was £30,060, went into voluntary liquidation for the purpose of reconstruction, and its assets were transferred to a new company. After the transfer of assets to the new company and after the liquidator had paid all debts and liabilities of the company, including costs of winding it up, and after the distribution of shares in the new company, there remained a sum of cash belonging to the company, which amounted to £15,030. As a final step in the liquidation proceedings, the liquidator distributed this sum of cash to the executors of one shareholder and to the remaining shareholder, they being the only members of the company.

The Crown claimed that this sum was a "gross relevant "distribution" in respect of the last chargeable accounting period in which the trade or business of the company was carried on,

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within the meaning of section 35 (1) of the Finance Act, 1947,[1] having regard to the terms of section 31 (1) of the Finance Act, 1951:—

Held, that the distribution made by the liquidator was not a "gross relevant distribution" for profits tax purposes, since (1) it

[1] Finance Act, 1947, s. 35 (1): "Subject to the provisions of this "and the two next succeeding "sections, the gross relevant distribu- "tions to proprietors for any charge- "able accounting period of a body "corporate, society or other body, are "the total distributions to the mem- "bers of the body corporate, society "or other body, not being distribu- "tions allowable as deductions in "computing the profits of the trade "or business for any period for the "purposes of the profits tax, and "being either:—(*a*) dividends de- "clared not later than six months "after the end of that period which "are expressed to be paid in respect "of that period or any part thereof; "or (*b*) distributions (other than "dividends which, under paragraph "(*a*) of this subsection, are to be "treated as part of the gross relevant "distributions to proprietors for any "previous chargeable accounting "period) made in the period; or "(*c*) in the case of the last charge- "able accounting period in which the "trade or business is carried on, so "much of any distribution made after "the end of that period (not being a "distribution to which paragraph (*a*) "of this subsection applies) as is not "a distribution of capital, and, for "the purposes of paragraph (*c*) of this "subsection, the distributions which "are to be treated as distributions "of capital shall not, in the case of "distributions made by a body cor- "porate with a share capital, exceed "an amount equal to the total "nominal amount of the paid-up "share capital thereof together, where "the body corporate has issued "shares at a premium for cash, with "the aggregate of the amounts of the "premiums."

S. 36 (1): "Subject to the provi- "sions of the next succeeding sub- "section, wherever—(*a*) any amount "is distributed directly or indirectly "by way of dividend or cash bonus "to any person; or (*b*) assets are "distributed in kind to any per- "son; or (*c*) where the trade or "business is carried on by a body "corporate the directors whereof have "a controlling interest therein, an "amount is applied, whether by way "of remuneration, loans or otherwise, "for the benefit of any person, there "shall be deemed for the purposes "of the last preceding section to be "a distribution to that person of that "amount or, as the case may be, of "an amount equal to the value of "those assets: Provided that no sum "applied in repaying a loan or in "reducing the share capital of the "person carrying on the trade or "business shall be treated as a dis- "tribution."

Finance Act, 1951, s. 31 (1): "Subject to the provisions of this "section, where (*a*) whether . . . "a body corporate, unincorporated "society or other body capitalizes "any distributable sum; and (*b*) then "or thereafter, whether before or "after the passing of this Act but "after the tenth day of April, 1951, "any sum is applied in reducing its "capital, there shall be deemed for "the purposes of section 35 of the "Finance Act, 1947 (which defines "the expression 'gross relevant dis- "'tributions to proprietors' for "profits tax purposes), to be a dis- "tribution to the members of the "body corporate, society or other "body of an amount equal to the "sum so applied or to the total "amount of the distributable sums "previously capitalized by it as "aforesaid, whichever is the less, "taking place when the sum is so "applied."

Subs. (5): "In this section—'dis- "'tributable sum' means, in relation "to a body corporate, society or "other body, a sum which could be "utilized in making a distribution, "within the meaning of subsection "(1) of section 36 of the Finance Act, "1947, to the members thereof: "'capitalize' means capitalize by "means of an issue of paid up or "partly paid share capital or by the "paying up, in whole or in part, of "share capital already issued or by "the creation of loan capital, and "'capitalization' shall be construed "accordingly, and references to the "reduction of capital shall be deemed "to include references to the repay- "ment or return of share capital and "the repayment or redemption of "loan capital, other than loan capital "issued for full consideration paid in "cash to the body corporate, society "or other body or redeemable pre- "ference shares so issued."

was not a repayment or return of share capital within the meaning of section 31 of the Act of 1951, but a distribution of the assets or property of the company among the shareholders after discharging the liabilities and costs of liquidation, and that it was distributed as capital irrespective of its source; (2) even assuming that it was a return or repayment of share capital, it was excepted by section 35 (1) (*c*) of the Act of 1947 from being a "gross relevant "distribution," for it was a capital payment not exceeding the total nominal amount of paid up share capital; (3) a liquidator in such a winding up was not concerned to and would be unable to dissect the company's assets into income and capital, and no such operation was required to be carried out by section 35 of the Act of 1947.

Birch v. *Cropper* (1889) 14 App.Cas. 525; 5 T.L.R. 722 and *Inland Revenue Commissioners* v. *Burrell* [1924] 2 K.B. 52; 40 T.L.R. 562; 9 T.C. 27 applied.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated, so far as relevant, provided:—

At a meeting of the commissioners, held on January 21, 1955, Pollock and Peel Ltd. (in liquidation) (hereinafter called "the "respondent company") appealed against an assessment to profits tax as follows:—

Chargeable Accounting Period January 1, 1953 to October 31, 1953;

Distribution charge of . . . £22,033 10s. 2d. at 20 per cent.; Profits tax payable £4,406 14s. 10d.

The only matter in dispute was whether an amount of £15,030 cash distributed by the liquidator of the respondent company to its members was a "gross relevant distribution" within the meaning of section 35 (1) of the Finance Act, 1947, having regard to the terms of section 31 (1) of the Finance Act, 1951.

. . .

On the evidence before them the commissioners found the following facts admitted:—

(1) The respondent company was incorporated on May 12, 1942, to acquire and carry on an engineering business. Its share capital was £2,500 divided into 2,500 shares of £1 each of which 2,004 shares were issued. . . .

(2) In November, 1952, the respondent company's issued capital was increased from 2,004 shares of £1 each to 30,060 of £1 in pursuance of a special resolution passed on November 6, 1952, as follows:—"Capitalization of profits:—That it is "resolved that it is desirable to capitalize the sum of £28,056, "being part of the amount standing to the credit of a capital "reserve account and a profit and loss appropriation account, "and that such sum be capitalized accordingly and used for the "purpose of paying up as fully paid bonus shares 28,056 ordinary "shares of £1 each and that such bonus shares be issued and "allotted to the existing shareholders of the company on the "basis of fourteen new bonus shares for each ordinary share now "held."

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(3) At all material times the only directors of the respondent company were J. C. Pollock and his wife and they were the only shareholders until the death of J. C. Pollock on November 8, 1953.

(4) On October 31, 1953, the respondent company went into voluntary liquidation.

(5) As part of a scheme of reconstruction, the respondent company's trade or business was transferred on November 6, 1953, to a new company called Pollock and Peel, Ltd., in pursuance of an agreement made on that date between the liquidator of the respondent company and the new company. . . . Apart from a sum of cash (referred to hereafter), which was excluded from the said transfer on November 6, 1953, the new company took over all the assets of the respondent company's trade or business. The consideration for the transfer of assets consisted wholly of shares in the new company and those shares were received by the executors of J. C. Pollock and Mrs. Pollock, the sole members of the respondent company. It was common ground between the parties to the appeal that the distribution of the said shares to the executors of J. C. Pollock and Mrs. Pollock, being a distribution of shares in the new company in the course of the winding up of the respondent company, did not give rise to any liability to profits tax, because of a joint election by the two companies within the terms of section 36 (4) of the Finance Act, 1947.

(6) After the aforesaid transfer of assets to the new company and after the liquidator had paid all debts and liabilities of the respondent company, including costs of winding it up and after the distribution of shares in the new company there remained a sum of cash belonging to the respondent company amounting to £15,030. As a final step in the liquidation proceedings and subsequent to the date by which the respondent company ceased to carry on its trade or business the liquidator distributed the said sum of £15,030 cash to the executors of J. C. Pollock and Mrs. Pollock, the only members of the respondent company.

(7) Article 23 of the Articles of Association of the respondent company was as follows:

"In a winding up the liquidator may, with the sanction of an "extraordinary resolution, distribute all or any of the assets in "specie among the members in such proportions and manner as "may be determined by such resolution, provided always that "if any such distribution is proposed to be made otherwise than "in accordance with the existing rights of the members, every "member shall have the same right of dissent and other "ancillary rights as if such resolution were a special resolution "passed pursuant to section 23 of the Companies Act, 1929."

No extraordinary resolution pursuant to the said article was passed by the respondent company.

It was contended on behalf of the respondent company that:—(1) Section 35 (1) of the Finance Act, 1947, provides, in

relation to a distribution made by a body corporate with a share capital after the end of the last chargeable accounting period in which a trade or business is carried on that so much only of that distribution as was a distribution as is in excess of the nominal amount of the body corporate's paid-up share capital may be treated as a gross relevant distribution;

(2) the respondent company's last chargeable accounting period was the period from January 1, 1953, to the date of liquidation, October 31, 1953; as the sum of £15,030 paid by the liquidator to the members of the respondent company after October 31, 1953, was less than the nominal amount of its paid-up share capital (£30,060), the said sum of £15,030 (even if, which was not admitted, it was a distribution for profits tax purposes) was not a gross relevant distribution;

(3) the provisions of section 31 of the Finance Act, 1951, on which the Commissioners of Inland Revenue relied and which provide that in certain events certain sums are to be deemed to be distributions for the purpose of section 35 of the Finance Act, 1947, do not override those provisions of the said section 35, which limit the amount of the distributions made after the end of the last chargeable accounting period which may be treated as gross relevant distributions;

(4) the said sum of £15,030 paid by the liquidator of the respondent company to its members was not, for the purpose of section 31 (1) of the Finance Act, 1947, a sum applied in "reducing" the share capital of the respondent company; accordingly that provision did not operate to make the said sum of £15,030 a distribution for profits tax purposes;

(5) alternatively, only a rateable part of the said sum of £15,030 could be treated as a sum applied in "reducing" the share capital of the respondent company; the shares in the new company distributed by the liquidator were as much accepted by the members of the respondent company in satisfaction of their rights in the liquidation as was the said sum of £15,030;

(6) the appeal should succeed.

It was contended on behalf of the Commissioners of Inland Revenue that:—

(1) the said sum of £15,030 was a sum applied in reducing capital within the meaning of section 31 and was therefore deemed, for the purposes of the said section 35, to be a distribution of a like sum. . . .

(3) the said sum of £15,030 fell to be treated for the purposes of section 35 as a distribution and was accordingly a "gross "relevant distribution to proprietors" within the meaning of that section;

(4) the shares in the new company were not to be taken into account in arriving at the total gross relevant distributions, because section 36 (4) of the Finance Act, 1947, which applied to the respondent company and the new company by virtue of the election referred to above, provides that a distribution of shares

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shall not be deemed to be a distribution for the purposes of the said section 35;

(5) the appeal should be dismissed.

The commissioners gave their decision as follows:—

"We, the commissioners who heard the appeal, decided that "the provisions of section 31 of the Finance Act, 1951, did not "overrule the requirements in subsection (1) of section 35 of the "Finance Act, 1947, that for the purposes of paragraph (*c*) of "that subsection, distributions were to be treated as distributions "of capital except to the extent that they exceeded the paid up "share capital. There was no dispute that, when the respondent "company went into liquidation, its paid up share capital was "£30,060. That amount of £30,060 of share capital was greater "than the distribution by the liquidator of £15,030 to the "members of the respondent company and we held that the said "sum of £15,030 was not a 'gross relevant distribution to "'proprietors' for the purposes of a charge to profits tax."

[The appellant Commissioners of Inland Revenue, having declared their dissatisfaction with this decision, a case was stated, the point of law for the opinion of the High Court being, whether on the facts found by the special commissioners, their decision in favour of the respondent company was correct in law.]

Sir Reginald Manningham-Buller Q.C., A.-G., Sir Reginald Hills and *E. Blanshard Stamp* for the Crown.

Roy Borneman Q.C. and *Hilary Magnus* for the respondent company.

Cases cited in argument not referred to in the judgment: *Inland Revenue Commissioners* v. *Universal Grinding Wheel Co. Ltd.*[2]; *Inland Revenue Commissioners* v. *Bell & Nicholson Ltd.*[3]; *Farmer* v. *Scottish North American Trust Ltd.*[4]; *Verner* v. *General and Commercial Investment Trust*[5]; *Canada Southern Railway Co.* v. *International Bridge Co.*[6]; *R. A. Hill* v. *Permanent Trustee Co. of New South Wales.*[7]

Cur. adv. vult.

June 14. UPJOHN J. read the following judgment. This case raises an interesting point on profits tax. Shortly, the question is whether for the purposes of the tax a payment made to shareholders in the winding up of a company after all liabilities have been discharged is to be treated as a "gross relevant distribu-"tion" in respect of the last chargeable accounting period in which the trade or business of the company was carried on.

The company was incorporated in 1942, with an issued and

[2] [1955] A.C. 807; [1955] 2 W.L.R. 892; [1955] 2 All E.R. 291; 35 T.C. 551.

[3] [1952] W.N. 61; [1952] 1 T.L.R. 301; [1952] 1 All E.R. 428; sub nom. *I. R. C.* v. *Bell & Nicolson*, 33 T.C. 130.

[4] [1912] A.C. 118; 28 T.L.R. 142; sub nom. *Scottish North American Trust* v. *Farmer*, 5 T.C. 698, 702.

[5] [1894] 2 Ch. 239; 10 T.L.R. 393.

[6] (1883) 8 App.Cas. 723.

[7] [1930] A.C. 720.

fully paid up capital of 2,004 shares of £1 each, to acquire and carry on an engineering business. The company prospered and in 1952 its capital was increased to £30,060 and 28,056 new shares were issued to the shareholders as fully paid shares, by applying a sum of £28,056 then standing to the credit of reserve and profit and loss accounts to payment in full of the amount of the shares. Briefly, the company issued new fully paid bonus shares on the basis of 14 new shares for each old share. Thereafter, the issued capital consisted of 30,060 fully paid shares of £1 each all of one class. There were only two shareholders, Mr. S. C. Pollock, until his death on November 8, 1953, and his wife.

On October 31, 1953, the company went into voluntary liquidation for the purposes of reconstruction. A new company was formed, which, pursuant to an agreement dated November 6, 1953, took over all the assets of the old company, except a sum of cash which was retained by the liquidator. The consideration for the transfer was an issue of shares in the new company, which were in due course distributed to Mrs. Pollock and the executors of Mr. Pollock. This gave rise to no claim to profits tax because of a joint election by the old and new companies within section 36 (4) of the Finance Act, 1947. Whether apart from such election there would have been a valid claim is a matter which has not been argued before me.

Out of the cash retained the liquidator discharged all liabilities of the old company and costs of administration and was left with the sum of £15,030 in hand available for distribution among the shareholders, i.e., of exactly 10s. per share in the old company; as a final step in the liquidation and subsequent to the date on which the company ceased to carry on its trade the liquidator paid this sum away to the shareholders in proportion to their shareholding. This sum so applied is claimed by the Crown to be a "gross relevant distribution" for the purposes of profits tax in the last chargeable accounting period in which the trade or business was carried on, i.e., the period from January 1, 1953, to October 31, 1953. That is the period and the only period in which the Crown alleges that the payment falls so to be described.

I need not trace the history of profits tax. It is a tax on profits, but the nature of the tax was fundamentally altered by the Finance Act, 1947, in that by section 30, which was the charging section, the rate of tax was in effect made to depend on the "net relevant distributions" made to proprietors; profit which is not distributed pays tax at a lower rate than profit which is distributed. I am only concerned with the machinery sections numbered 34 to 36 of that Act, which purport to lay down rules for ascertaining the "net relevant distribution" for the purposes of section 30.

Section 34 defines the "net relevant distribution" as being a certain proportion of the "gross relevant distribution" to the proprietors.

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Section 35 defines "gross relevant distribution," and I must read subsection (1), for the answer to the question I have to determine depends on the true construction of that section. [His Lordship read section 35 (1), and continued:] The section, it is to be observed, deals with dividends and distributions, and the purpose of the section is not only to define "gross relevant "distribution" but to allocate the dividends and distributions to particular chargeable accounting periods according to the circumstances.

Some further explanation of the word "distribution" was plainly necessary, and this is to be found in section 36. Subsection (1) is in these terms: [His Lordship read the subsection and continued:] Mr. Magnus argued that this section was intended to be an exhaustive definition section and the marginal note lends support to that view; but if the draftsman so intended, he used the most inappropriate language for the purpose. "Deeming" sections do not usually define but, on the contrary, expand or sometimes endeavour to clarify, e.g., by making it clear that a distribution in kind is to be treated as a distribution; however, I do not think that it is necessary to express a concluded view on the matter. What the subsection makes quite clear is that a sum applied in reducing share capital is not to be treated as a distribution.

Section 31 of the Finance Act, 1951, however, provided that in certain conditions a return or repayment of capital was to be treated as a distribution. Subsection (1) is in these terms: [After reading subsection (1) his Lordship continued:] Subsection (5) defines "distributable sum" and "capitalize" and then states: "and references to the reduction of capital shall "be deemed to include references to the repayment or return "of share capital and the repayment or redemption of loan "capital, other than loan capital issued for full consideration "paid in cash to the body corporate, society or other body or "redeemable preference shares so issued."

The Crown makes two main submissions. The first depends on section 31 of the Finance Act, 1951. It may be summarized as follows: Section 31 (1) (*a*) is clearly satisfied in that a distributable sum of £28,056 has been capitalized since April 6, 1949; that is not disputed. Then it is said that a lesser sum of £15,030 has been applied, in the words of subsection (5), in "repayment or return of share capital," so that this lesser sum must be deemed for the purposes of section 35 of the Act of 1947 to be a distribution taking place when the sum is so applied. As the Crown's argument was finally presented, that admittedly does not conclude the case in its favour, for the date of application was after the chargeable accounting period with which I am concerned, and it is admitted that reference back to section 35 of the Finance Act, 1947, is necessary for the purpose of ascertaining to what chargeable accounting period this distribution must be related. To that extent the Crown impliedly accepts

Mr. Magnus's admirable argument on this part of the case, that section 31 of the 1951 Act really amends, in certain conditions, section 36 of the 1947 Act and not section 35.

This part of the argument necessarily proceeds on the footing that there has been a return or repayment of share capital, and reference to section 35 (1) (*c*), which is the only relevant paragraph, discloses, the Attorney-General says, an apparent inconsistency, for paragraph (*c*) refers to a distribution which is not a distribution of capital. He submits that section 31 of the Act of 1951 is superimposed on section 35 of the Act of 1947, and, reading them together, it is plain that the legislature intended to bring this return of capital into the ambit of a "gross relevant "distribution." That being so plain, the concluding words of paragraph (*c*) must be moulded to give effect to that intention by reading into paragraph (*c*) of section 35 (1) words to the following effect, namely, that "provided that any sum deemed "to be a distribution by virtue of section 31 of the Act of 1951 is "not for the purposes of section 35 (1) (*c*) of the Act of 1947 to "be regarded as a distribution of capital." So construing the section, one finds for the purposes of tax that this return of capital in the liquidation is in reality to be treated as a distribution of income in the last trading period of the company's life.

The Crown's second main point arises on section 35 without reference to section 31 of the Act of 1951. It was taken for the first time in this court on notice duly given to the company. The argument is that the liquidator, if necessary with the assistance of expert advice, must find out whether the sum of £15,030 which he distributed was capital or income or partly the one and partly the other. That has not been done, and the Attorney-General invites me to remit the case to the special commissioners, so that this interesting operation may be performed, and when performed, he says that one applies subsection (1) (*c*) to that part ascertained to be income.

Both these main points make it necessary to inquire into the nature of a distribution of a company's assets among the shareholders by a liquidator.

I was referred to two authorities, the first is *Birch* v. *Cropper*.[1] In his speech Lord Macnaghten said this: "In the case of "winding up everything is changed. The assets have to be distri-"buted. The rights arising from unequal contributions on shares "of equal amounts must be adjusted, and the property of the "company, including its uncalled capital not required to satisfy "prior claims, must be applied for that purpose. But when "those rights are adjusted, when the capital is equalised, what "equity founded on inequality of contribution can possibly "remain? The rights and interests of the contributories in the "company must then be simply in proportion to their shares." Later on he continued[2]: "I think it rather leads to confusion to

[1] (1889) 14 App.Cas. 525, 545; 5 T.L.R. 722.

[2] 14 App.Cas. 525, 546.

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" speak of the assets which are the subject of this application as " ' surplus assets ' as if they were an accretion or addition to the " capital of the company capable of being distinguished from it " and open to different considerations. They are part and parcel " of the property of the company—part and parcel of the joint " stock or common fund—which at the date of the winding-up " represented the capital of the company. It is through their " shares in the capital, and through their shares alone, that " members of a company limited by shares become entitled to " participate in the property of the company. The shares in this " company were all of the same amount. Every contributory " who held a preference share at the date of the winding-up must " have taken that share and must have held it on the terms of " paying up all calls duly made upon him in respect thereof. " In paying up his share in full he has done no more than he " contracted to do; why should he have more than he bargained " for? Every contributory who was the holder of an ordinary " share at the date of the winding-up took his share and held it " on similar terms. He has done all he contracted to do; why " should he have less than his bargain? When the preference " shareholders and the ordinary shareholders are once placed " on exactly the same footing in regard to the amounts paid up " upon their shares, what is there to alter rights which were the " subject of express contract? "

The form of the order in that case on which the Attorney-General relied in support of his argument that the liquidator was making a repayment or return of share capital for the purposes of section 31 is as follows[3]: " the balance of the pro- " ceeds of sale of the said undertakings to the Manchester Ship " Canal Company remaining after satisfaction of all the debts " and liabilities of the Bridgewater Navigation Company Limited, " and after adjusting the rights of the shareholders inter se " (other than their rights in respect of the purchase-money), and " after payment of the costs of the liquidation and repayment to " the shareholders (both ordinary and preference) of the capital " respectively paid on their shares, ought to be divided amongst " the holders of all the shares of the Bridgewater Navigation " Company Limited in proportion to the shares held by them " respectively."

The next case was *Inland Revenue Commissioners* v. *Burrell*.[4] Atkin L.J. said this: " The property of the company remains the " property of the company. The liquidator's duty is to realize " it, to pay off the liabilities and distribute the remaining assets " amongst the shareholders subject to the rights given under " the articles. The liquidator cannot declare a dividend or distri- " bute a dividend. He deals with assets. He need not trouble " himself with the question whether the assets in the company's " books represent capital or uncapitalized profits. He can realize

[3] 14 App.Cas. 525, 548.

[4] [1924] 2 K.B. 52, 67; 40 T.L.R. 562; 9 T.C. 27.

"the assets in the most beneficial way and can pay capital "liabilities out of the assets that represented profits, or liabilities "on revenue account out of the assets that represented capital. "Having paid the liabilities and having a lump sum in his hand "there appears to me to be no liability in him to reconstruct "his capital account or other accounts; and no power in the "shareholders either to insist on the liquidator doing so, or "themselves so to adventure." Later on he continued [5]: "But "though the liquidator must honour such obligations he himself "has no power to capitalize or decapitalize, to distinguish in his "distribution between capital or income: his duty is simply to "distribute assets. He may, while carrying on the business of a "company, with a view to a beneficial realization, earn profits. "In such a case the company will be assessable to income tax "on such profits. But the shareholder will not receive them as "profits; for him they are but an accretion to the assets; and "if they become surplus assets, it is in that form that the "shareholder will receive them. We are thus removed from the "sphere of cases such as *Inland Revenue Commissioners* v. "*Blott* [6] where there have to be considered the rights produced "by the action of a company still carrying on its business and "distributing some of its assets in some form of bonus. There "the intention of the company is dominant for all purposes. Did "the company intend to distribute as profits or as capital? "Here the liquidator has no choice, and the question cannot "arise in that form. The inquiry takes a different shape; not "what does the liquidator intend to give the shareholder, but "what does the shareholder in fact receive? In fact he receives "his share of the joint stock, as Scrutton L.J. said in *Blott's* "case,[7] not income of the property, but the property itself." Sargant L.J. said in the course of his judgment in *Inland Revenue Commissioners* v. *Burrell* [8]: "The character in which "any distribution by the company amongst its shareholders "reaches their hands depends entirely on the circumstances in "which the distribution is made. In the liquidation of a limited "company the distribution of the surplus assets of the company "is almost necessarily of a final and non-recurrent character, and "reaches the hands of the shareholders quite irrespective of the "sources from which the assets have accrued to the company. "It is true that so far as the assets can be identified, as here, "as having arisen from profits, they might while the company "was a going concern, have been distributed by way of declara-"tion of dividend; but though this power, if exercised, would "have removed the assets from the ownership of the company "and divided them amongst the shareholders by way of income, "the mere existence of the power while unexercised cannot, in "my judgment, have any effect of the kind. These assets,

[5] [1924] 2 K.B. 52, 68.
[6] [1921] 2 A.C. 171; 37 T.L.R. 762; 8 T.C. 101.
[7] [1920] 2 K.B. 657, 676; 36 T.L.R. 575; 8 T.C. 101.
[8] [1924] 2 K.B. 52, 73.

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" though capable of distribution as income, remain, while not so " distributed, part of the general mass of the property of the " company and are subject to the debts and all the accruing " liabilities and possible losses of the company, and the expenses " of any liquidation; and I cannot see enough in the mere " history of the accruer of the assets to the company to enable " a distinction to be made for the present purpose between that " part of a final distribution of assets of the company which " arises from profits of the company capable of distribution as " income, and the other parts of that distribution."

With these authorities to guide me, I return to the Crown's argument on section 31. The first question is whether this distribution by the liquidator can properly be described as a repayment or return of share capital. In my judgment it cannot be properly so described; all that the liquidator is doing is to distribute the assets or property of the company among the shareholders, after discharging its liabilities and the costs of liquidation, and it is distributed as capital irrespective of its source.

There may be cases where a liquidator makes a return of share capital to shareholders in the course of liquidation; he may have to do so before he makes the distribution of assets among the shareholders to adjust their rights inter se to bring them to equality, as for example, when some shares are partly paid and others are fully paid. That is, in my judgment, the explanation of the form of order in *Birch* v. *Cropper*.[9] Another example where a liquidator makes a return of capital is when the memorandum of association or terms of issue entitle one class of share capital to a return of capital in priority to some other class.

In those cases the liquidator may truly be said to be making pro tanto a return of share capital; but that is not this case, no adjustment among the shareholders is required and all the liquidator is doing is to distribute the assets of the company; he is not making a repayment or return of share capital at all.

That is fatal to the Crown's case under section 31, but even if the Crown had surmounted that hurdle it would, in my judgment, have fallen at the next. To examine the next step in the argument, I will assume that, contrary to my own opinion, this payment of £15,030 is a return or repayment of capital within section 31.

The scheme of the relevant sections seems reasonably plain though the language may be obscure.

Section 36 of the Finance Act, 1947, provides that a reduction of capital is not to be treated as a distribution. Section 31 of the Finance Act, 1951, in effect amends that section by providing that if certain conditions are fulfilled a reduction of capital is for the purposes of section 35 " to be a distribution " not, be it noted, " to be a gross relevant distribution." Reference back to

[9] 14 App.Cas. 525.

section 35 is then necessary to see whether this distribution is included in the definition of " gross relevant distribution " for the relevant chargeable accounting period, that is the period that ended with the commencement of the liquidation. The relevant paragraph is (*c*) and that does not apply to distributions of " capital." Thus this return of capital though a distribution for the purposes of section 35 is found not to be a " gross relevant " distribution " because it is a distribution of capital. If the liquidator had returned not 10s. in respect of each £1 share but a sum which exceeded the total allowed as capital by the concluding words of the subsection, the excess would not for the purposes of the tax be treated as capital, but income, and would fall to be included in the gross relevant distribution for the period. Reading the sections together, that seems to me how the scheme works and I see no conflict real or apparent between the sections and certainly no justification whatever for reading in the words which the Attorney-General submits ought to be read in. It is contrary to the highest and classic authority of Lord Simon and Rowlatt J. that nothing is to be read into a taxing statute (*Canadian Eagle Oil Co.* v. *Rex* [10]) unless, I would myself add, one is compelled to do so by necessary implication. I see no such compelling reason in this case; section 31 has not misfired; it operates in the case of a company in liquidation when the distribution exceeds a certain total; it has a wide operation when the company is a going concern. If the legislature in and by section 31 intended to turn a distribution of capital by a liquidator in winding up into a distribution of income, it should have said so in clear terms.

I come now to the Crown's second main point. While the company is a going concern there is no difficulty in distinguishing between capital and income or more strictly profits; unless a company capitalizes its profits by applying them in paying up new shares, all distributions, even those usually referred to as capital distributions, are necessarily made out of profits and as between tenants for life and remaindermen will normally be income: *In re Doughty.*[11] When the company ceases to trade and goes into liquidation entirely different considerations arise. Speaking for myself, I do not in the least understand how the most expert of accountants can, save in very simple cases, undertake the required dissection of the company's surplus assets into capital and income. Atkin L.J., in the passage I have quoted, has pointed out the difficulty of doing so; I doubt its possibility. The liquidator finds that the company has assets, a factory, plant, machinery, tools, stock-in-trade, trade debtors, cash and possibly goodwill. He realises everything except the cash by sale. Except in very simple cases it is impossible to say what represents income and what capital; all one can say is that the assets

[10] [1946] A.C. 119, 140; 61 T.L.R. 577; [1945] 2 All E.R. 499; 27 T.C. 206, 248.

[11] [1947] Ch. 263; 63 T.L.R. 257; [1947] 1 All E.R. 207.

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represent the original capital contributed plus the result of years of trading. The very factory itself may have been purchased out of the capital originally subscribed, but it is equally possible that it has been purchased out of trading profits. Where a company has traded for years no one can say, for example, what cash represents at any given moment, and it seems to me that its dissection into capital and income would be impossible without a review of the whole trading activities of the company from its incorporation and possibly then only by adopting a series of completely artificial rules, to assist the analysis, *e.g.*, that new stock-in-trade is purchased or wages expended in new manufacture out of the cash proceeds of old stock-in-trade, which rules have no necessary relation to truth or reality.

But, apart from the practical difficulty in the way of the dissection, there is nothing in section 35 which compels the liquidator either to perform this operation or permit it to be performed on the assets he has got in. As Atkin L.J. pointed out, the liquidator is utterly indifferent as to what is income and what is capital. He gets in the property; he discharges the liabilities out of any assets in hand as may be most convenient. He may discharge trade creditors out of the proceeds of sale of a factory or a loan creditor out of stock-in-trade, it matters not; he is left with a net surplus representing the property of the company. His sole duty is to distribute that property and he distributes it as capital and capital it remains for the purposes of section 35 (1) (*c*) unless it exceeds the total provided in the concluding words of the subsection.

The Crown fails on both points and I dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Frank Simmonds, Parker & Hammond for Percy Holt & Nowers, Croydon.*

J. L. D.

[PRIVY COUNCIL.]

* SUBRAMANIAM . . . . . APPELLANT;

AND

PUBLIC PROSECUTOR . . . . . RESPONDENT.

J. C.† 1956 *May* 16; *July* 9.

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA (COURT OF APPEAL).

Evidence—Hearsay—Admissible to show fact that statement was made—Criminal law—Charge of carrying ammunition—Defence of duress—Hearsay evidence wrongly excluded—Implication from exclusion—Federation of Malaya Emergency Regulations, 1951 (*as amended by L.N.* 363/1-7-52), *reg.* 4 (1) (*b*)—*Penal Code* (*Laws of the Federated Malay States, c.* 45), *s.* 94.

Malaya. Privy Council—Jurisdiction—Criminal matter—Essential principle of justice infringed—Board will not otherwise interfere. Criminal Law—Duress—Evidence of.

The appellant was found in a wounded condition in the Rengam District in the State of Johore by members of the security forces operating against terrorists. He was tried on a charge of being in possession of ammunition contrary to regulation 4 (1) (*b*) of the Emergency Regulations, 1951, of the Federation of Malaya, and put forward the defence, inter alia, that he had been captured by terrorists and that at all material times he was acting under duress. He sought to give evidence, in describing his capture, of what the terrorists said to him, but the trial judge ruled that evidence of the conversation with the terrorists was not admissible unless they were called. The judge said that he could find no evidence of duress, and in the result the appellant was convicted of the offence charged and sentenced to death. On appeal:—

Held, allowing the appeal, that the judge was in error in ruling out peremptorily the evidence of conversation between the terrorists and the appellant. Evidence of a statement made to a witness by a person who was not himself called as a witness was not hearsay evidence and was admissible when it was proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. Statements could have been made to the appellant by the terrorists which, whether true or not, if they had been believed by the appellant, might, within the meaning of section 94 of the Penal Code of the Federated Malay States, reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes. Thus a complete, or substantially complete, version according to the appellant of what was said to him by the terrorists and by him to them had been shut out. That version, if believed, could and might have afforded cogent evidence of duress brought to bear on the appellant. He had not been allowed to give relevant and admissible evidence, and it could not be held with any confidence that had the excluded evidence, which went to the very root of the defence of duress, been admitted, the result of the trial would probably have been the same.

Order of the Supreme Court of the Federation of Malaya (Court of Appeal) reversed.

† *Present*: LORD RADCLIFFE, LORD TUCKER, MR. L. M. D. DE SILVA.

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APPEAL (No. 2 of 1956), by special leave, from an order of the Supreme Court of the Federation of Malaya (Court of Appeal at Kuala Lumpur) (Mathew C.J., Wilson and Abbott JJ.) (September 12, 1955) dismissing the appellant's appeal against a judgment and order of the High Court of Johore Bahru (Storr J., sitting with two assessors) (August 2, 1955) whereby he was found guilty on a charge of being in possession of 20 rounds of ·303 ammunition without lawful authority contrary to regulation 4 (1) (*b*) of the Emergency Regulations, 1951, and sentenced to death.

It was common ground that on April 29, 1955, at a place in the Rengam District in the State of Johore the appellant was found in a wounded condition by members of the security forces operating against terrorists. The appellant's defence, and the main ground of his appeal, was that he had been captured by bandits, that at all material times he was acting under duress, and that at the time of his "capture" by the security forces he had formed the intention to surrender and was on his way to do so.

The facts appear fully from the judgment of the Judicial Committee.

1956. May 14, 15, 16. *Dingle Foot Q.C.* and *R. K. Handoo* for the appellant.

D. A. Grant for the respondent.

The following cases were referred to in argument: *Wong Pooh Yin* v. *Public Prosecutor*[1]; *Murugiah* v. *Jainudeen*[2]; *Chan Kau* v. *The Queen*[3]; *Lejzor Teper* v. *The Queen*[4]; *Public Prosecutor* v. *Chin Kiang Yin*,[5] and *Abdul Rahman* v. *King-Emperor*.[6]

May 16. LORD RADCLIFFE announced that their Lordships would humbly advise Her Majesty that the appeal should be allowed and that they would give their reasons later.

July 9. Their Lordships' reasons for allowing the appeal were delivered by MR. L. M. D. DE SILVA. This is an appeal, by special leave, from a judgment of the Supreme Court of the Federation of Malaya dismissing an appeal against a conviction in the High Court of Johore Bahru whereby the appellant was found guilty of being in possession on April 29, 1955, of 20 rounds of ammunition contrary to regulation 4 (1) (*b*) of the Emergency Regulations, 1951, and sentenced to death.

When the appeal from the Supreme Court came up for hearing counsel assigned to argue the case for the appellant said that

[1] [1955] A.C. 93; [1954] 3 W.L.R. 471; [1954] 3 All E.R. 31.
[2] [1955] A.C. 145, 152; [1954] 3 W.L.R. 682.
[3] [1955] A.C. 206; [1955] 2 W.L.R. 192; [1955] 1 All E.R. 266.
[4] [1952] A.C. 480; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447.
[5] Not reported. (Sup.Ct. of Fed. of Malaya, Feb. 10, 1956).
[6] (1927) L.R. 54 I.A. 96, 104.

there was nothing that he could urge and, probably as a consequence, the judgment of the Supreme Court does not give reasons for the dismissal of the appeal. The statement of counsel in the Supreme Court, though relevant to the question whether valid grounds for this appeal exist, is not conclusive of that question.

Regulation 4 provides: "(1) Any person who without lawful "excuse, the onus of proving which shall be on such person, "carries or has in his possession or under his control—(*a*) any "firearm, without lawful authority therefor; or (*b*) any ammuni- "tion or explosive without lawful authority therefor, shall be "guilty of an offence and shall on conviction be punished with "death.

"(2) A person shall be deemed to have lawful authority for "the purposes of this regulation only if he—(*a*) is a police officer "or a member of Her Majesty's Naval, Military or Air Forces "or of any Local Force established under any written law or "any person employed in the Prisons Department of the Federa- "tion and in every such case is carrying or is in possession of or "has under his control such firearm, ammunition or explosive "in or in connexion with the performance of his duty; or (*b*) is "a person duly licensed, or authorized without a licence, under "the provisions of any written law for the time being in force "to carry, possess or have under his control such firearm, ammu- "nition or explosive; or (*c*) is a person exempted from the pro- "visions of this regulation by an Officer-in-Charge of a Police "district or is a member of any class of persons so exempted by "the Commissioner of Police by notification in the Gazette:

"Provided that no person shall be deemed to have lawful "authority for the purpose of this regulation or to be exempt "from this regulation if he carries or has in his possession or "under his control any such firearm, ammunition or explosive for "the purpose of using the same in a manner prejudicial to public "safety or the maintenance of public order.

"(2A) A person shall be deemed to have lawful excuse for the "purpose of this regulation only if he proves—(*a*) that he acquired "such firearm, ammunition or explosive in a lawful manner and "for a lawful purpose; and (*b*) that he has not at any time while "carrying or having in his possession or under his control such "firearm, ammunition or explosive, acted in a manner prejudicial "to public safety or the maintenance of public order.

"(3) A person charged with an offence against this regulation "shall not be granted bail."

The words "who without lawful excuse, the onus of proving "which shall be on such person" in sub-regulation (1) did not appear in the original regulation and were added by an amendment made in 1952. Sub-regulation 2A was added by an amendment, made on December 30, 1954.

It was common ground that on April 29, 1955, at a place in the Rengam District in the State of Johore, the appellant was found in a wounded condition by certain members of the security

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forces; that when he was searched there was found around his waist a leather belt with three pouches containing 20 live rounds of ammunition; no weapon of any description was found upon him or in the immediate vicinity.

The defence put forward on behalf of the appellant was that he had been captured by terrorists, that at all material times he was acting under duress, and that at the time of his capture by the security forces he had formed the intention to surrender, with which intention he had come to the place where he was found.

In view of the opinion they have formed upon the questions relating to the defence of duress it is not necessary for their Lordships to discuss the questions unrelated to this defence argued upon this appeal.

The law relating to duress is set out in section 94 of the Penal Code of the Federated Malay States (chap. 45, Laws of the Federated Malay States, Vol. II, p. 935), in a group of sections headed "general exceptions" and is to the following effect:—

"94. Except murder and offences included in Chapter VI "punishable with death, nothing is an offence which is done by "a person who is compelled to do it by threats, which, at the "time of doing it, reasonably cause the apprehension that instant "death to that person will otherwise be the consequence; Pro- "vided that the person doing the act did not of his own accord, "or from a reasonable apprehension of harm to himself short "of instant death, place himself in the situation by which he "became subject to such constraint.

"*Explanation* 1.—A person who, of his own accord, or by "reason of a threat of being beaten, joins gang-robbers knowing "their character, is not entitled to the benefit of this exception "on the ground of his having been compelled by his associates "to do anything that is an offence by law.

"*Explanation* 2.—A person seized by gang-robbers, and forced "by threat of instant death to do a thing which is an offence by "law—for example, a smith compelled to take his tools and to "force the door of a house for the gang-robbers to enter and "plunder it—is entitled to the benefit of this exception."

It is convenient at this stage to deal with an interpretation of sub-regulation 2A and section 94 taken together put forward by counsel for the respondent. He conceded that the "general "exceptions" appearing in the Penal Code were applicable to offences created by the Emergency Regulations. He argued, however, that the term "lawful excuse" in regulation 4 (1) and in regulation 4 (2A) included the general exceptions and that, consequently, duress (or any other general exception) would be of no avail as a defence to a charge under regulation 4 unless the conditions set out in paragraphs (*a*) and (*b*) of sub-regulation 2A were satisfied. Their Lordships cannot agree. Their Lordships are of the opinion that "lawful excuse" in regulation 4 covers a field of its own and that sub-regulation 2A, although it restricts the scope of the defence of "lawful excuse," does not affect the scope

of the defences afforded by the general exceptions appearing in the Penal Code.

For the purposes of their decision their Lordships find it sufficient to set out in brief outline the evidence led in the case. Four members of the security forces, a police inspector and an interpreter gave evidence for the prosecution. The members of the security forces deposed, inter alia, that on April 29, a patrol went out to search a terrorist camp where an engagement had occurred earlier on the same day between another patrol and some terrorists. The patrol found the camp deserted. On searching the surrounding area they found the appellant wounded on the head, back, neck, right arm and right hand, with a belt containing 20 rounds of ammunition upon him. It was in respect of this ammunition that the appellant was charged.

The police inspector produced a statement which, after due caution, he had obtained, with the aid of the interpreter, from the appellant while he was lying in hospital in a wounded condition. In this statement the appellant said, among other things, that while walking along a certain road he was accosted by three Chinese terrorists armed with pistols and made to follow them, one walking in front and two behind him. He said that he was taken to a place where there were about a hundred terrorists, all armed, where he stayed about a month and was given training, and that after this training he was given a rifle and ammunition. He said that he left the camp with 12 others to collect food and that after some days they camped at the spot where they were attacked by security forces.

The statement appears as a series of answers to a series of questions, but from the evidence of the inspector and interpreter it is uncertain whether every question put has been recorded. The appellant was given an opportunity of adding to the statement, but did not do so. It does not appear that he was asked whether the carrying of the ammunition, and his conduct generally, was voluntary or the result of duress, and there is nothing in the statement to the effect that duress had been exercised except what might be gathered remotely from the fact that the terrorists were armed.

The appellant gave evidence in defence. He called witnesses to give evidence as to his character and to support his story as to how he had been occupied for some months before his capture by the terrorists. The appellant described his capture thus:—

"... when I was just walking down a small hill, where there "was lallang at the sides, a Chinese came out and asked me to "halt; I did not know then that he was a communist; he came "from behind me. I asked him why are you stopping me? I "want to return home. He spoke in Malay and I replied in "Malay. He then asked me: 'Do you know who I am?' and so "saying he drew out a revolver from behind him; to all appear-"ance he was a civilian; he pointed that pistol at me and said "'I am a communist'" and it was then I knew that he was

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" one. He asked me to produce my I. Card; when he looked " at my I.C. he spoke something in his own language and two " others came out; the three then surrounded me; of the other " two one had a pistol and the other had a rifle about a yard " long; they told me I could not return home; two of them had " knives like sickles."

He then described how he was forced to accompany the terrorists, one of whom walked in front and two behind, who told him he was being taken to their leader. At this stage an intervention by the trial judge is recorded thus:—

" *Court*: I tell Murugason hearsay evidence is not admissible " and all the conversation with bandits is not admissible unless " they are called."

Murugason was counsel assigned to defend the appellant.

In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.

In the rest of the evidence given by the appellant statements made to him by the terrorists appear now and again to have been permitted, probably inadvertently, to go in. But, a complete, or substantially complete, version according to the appellant of what was said to him by the terrorists and by him to them has been shut out. This version, if believed, could and might have afforded cogent evidence of duress brought to bear upon the appellant. Its admission would also have meant that the complete story of the appellant would have been before the trial judge and assessors and enabled them more effectively to have come to a correct conclusion as to the truth or otherwise of the appellant's story.

In the course of his evidence the appellant stated that he was given the ammunition belt to wear but no weapon, the object, according to him, being that others could use the ammunition. The evidence of the appellant, such as it was, suggested generally that he was in fear, that he planned unsuccessfully to escape, and that he had no alternative but to do as the terrorists asked him to do. He said, amongst other things, " I could not refuse

" wearing the belt; if I had refused they would have done any-" thing to me." Those words, in the context in which they occur, may well have been used by the appellant to indicate, as best he could, that owing to what the terrorists said and did he was in reasonable fear of instant death if he refused to do what the terrorists demanded of him.

At the end of the trial the judge put to the assessors the question (among other questions which their Lordships do not find it necessary to discuss) whether the appellant was acting under duress when he was in possession of the ammunition. In this connexion he read and explained to them section 94 of the Penal Code. He reviewed the evidence and said, " When you " are considering the evidence in this case, if there are any points " on which you have reasonable doubt, then you must give the " benefit of that doubt to the accused." It would appear that in the use of the word " evidence " he included evidence led for the defence as well as evidence led for the prosecution. This direction was favourable to the appellant.

On the question of duress he observed, " The accused said he " was taken into the jungle by force, and he was afraid to escape, " while in the jungle, for fear of being killed; but you will " remember when he was captured there was nobody else with " him and he was not in fear of being killed. I must tell you I " cannot find any evidence of duress myself."

The first assessor answered, " I am doubtful. From the " prosecution evidence he was under constant watch of com-" munist terrorists in the jungle, so it may be interpreted as that " he was acting under duress. From statement given in hospital " he stated he was on patrol duty to collect foodstuffs; that means " he was acting with full awareness of his work. Comparing " these two we are unable to find a satisfactory solution; so we " are doubtful." The second assessor answered, " I am doubtful. " Having been in the jungle, he was at the mercy of the com-" munists; had he not obeyed them he would have risked his life, " but the duress has not been proved; that is why I say it is " doubtful."

When due weight is given to the direction regarding doubts (vide above) these answers must be considered as having been in the minds of the assessors, answers in favour of the appellant, and it would appear that they were so understood by the trial judge. He disagreed with them and convicted the appellant.

On the question of duress the following passage appears in his judgment, " The question of duress was raised by counsel for " the defence. Although I cannot find any evidence of duress, " I put to the assessors a question on that point." He then stated what the question was and what the answers were and went on to say, " With these answers I am unable to agree. I " can find no evidence from which duress can be said to have been " proved by the defence."

Their Lordships cannot agree with the statement made by the

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trial judge to the assessors and repeated in his judgment that there was no evidence of duress in the evidence recorded, if by that statement he meant that as a matter of law there was no evidence of duress to be considered by a jury or, as in this case, by a judge and assessors. (The evidence may, after due consideration, have failed on grounds of credibility or other grounds, to establish the existence of duress, but it would be incorrect to say that there was no evidence.)

It is possible, though it is not clear, that in saying what he did the judge did not intend to say that there was no evidence of duress but was saying (as he was entitled to do) that the evidence was unacceptable. The last sentence in the passage from his judgment quoted above would appear to support this view.

It is also possible, though in their Lordships' view, improbable, that the trial judge directed himself and the assessors that there was no evidence of duress because at the actual moment of capture the terrorists had left and the judge thought that duress, if it had existed, had then ceased to exist. But threats previously made could have been a continuing menace at the moment the appellant was captured, and this possibility was at least a matter for consideration by a jury or by a judge and assessors. The terrorists or some of them may have come back at any moment.

Whatever may be said of the evidence of duress on the record, it is only fair to the appellant to assume that the evidence which the appellant was in the course of, but was wrongly prevented from, giving would have borne upon the vital issue of duress, and their Lordships have to consider whether in the circumstances of this case this exclusion of admissible evidence affords sufficient reason for allowing this appeal.

The jurisdiction exercised by the Board in criminal cases is a very narrow one. In examining that jurisdiction Viscount Simon L.C., delivering the judgment of the Board in *Muhammad Nawaz* v. *King-Emperor*,[1] said: "Broadly speaking, the Judicial Committee will only interfere where there has been an infringement "of the essential principles of justice. An obvious example "would be a conviction following a trial where it could be "seriously contended that there was a refusal to hear the case "of the accused, or where the trial took place in his absence, or "where he was not allowed to call relevant witnesses." In this case the appellant has not been allowed to give relevant and admissible evidence, which is a circumstance very similar in its consequences to not being allowed "to call relevant witnesses." It is not, however, in every case that admissible evidence is shut out that their Lordships will interfere, and the question whether this is a case which warrants interference requires further consideration. There remains one further matter to be considered before this question can be finally decided.

The trial judge in the last paragraph of his judgment said:

[1] (1941) L.R. 68 I.A. 126, 128.

"Considering the evidence as a whole, I am unable to accept the "story of the accused as to his entry into the jungle or what he "did there." If this view of the credibility of the appellant's story is accepted, the exclusion of evidence referred to in preceding paragraphs was immaterial to the result of the trial. In support of his view the trial judge referred to a discrepancy between the appellant's evidence and his statement to the police and also to a discrepancy between his evidence and the evidence of a witness for the defence as to the period during which the appellant had stayed with the witness. Whatever might have been the effect of these two discrepancies on the mind of the trial judge he had to, and did, consider the evidence as a whole. The argument that, in the circumstances of this case, the admission of the evidence wrongly excluded would have made a material difference to the consideration of the evidence as a whole and to the conclusions of the trial judge upon credibility and duress has considerable force, particularly when the opinions of the assessors are taken into account. And the argument would have force even if the appellant be regarded as having given untrue evidence on the matters with regard to which the discrepancies arose. His evidence upon vital matters may or may not have been held to be untrue. Their Lordships feel unable to hold with any confidence that had the excluded evidence, which goes to the very root of the defence of duress, been admitted the result of the trial would probably have been the same.

For the reasons which have been given their Lordships have humbly advised Her Majesty that the appeal be allowed.

Solicitors: *Stanley Johnson & Allen; Charles Russell & Co.*

C. C.

[CHANCERY DIVISION.]

*PRACTICE DIRECTION (BANKRUPTCY).

1956
July 11.

Bankruptcy — Judgment summons — Leave to issue — Application for leave to issue in High Court—Affidavit showing cause why summons should not issue in county court.

Section 5 of the Debtors Act, 1869, enables any court to issue committal orders in respect of any debt or instalment of any debt due from the debtor in pursuance of any order of that or any other competent court. The High Court and county court can thus exercise concurrent jurisdiction. In the High Court save in respect of any order or judgment made or given in a matrimonial cause this jurisdiction is exercised by any one of the judges to whom bankruptcy business is assigned (at present Harman J.,

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PRACTICE DIRECTION (BANKRUPTCY).

Danckwerts J. and Upjohn J.). Rule 378 of the Bankruptcy Rules, 1952, provides that (save as aforesaid) no judgment summons shall be issued without leave of the judge. The practice has been to give leave ex parte without any affidavit in support of the application where the amount due exceeds £50. In the final report of the Committee on Supreme Court Practice and Procedure (1953 Cmd. 8878), it was recommended that all judgment summonses, whether on High Court or county court judgments, should be issued and heard in the county court unless a judge of the High Court should otherwise direct on an application to proceed in the High Court. It is now proposed to give effect to this recommendation.

The judges of the High Court exercising bankruptcy jurisdiction have therefore decided that in future all applications for leave to issue a judgment summons in the High Court made after July 31, 1956 (subject as provided below) must be accompanied by an affidavit showing cause why the summons should issue in the High Court rather than the county court. Such application will in the first place be considered by the judge alone, but he may require the applicant or his solicitors or counsel to attend to support his application. Notwithstanding this direction default summonses on orders made in the High Court under section 5 of the Debtors Act, 1869, before August 1, 1956, will be issued as heretofore.

Nothing in this Practice Direction is intended to affect the practice and procedure in cases falling within the Matrimonial Causes (Judgment Summonses) Rules, 1952.

By direction of the judges exercising bankruptcy jurisdiction.

J. T. P. WILSON,
Chief Bankruptcy Registrar.

[CHANCERY DIVISION.]

1956
June 14, 15.

Vaisey J.

* PYRAH (INSPECTOR OF TAXES) *v.* ANNIS & CO. LTD.

Revenue—Income tax—Capital or income expenditure—Licence—Claim to deduct expenses incurred in application for extension of public carrier's licence—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 123, *Sch. D, Case* 1.

A company had obtained an "A" licence for four articulated vehicles. In an endeavour to bring the number of articulated vehicles authorized by its "A" licence up to seven the company in 1952 incurred expenses of £1,272 in applying to the appropriate authorities to vary its licence by the inclusion of a further three articulated vehicles. The company claimed that these expenses might properly

[Reported by P. G. GALLICHAN, Esq., Barrister-at-Law.]

be deducted from its trading profits for the purpose of computing its liability to income tax under Case 1 of Schedule D:—

Held, that these expenses could not be so deducted since they were incurred in an attempt to make the company's fleet of lorries more advantageous as income winning assets and were therefore attributable to capital expenditure.

Principle in *Southwell* v. *Savill Bros. Ltd.* [1901] 2 K.B. 349; 17 T.L.R. 513; 4 T.C. 430 and other cases dealing with expenses of applications for liquor licences applied.

APPEAL from the General Commissioners for the purposes of the Income Tax Acts for the division of Uxbridge in Middlesex.

At the outbreak of war in 1939 Annis and Co. Ltd., the respondents (hereinafter called "the company"), held a public carrier's licence (as defined in section 2 of the Road and Rail Traffic Act, 1933, and therein and hereinafter described as an "A" licence) for seven rigid tipper vehicles. After the war had begun "A" licences were replaced by "A Defence Permits" and the company was accordingly granted such permits for the said seven rigid tipper vehicles. This holding of "A Defence "Permits" was subsequently varied as follows in consequence of applications by the company:—

(a) 1943: five rigid tipper vehicles and one articulated vehicle consisting of a tractor vehicle and trailer suitable for transporting abnormal indivisible loads.

(b) 1945: four rigid tipper vehicles and two articulated vehicles as above described.

(c) 1947: one rigid tipper vehicle and five articulated vehicles.

In 1948, "A" licences having been restored, the company applied to the licensing authority for an "A" licence for five articulated vehicles. The authority granted an "A" licence for five tractor vehicles but for only two trailers. The company appealed to the Appeal Tribunal set up under the Road and Rail Traffic Act, 1933, which tribunal varied the order of the licensing authority by granted an "A" licence for three tractor vehicles and three trailers, i.e., three articulated vehicles. Subsequently the licensing authority included one further articulated vehicle on the "A" licence, making four in all.

In 1952 the company applied to the licensing authority to vary the said "A" licence by the inclusion of a further three articulated vehicles in an endeavour to bring the number of vehicles authorized by the said "A" licence up to seven. The application was refused. The company appealed against this refusal to the Transport Tribunal, which dismissed the appeal.

The expenses incurred by the company in making this application to the licensing authority in 1952 and in appealing to the Transport Tribunal after its application had been rejected amounted to £1,272. The company claimed that this sum should be deducted from its trading profits for the year ending March 31, 1953, for the purpose of computing its liability to income tax under Case I of Schedule D in respect of the year of assessment

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1953/54. The General Commissioners upheld the company's claim, and from their decision the inspector of taxes now appealed.

Cyril King Q.C. and *Sir Reginald Hills* for the appellant.
William Lindsay for the company.

Cases cited in argument not referred to in the judgment: *Henriksen (Inspector of Taxes)* v. *Grafton Hotel Ltd.*[1]; *Southern* v. *Borax Consolidated Ltd.*[2]; *British Insulated and Helsby Cables Ltd.* v. *Atherton.*[3]

VAISEY J. stated the facts and continued: The contentions on behalf of the company are that the legal expenses in question, that is, the £1,272, are admissible expenses in computing the company's liability to tax because they were expended in attempts to obtain a replacement of the original "A" licence held before the war, and could be said to be part of the administrative expenses of the day-to-day running of their business of road hauliers.

The Crown, on the other hand, submitted that the purpose of the further applications to the licensing authority and the appeal to the Transport Tribunal—those, of course, being the matters which resulted in the expenditure of the £1,272—was to acquire an "A" licence of greater value to the company than that which it then held.

The Crown points out that the "A" licence which they sought to obtain was of greater value than the existing licence and argues accordingly that the legal expenses in question were capital expenditure and as such inadmissible in computing the Case 1 liability of the company. The Crown also contends that this case is covered by a long line of authorities which deal with the analogous matter of excise licences for the sale of excisable liquors. The Crown's argument amounts to this: that this application to the Road Transport Tribunal, if successful, would have resulted in an accretion to the value of capital assets of this company by improving its existing fleet of haulage vehicles, either by increasing their number or by increasing or augmenting their usefulness, and that this was really an attempt to increase or augment the capital resources of the company and not a trading expense or an administrative expense or an expense incurred in the carrying on of the business, but an expense incurred in an attempt—and I think there is no question but that the same principle applies to that attempt as would have applied to a successful attempt—to add to or increase the capital assets and capital property of the company.

[1] [1942] 2 K.B. 184; 58 T.L.R. 271; [1942] 1 All E.R. 678; 24 T.C. 453.

[2] [1941] 1 K.B. 111; [1940] 4 All E.R. 412; 23 T.C. 597.

[3] [1926] A.C. 205; 42 T.L.R. 187; 10 T.C. 155.

That argument, I think, necessarily must depend, in so far as it is based upon the authorities relied on by the Crown and to which I will shortly refer, not merely on the similarity but the identity for practical purposes of a licence under the Road and Rail Traffic Act and a licence in the more familiar use of the word in connection with "licensed premises." My task in coming to a conclusion on that point is not made easier by the unfortunate omission from the case of anything which enables me to discover what are the contents of a licence which is granted to a licensed victualler in respect of licensed premises. I am, therefore, asked to compare one unknown with another unknown, and I have hesitated as to whether I really ought to deal with this question at all on the materials before me. If I am right, as I hope I am, in assuming the substantial identity of those two kinds of documents, the licensed victualler's licence and the carrier's licence, though I have not got either of them before me, I will endeavour to deal with the case on the materials which I have and to assume that both kinds of licence are the same kind of thing or can be treated for the purpose of such a case as this is as though they were the same thing.

Of the cases to which I have been referred the earliest is *Southwell* v. *Savill Brothers Ltd.*[1] The headnote reads as follows: "Income Tax, Schedule D.—Brewers.—Licensing "Magistrates require surrender of licenses before grant of new "licenses for new house; brewers claim to deduct sums paid for "'call of licenses' and other expenses of unsuccessful applica-"tions for new licenses in arriving at profits for assessment." In that case, which was a decision of the Divisional Court consisting of Kennedy and Phillimore JJ., it was held that those deductions were not admissible.

Kennedy J. said[2]: "In our view, this case is one which, "having listened to, and, I hope, fully appreciated, the argument "addressed to us, we think the appeal of the Crown is right. "The commissioners, who have stated the case here, have found "that in allowing the amounts, against the allowance of which "the Crown appeals, they have allowed them as a necessary "annual trade expense incurred by the respondents as brewers. "That is an inference from the facts which are stated before, "and the question is whether or not this ought to be dealt with "in the way the respondents here contend, or whether or not this "is not really an investment upon what I may call the whole "realised profits, an investment which ought to go into capital "and not be brought into the question of income and the balance "of profits and gains. I have come to the conclusion that the "view the commissioners have taken is the wrong one. It seems "to me that this is not an expenditure which ought to be treated "as a loss, a something to be put against that which they have

[1] [1901] 2 K.B. 349; 17 T.L.R. 513; 4 T.C. 430.

[2] 4 T.C. 433.

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" gained in the year as profits, and to be deducted therefrom for " the purpose of getting at the sum on which they are assessable " to income tax, that it is a sum which may be treated as an " investment; not an investment of a sum out of profits which " they have realised, but an investment which goes to capital, " and it seems to me that if, as they admit, they do not feel them- " selves justified in treating in the same way their expenditure, " which is an expenditure for obtaining licences of houses where " it is successful, they cannot claim that as a deduction. It has " seemed to me from the very first very difficult to see how the " nature (so far as taxability is concerned) of an expenditure can " be different when it turns out that they do not get a profitable " investment of that sum of money, instead of it representing " capital in future years, it does not represent capital, but the " nature of it as an investment of money seems to me not to be " altered." And Phillimore J. took the same view.

The next case cited was *A. G. Moore & Co.* v. *Hare*.[3] It was a very curious case in which a coal company, which found that the accommodation afforded it by the ordinary railroad service of the country was not satisfactory, conceived the idea of promoting a Bill in Parliament for permission to build a railway of their own. That application for leave to promote such a Bill was unsuccessful and the Bill was ultimately dropped by agreement and with the happy result that the railway service was improved. The point was that the expenditure incurred in the promotion of the Bills constituted a capital outlay and was inadmissible as a deduction in computing the firm's liability for income tax.

That is a very interesting case. It is a Scots case. I do not think it is necessary for me to read the judgments or to refer to them in any way beyond what I have already said. The point, of course, was that the business of the company in that case was not the construction of a railroad or anything of that kind; it was the mining of coal. Therefore, the losses which occurred in such a matter as the promotion of a Bill to build a railway had nothing to do with the trading activities of the company; it was an unsuccessful attempt to put itself in the way of earning, by its coal-mining activities, further profits, but both the profit to be derived from the railway if it had been constructed and the expense of trying to get the railway constructed were nothing to do with the company's trading; they were designed as capital expenditure to put the company into a position to earn profits, but had nothing to do with the earning of the profits themselves.

Another case depending on something of the same principle was *Kneeshaw* v. *Albertolli*,[4] decided by Lawrence J. The headnote is this: " The respondent, a restaurant proprietor, was granted " a renewal of his beer and wine on-licence for three years, " subject to a payment for monopoly value of £75, payable in " three annual instalments. Held, that the sums so paid were

[3] 1915 S.C. 91; 6 T.C. 572.

[4] [1940] 2 K.B. 295; [1940] 3 All E.R. 500; 23 T.C. 462.

" capital sums and were not admissible deductions in computing " the respondent's profits for Income Tax purposes."

There again the commissioners had decided in favour of the subject and the appeal was allowed. Judgment was given for the Crown on the ground that the expenditure of that sum for the renewal of the licence was not an expenditure for income purposes, but an expenditure which was referable to capital.

I was also referred to *Morse* v. *Stedeford*.[5] The facts are sufficiently indicated in the headnote which says this: " The " appellant, who carried on the business of brewer and owned a " number of licensed premises let to tied tenants, applied to the " licensing justices for the removal of an existing licence to a new " house to be erected, on the terms that a licence at another inn " should at the same time be surrendered. In due course the " removal was effected in the manner approved by the justices. " Neither of the outgoing tenants of the two inns, the licenses of " which were thus withdrawn, became the tenant of the new " inn, and certain sums were paid to them in 1931 as the com- " pensation in order to secure their consent to the application " to the licensing justices.

" On appeal against assessments to Income Tax under " Schedule D for the years 1931–32 and 1932–33, the appellant " contended that the legal expenses incurred in connection with " the applications to the licensing justices and the sums paid to " the outgoing tenants as compensation were admissible deduc- " tions in computing the amount of his profits assessable under " Schedule D. The General Commissioners confirmed the assess- " ments. Held, that, on the facts of the case, the General " Commissioners, in applying the principle in *Southwell* v. *Savill* " *Bros. Ltd.*,[6] had not made an error of law."

It seems to me that, quite apart from the cases, the matter must turn on ordinary principles. If a man buys and sells stocks and shares and it is his business to buy and sell stocks and shares, then any profits which he makes in the conduct of that business are brought in as income profits in the computation of his income and any losses are brought in as part of his losses in carrying on that business. If, on the other hand, his purchasing or selling of stocks and shares is not his business but is something which cannot be treated as the carrying on of a trade, in that case, of course, the profit or loss which he makes in buying an investment is not part of his profits or losses in carrying on any business.

Here the purpose for which this sum of £1,272 was expended, as I have already mentioned, in an attempt to make the fleet of lorries owned by this company more useful and more advantageous as income-winning assets, is not part of the carrying on of the business at all. It was an expenditure which was designed to improve the capital position of the company, and I think that this unsuccessful attempt to better the capital position by obtaining the desired variation of the " A " licence was a matter which

[5] (1934) 18 T.C. 457. [6] [1901] 2 K.B. 349.

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was properly attributable in the accounts to capital and not to income.

As I have said, I have rather hestitated about this case, because I have had to draw inferences and make assumptions which may perhaps be resting on rather insecure foundations, but altogether I think that I am justified, having regard to all the circumstances of the case, in dealing with the matter on the materials before me and forming the conclusion that this "A" licence in question is exactly comparable with and analogous to the licence granted in respect of licensed premises under the Licensing Act, and I think that the principle of the cases to which I have referred really governs my decision in the present case.

It is unfortunate, I think, that I have not some better information about these "A" licences, although one has been produced to me, but I think that with this licence before me and the somewhat imperfect information I have about what the licence of a public house looks like it is very much better in the circumstances that I should state my conclusions. It would be very unfortunate if I had to send this case back to the commissioners.

It is a great pity that the case as stated leaves so much to be conjectured and asks me to draw deductions which may not, of course, be well founded, but there it is. I do think that for such a case as this, at any rate, the analogy between a road haulage licence and an excise licence for licensed premises must be very close and that the safer course is to treat the two kinds of document as being in pari materia and governed by the same considerations. The result is that I must allow this appeal.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Stanley Wise & Company.*

[CHANCERY DIVISION.]

1956
June 28.

Vaisey J.

*ESCOIGNE PROPERTIES LTD. *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Stamp duty—Conveyance or transfer on sale—Company having contracted for purchase of property agrees to sell same to another company—Conveyance to other company by executors of original vendor when one company beneficial owner of not less than 90 per cent. of other company's share capital—Conveyance or transfer of beneficial interest from one company to another—Whether conveyance executed in pursuance or in connection with arrangement whereunder beneficial interest had been previously conveyed or transferred—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54,

[Reported by P. G. GALLICHAN, Esq., Barrister-at-Law.]

58 (4), *Sch. I—Finance Act*, 1930 (20 & 21 *Geo.* 5, *c.* 28), *s.* 42—*Finance Act*, 1938 (1 & 2 *Geo.* 6, *c.* 46), *s.* 50.

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ESCOIGNE PROPERTIES LTD. *v.* INLAND REVENUE COMMISSIONERS.

In 1950 C entered into an agreement to sell certain properties to Company X in consideration of an allotment of shares in that company. The agreement was duly stamped and the shares allotted to C, but no conveyance or transfer of the properties to company X was executed either by C or, after C's death in 1951, by his executors.

In 1954 company X orally agreed to sell the properties to the appellant company in consideration of an allotment of shares in the appellant company. In November, 1954, at a time when company X was the beneficial owner of not less than ninety per cent. of the appellant company's issued share capital, C's executors, at the direction of company X, executed five instruments conveying or transferring the properties to the appellant company, which duly allotted the agreed amount of shares to company X.

In due course the instruments were presented to the Inland Revenue Commissioners for adjudication under section 12 of the Stamp Act, 1891. The commissioners were of the opinion that the instruments were within the definition of "Conveyance on sale" in section 54 of the Act[1] and were liable to stamp duty under the heading "Conveyance or Transfer on sale" in the first Schedule to that Act assessed ad valorem, by virtue of section 58 (4) of the Act, upon the value of the shares allotted by the appellant company to company X. They assessed stamp duty accordingly. The appellant company appealed against this assesment on the ground that the instruments were exempted from duty under section 42 of the Finance Act, 1930:—

Held, (1) that the effect of the instruments was first to convey

[1] Stamp Act, 1891, s. 54: "For "the purposes of this Act the expres- "sion 'conveyance on sale' includes "every instrument . . . whereby any "property, or any estate or interest "in any property, upon the sale "thereof is transferred to or vested "in a purchaser, or any other person "on his behalf or by his direction."

S. 58 (4): "Where a person "having contracted for the purchase "of any property, but not having "obtained a conveyance thereof, con- "tracts to sell the same to any other "person, and the property is in con- "sequence conveyed immediately to "the sub-purchaser, the conveyance "is to be charged with ad valorem "duty in respect of the consideration "moving from the sub-purchaser."

Finance Act, 1930, s. 42: "(1) "Stamp duty under the heading "'Conveyance or Transfer on Sale' "in the First Schedule to the Stamp "Act, 1891, shall not be chargeable "on an instrument to which this "section applies. . . . (2) This "section applies to any instrument "as respects which it is shown . . . — "(*a*) that the effect thereof is to "convey or transfer a beneficial "interest in property from one com- "pany with limited liability to "another such company; and (*b*) that ". . . one of the companies is bene- "ficial owner of not less than "ninety per cent. of the issued share "capital of the other company."

Finance Act, 1938, s. 50: "(1) "Section forty-two of the Finance "Act, 1930 . . . shall not apply . . . "unless it is shown . . . that the "instrument was not executed in pur- "suance of or in connection with an "arrangement whereunder—(*a*) the "consideration for the transfer or "conveyance was to be provided "directly or indirectly by a person "other than a company which at "the time of the execution of the "instrument was associated with "either the transferor or the trans- "feree; or (*b*) the beneficial interest "in the property was previously "conveyed or transferred directly or "indirectly by such person as afore- "said. (2) For the purpose of this "section, a company shall be deemed "to be associated with another com- "pany if, but not unless, both are "companies with limited liability, "and . . . one of them is the bene- "ficial owner of not less than ninety "per cent. of the issued share capital "of the other."

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or transfer the legal estate outstanding in C's executors to the appellant company, and secondly to convey or transfer the beneficial interest in the properties from company X to the appellant company; and that accordingly, as at the time of the execution of the instruments company X was the beneficial owner of not less than ninety per cent. of the issued share capital of the appellant company, the instruments were, by section 42 of the Finance Act, 1930, exempted from stamp duty under the heading "Conveyance or Transfer on sale" in the first Schedule to the Stamp Act, 1891.

(2) That the instruments were not executed in pursuance of or in connexion with an arrangement whereunder the beneficial interest in the properties had been previously conveyed or transferred by some person other than the companies in question within the meaning of section 50 (1) (*b*) of the Finance Act, 1938, and that accordingly the exemption afforded by section 42 of the Finance Act, 1930, was not excluded by this section.

CASE STATED by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891.

The following facts were set forth in the case stated:

1. The determination of the court is desired of the amount of stamp duty chargeable on five instruments of conveyance or assignment on sale of properties in land or houses to Escoigne Properties Limited, hereinafter called the "appellant company." Copies of these five instruments are hereto annexed (Exhibits A, B, C, D and E) and may be referred to as part of this case. They have been presented by the appellant company, through its solicitors, to the Commissioners of Inland Revenue (hereinafter called "the commissioners") under the provisions of section 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instruments were to be chargeable.

2. Short particulars of the instruments are as follows:—

Exhibit.	Date.	Description of Instrument.	Expressed Consideration.
A	2nd November, 1954.	Land Registry Transfer to the appellant company of leasehold property Chichester Chambers Chichester Rents and Chichester House Chichester Rents Westminster by the personal representatives of Samuel Cohen deceased at the request and by the direction of Samuel Cohen (Properties) Limited.	£24,200 paid and satisfied by the allotment to Samuel Cohen (Properties) Limited of 2,200 shares of £1 each credited as fully paid in the appellant company.
B	5th November, 1954.	Land Registry Transfer to the appellant company of leasehold property 65, 67, 69, 71 and 73 Shaftesbury Avenue The Tuscan Hotel 67a Shaftesbury Avenue and The Mecca Café 67b Shaftesbury Avenue Westminster by the personal representatives of Samuel Cohen deceased at the request and by the direction of Samuel Cohen (Properties) Limited subject to a charge for £60,000.	£30,250 paid and satisfied by the allotment to Samuel Cohen (Properties) Limited of 2,750 shares of £1 each in the appellant company credited as fully paid and covenants.

Exhibit.	Date.	Description of Instrument.	Expressed Consideration.
C	6th November, 1954.	Land Registry Transfer to the appellant company of leasehold property 22a Cavendish Square London by the personal representatives of Samuel Cohen deceased at the request and by the direction of Samuel Cohen (Properties) Limited subject to a charge for £15,000 and a further charge for £5,000.	£35,200 paid and satisfied by the allotment to Samuel Cohen (Properties) Limited of 3,200 shares of £1 each in the appellant company credited as fully paid and covenants.
D	5th November, 1954.	Assignment made between the executors of the will of Samuel Cohen deceased of the first part Samuel Cohen (Properties) Limited of the second part and the appellant company of the third part of leasehold property Sydney House Woodstock Road Acton.	£3,080 paid and satisfied by the allotment as fully paid to Samuel Cohen (Properties) Limited of 280 shares of £1 each in the appellant company.
E	5th November, 1954.	Conveyance made between the executors of the will of Samuel Cohen deceased of the first part Samuel Cohen (Properties) Limited of the second part the appellant company of the third part of freehold property 65 and 67 (including 65a and b and 67a and b) Broadway Burnt Oak Kingsbury subject to a mortgage for £10,000.	£16,170 paid and satisfied by the allotment to Samuel Cohen (Properties) Limited of 1,470 shares of £1 each credited as fully paid in the appellant company.

In the case of the transfer of the Shaftesbury Avenue property (Exhibit B) and of the transfer of the Cavendish Square property (Exhibit C) there is contained in each deed a new covenant by the appellant company with the respective mortgagees for payment of the mortgage debt.

3. By an agreement (hereinafter called "the 1950 agree-" ment") dated June 30, 1950, made between the late Samuel Cohen referred to in the preceding paragraph then of Monte Carlo Palace Monte Carlo gentleman of the one part and Samuel Cohen (Properties) Ltd. of the other part the late Samuel Cohen agreed to sell to Samuel Cohen (Properties) Ltd. the freehold and leasehold properties therein referred to subject to the incumbrances then affecting the same. The freehold and leasehold properties comprised in the 1950 agreement included (inter alia) the freehold and leasehold properties referred to in the preceding paragraph and assigned by the instruments presented for adjudication. In the case of the Shaftesbury Avenue property the charge subsisting on the property at the date of the 1950 agreement was for £19,000 and interest, and in the case of the Cavendish Square property the only mortgage subsisting on the property at the date of the 1950 agreement was the charge for £15,000 and interest. The mortgage on the Burnt Oak property was £10,000 at the date of the 1950 agreement. A copy of the 1950 agreement is hereto annexed and may be referred to as part of the case. The original is stamped with a ten shilling stamp and has been adjudicated

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duly stamped. The duty thereon is not the subject of this case. The consideration under the 1950 agreement, apart from liabilities assumed by Samuel Cohen (Properties) Ltd. was stated to be £9,998 to be satisfied by the allotment to the late Samuel Cohen or his nominees of 9,998 fully paid shares of £1 each of Samuel Cohen (Properties) Ltd., and these shares were on or about June 30, 1950, allotted accordingly.

4. Samuel Cohen died on July 21, 1951, and his will dated June 30, 1950, was proved by his executors (parties to the deeds presented for adjudication) in the Principal Probate Registry on February 29, 1952.

5. The appellant company is a company incorporated on August 26, 1954, under the Companies Act, 1948, with a capital of £10,000 divided into 10,000 shares of £1 each. One hundred of these shares were issued for cash. Two of these were issued to subscribers on the occasion of the incorporation of the company, and the remaining ninety-eight of the shares issued for cash were alloted to Samuel Cohen (Properties) Ltd. These ninety-eight shares of the appellant company were allotted to Samuel Cohen (Properties) Ltd. on or about November 1, 1954, as part of an allotment to that company of 2,298 shares of the appellant company, the remaining 2,200 of those shares being consideration for the transfer to the appellant company of the Chichester Rents property (Exhibit A).

Immediately before the execution of the conveyances and transfers presented for adjudication, Samuel Cohen (Properties) Ltd. was beneficial owner of not less than ninety per cent. of the issued share capital of the appellant company.

6. No conveyance transfer or assignment of the properties conveyed or assigned by the instruments presented for adjudication was executed by the late Samuel Cohen in his lifetime, and prior to their execution the executors of his will had not given or made any assent or conveyance in respect of a legal estate in or affecting the said property or any part thereof.

7. After the death of Samuel Cohen the appellant company entered into separate bargains with Samuel Cohen (Properties) Ltd. for purchase of the said properties for shares of the appellant company. The value of these shares far exceeded their nominal value and as appears from the instruments presented for adjudication they were issued at a premium of £10 per £1 share.

8. The appellant company claimed that the conveyances and transfers presented for adjudication were not liable to any stamp duty under the heading "Conveyance or Transfer on sale" in the First Schedule to the Stamp Act, 1891, on the ground that the effect thereof was to convey or transfer a beneficial interest in property from one company with limited liability namely, Samuel Cohen (Properties) Ltd. to another such company, namely, the appellant company, and that the former company was beneficial owner of not less than 90 per cent. of the issued share capital of

the appellant company. The appellant company claimed relief under the provisions of section 42 of the Finance Act, 1930, accordingly.

9. The commissioners were of the opinion that each of the instruments presented for adjudication was an " instrument . . . " whereby . . . property . . . upon the sale thereof " by the late Samuel Cohen to Samuel Cohen (Properties) Ltd. was " trans- " ferred to or vested in " the appellant company within the definition of " Conveyance on Sale " in section 54 of the Stamp Act, 1891, and was liable to stamp duty under the heading " Conveyance or Transfer on sale " in the First Schedule to that Act. The commissioners were not satisfied as respects any of the instruments presented for adjudication that " the effect thereof " was " to convey or transfer a beneficial interest in property from " Samuel Cohen (Properties) Ltd. to the appellant company within the meaning of section 42 of the Finance Act, 1930. If, however, the effect of any of the said instruments was to convey or transfer a beneficial interest from Samuel Cohen (Properties) Ltd. to the appellant company the commissioners are of the opinion that such beneficial interest could only have become vested in Samuel Cohen (Properties) Ltd. under the 1950 agreement; and they submit that although at the date of the 1950 agreement the appellant company was not in contemplation as a sub-purchaser of the property thereby affected each of the instruments was executed pursuant to the obligation imposed upon the late Samuel Cohen by the 1950 agreement to execute a conveyance or transfer of the property affected by that agreement when called upon to do so. The instruments submitted for adjudication were executed, in the view of the commissioners, in pursuance of, or in connexion with, an arrangement whereunder the beneficial interest in the property thereby affected was previously conveyed or transferred directly or indirectly by the late Samuel Cohen or his executors so that by the effect of section 50 of the Finance Act, 1938, such instruments are not entitled to such exemption as is claimed by the appellant company under section 42 of the Finance Act, 1930.

10. The commissioners accordingly assessed the duty on the conveyances or transfers presented for adjudication by reference to the heading " Conveyance or Transfer on sale " in the First Schedule to the Stamp Act, 1891, sections 54, 55, 57 and 58 (4) of the Stamp Act, and other relevant statutory provisions as follows:—

Exhibit A

Transfer of the Chichester Rents property: ad valorem " Conveyance or Transfer on " sale " duty on the consideration of £24,200	£484 0 0

Exhibit B

Transfer of 65, 67, 69, 71 and 73, etc.,

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	brought forward	£484	0 0
Shaftesbury Avenue, property: ad valorem "Conveyance or Transfer on sale" duty on the total consideration of			
£30,250			
Charge £60,000			
	£90,250	£1,805	0 0
and in respect of the covenant with the mortgagees ad valorem "collateral" or "substituted" security duty under sub-head (2) of the heading "Mortgage," etc., in the First Schedule to the Stamp Act, 1891, limited under the Revenue Act, 1903, s. 7 to		10	0
Exhibit C			
22a Cavendish Square: ad valorem "Conveyance or Transfer on sale" duty on the total consideration of			
£35,200			
Charges £15,000			
£5,000			
	£55,200	£1,104	0 0
and in respect of the covenant with the mortgagees ad valorem "collateral" or "substituted" security duty under sub-head (2) of the heading "Mortgage," etc., in the First Schedule to the Stamp Act, 1891, limited under the Revenue Act, 1903, s. 7, to		10	0
Exhibit D			
Assignment of Sydney House, Woodstock Road, Acton: ad valorem "Conveyance or Transfer on sale" duty on the consideration of £3,080		£62	0 0
Exhibit E			
Conveyance of 65 and 67, etc., Broadway, Burnt Oak, Kingsbury: ad valorem "Conveyance or Transfer on sale" duty on the total consideration of			
£16,170			
Mortgage £10,000			
	£26,170	£524	0 0
Total duties		£3,980	0 0

11. No objection was made by the appellant company to the assessment of the " collateral " or " substituted " security duties of 10s. each in the case of Exhibits B and C, but the appellant company contended that no ad valorem " Conveyance or Transfer " on sale " duty was exigible on any of the instruments presented for adjudication, that the transfer of the Chichester Rents property (Exhibit A), the assignment of the Sydney House property (Exhibit D) and the conveyance of the Burnt Oak property (Exhibit E), were not liable to any duty, and that the transfer of the Shaftesbury Avenue property (Exhibit B) and the Cavendish Square property (Exhibit C), were each liable to the duty of 10s. only.

12. Being dissatisfied with the assessments made, and having paid the duty in accordance therewith, the appellant company appealed against the said assessments to the High Court, and for that purpose required the commissioners to state and sign a case, setting forth the question upon which their opinion was required and the assessments made by them, and the commissioners have stated and do sign this case accordingly.

The questions for the opinion of the court are:—

(1) Whether the instruments presented for adjudication are liable to duty as assessed by the commissioners.

(2) If not, to what duty (if any) are they liable.

John Pennycuick Q.C. and *J. P. Warner* for the appellant company.

Raymond Jennings Q.C. and *E. B. Stamp* for the commissioners.

The following cases were cited in argument: *Inland Revenue Commissioners* v. *Payne* [2]; *Limmer Asphalte Paving Co. Ltd.* v. *Inland Revenue Commissioners* [3]; *Ansell* v. *Inland Revenue Commissioners* [4]; *G. H. R. Co. Ltd.* v. *Inland Revenue Commissioners* [5]; *Wolfson* v. *Inland Revenue Commissioners* [6]; *Littman* v. *Barron (H.M. Inspector of Taxes)* [7]; *Inland Revenue Commissioners* v. *Angus.* [8]

VAISEY J. stated the facts and continued. The question for me to determine is the proper amount of stamp duty on the five instruments of conveyance or transfer on sale.

The effect of those instruments was first to convey or transfer to Escoigne Properties Ltd. the legal estate outstanding in Samuel Cohen's executors and, secondly, to convey or transfer the beneficial interest already vested in Samuel Cohen (Properties) Ltd. to Escoigne Properties Ltd. The first section at which I

[2] (1940) 23 T.C. 610.
[3] (1872) L.R. 7 Exch. 211.
[4] [1929] 1 K.B. 608.
[5] [1943] 1 K.B. 303; 59 T.L.R. 211; [1943] 1 All E.R. 424.
[6] [1948] 1 All E.R. 725; 31 T.C. 141.
[7] [1951] Ch. 993; [1951] 2 T.L.R. 323; [1951] 2 All E.R. 393; 33 T.C. 373.
[8] (1889) 23 Q.B.D. 579.

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Vaisey J.

must look is section 54 of the Stamp Act, 1891. [His Lordship read the section and continued:] It is clear that these five documents come within the definition of "Conveyance on sale" in that section. Then, section 58 (4) of the Act says this. [His Lordship read the section and continued:] That section means that the duty has to be so assessed whether the consideration for the sub-sale be greater or less than the consideration for the original sale. Thus so far it is clear that the proper stamp to be affixed to these five documents would be calculated by reference to the consideration for the respective sub-sales to Escoigne Properties Ltd., the total consideration having been divided for the purposes of the documents.

The next statutory provision is to be found in section 42 of the Finance Act, 1930. [His Lordship read this section and continued:] The facts here are that Samuel Cohen (Properties) Ltd. owned all the shares in Escoigne Properties Ltd. Accordingly an exemption is granted to these transactions under that section.

Then I have to look at the Finance Act, 1938, of which section 50 says this. [His Lordship read the section and continued:] I cannot however find that any arrangement within the meaning of this section was ever made. Of course, there were the preceding contracts for sale by which, first of all, Samuel Cohen sold to Samuel Cohen (Properties) Ltd., and the sub-sale whereby Samuel Cohen (Properties) Ltd. sold to Escoigne Properties Ltd. But the arrangement to which the section refers has to be an arrangement under which "the beneficial interest in the property "was previously conveyed"—which I think must mean "had "previously been conveyed"—"or transferred to any person "directly or indirectly." It is suggested by Mr. Stamp, and suggested in a very attractive way, that, in one sense, the mere payment of purchase money operates as a transfer of the property. That is quite true up to a point, but the truth is that there was in fact no transfer of the property, either directly or indirectly, prior to its transfer by the instruments now presented for my consideration. I agree that in what one may call some sort of metaphorical sense there can be a transfer by reason of there being no transfer; but I do not think that that is what this section means.

Although Mr. Pennycuick does not claim any particular merit in asking me to arrive at the conclusion which I do, and Mr. Jennings thinks that it is a rather surprising conclusion, it seems to me on the facts of the case, and having regard to the four sections to which I have referred, that these five documents are all of them exempt from any ad valorem stamp duty. Regard being had to certain admissions which were made as regards the form of two of these documents and certain collateral matters which were included in them, I must declare that the instruments presented for adjudication are liable to duty, first of all, as regards Exhibits B and C to a duty of ten shillings and no more and

secondly as regards Exhibits A, D and E, to no duty of any kind.

Appeal allowed.
Order accordingly.

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Solicitors: *Nicholson, Graham & Jones; Solicitor of Inland Revenue.*

[BIRMINGHAM ASSIZES.]

* REGINA *v.* DARKHU.

1956
July 12.

PRACTICE NOTE.

Finnemore J.

Criminal Law—Plea—Fitness to plead—Disagreement by jury—Whether new jury to be sworn.

TRIAL ON INDICTMENT.

The accused was charged with wounding with intent to murder. Before his plea was taken a jury was sworn to determine whether he was fit to plead, and evidence was given that he was suffering from paranoic schizophrenia. On this issue the jury disagreed and the question arose whether a further jury should be sworn to return a verdict on this issue or, whether, the evidence having failed to satisfy the jury of the accused's insanity, the court should proceed to trial of the charge contained in the indictment.

J. E. S. Simon Q.C. and *Michael Newell* for the Crown.
R. K. Brown for the accused.

FINNEMORE J. accepted the submission by counsel for the Crown that the issue whether the accused was fit to plead or to take his trial was an issue upon which a final decision must be made. He discharged the jury and directed that a new one be sworn.

Solicitors: *M. P. Pugh, Birmingham, for Director of Public Prosecutions; Faber & Co., Birmingham.*

[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

[PROBATE, ETC., DIVISION.]

1956
June 25.

Judge Granville Smith (sitting as special commissioner).

* LYCETT-GREEN *v.* LYCETT-GREEN AND DU PUY.

Husband and Wife — Practice (in matrimonial cases) — Costs — Costs against co-respondent—Absence of definite evidence that co-respondent knew respondent to be married—Inference from circumstances —Overriding discretion of court.

In a case in which adultery had been proved against both the respondent and the co-respondent it was submitted that the co-respondent ought not to be condemned in costs because there was no direct evidence that he knew that she was a married woman when he committed adultery with her. The couple belonged however to the same small social circle, and had travelled about the Continent together and stayed as man and wife at hotels in England. When found with the respondent in a hotel bedroom by inquiry agents, and later when served personally with the petition, the co-respondent had made no protest of his ignorance of the respondent's status; and although represented by counsel at the hearing gave no evidence to prove his ignorance:—

Held, that, although there is a practice of some evidence being given to prove that a co-respondent knew the respondent to be married, such as an admission by him, there is in considering whether costs should be awarded against a co-respondent an overriding statutory discretion of the court. Upon the evidence in the present case the reasonable inference to draw was that the co-respondent must have known that the respondent was married: it would be shutting one's eyes to the way of the world to hold that he had no reason to know. He should accordingly be ordered to pay the costs.

Smith v. *Smith and Reed* [1922] P. 1; 38 T.L.R. 57, *Langrick* v. *Langrick and Funnell* [1920] P. 90; 36 T.L.R. 308 followed.

UNDEFENDED PETITION for divorce by a husband on the ground of adultery: the co-respondent entered an appearance limited to costs.

Evidence was given on behalf of the petitioner by inquiry agents who had seen the co-respondent and respondent together in various places on the Continent, and at hotels in England, at one of which they had been found together in a bedroom at breakfast-time in circumstances from which the court was able to infer adultery. They had visited expensive restaurants together, and had travelled in Rolls-Royces.

The petition was served personally upon the co-respondent by one of the inquiry agents who had entered the hotel bedroom: on his first attempt to serve it the co-respondent recognized him and threatened to assault him; on the second occasion service was effected by the petition being handed to him in a newspaper. On none of these occasions did the co-respondent express surprise that he should be concerned in divorce proceedings: but there was no direct evidence by way of admission or otherwise that he knew the respondent to be a married woman. The respondent had been a widow at the time of her marriage to the petitioner.

with whom she had ceased to live in 1952. Although represented at the hearing, the co-respondent did not give evidence.

The case is reported upon the issue of costs which arose from the absence of direct evidence that the co-respondent knew the respondent to be a married woman.

Colin Sleeman for the co-respondent: It is submitted that although the question of costs must always be one for the court's unfettered discretion, the court must have some evidence upon which it can be satisfied that the co-respondent either knew that the respondent was a married woman at the time that he was committing adultery with her, or that he ought to have known. There is no evidence in this case upon which the court can find that the co-respondent knew that the respondent was married, or that he had any reasonable grounds for assuming her to be married, and he should not be condemned in the costs.

[The commissioner: To what extent am I entitled to rely on the fact that the couple moved in a small social circle in which everybody knew everybody else, and to use my knowledge of the world? I am inclined to think that I am not entitled to draw on such knowledge. It is rather shutting my eyes to the obvious, but it is true that at the moment I cannot see any direct evidence that the co-respondent was aware that the respondent was married.]

It is submitted that it would be unsafe in a matter such as this, in which the petitioner has quite clearly been at pains to prove the case to the court's satisfaction, to invite the court to import a judicial knowledge. The respondent was moreover a widow at the time of the marriage, there is no evidence as to what name she was using, and she had been living apart from the petitioner since 1952.

Donaldson Loudoun for the petitioner: I agree that there is no direct evidence that the co-respondent knew the respondent's status by way of admission or otherwise; but it is submitted that in such matters it is not essential for the petitioner to establish anything affirmatively, but that the court may in its discretion draw the inference upon the evidence that the co-respondent either knew or ought to have known, or could have found out, that the respondent was a married woman, and make an order for costs accordingly. In *Smith* v. *Smith and Reed* [1] the petitioner was on active service and the wife went into domestic service with the wife of the managing director of a picture palace, the manager of which was Reed. She became pregnant by Reed, and in the subsequent divorce proceedings he put in an answer admitting one act of adultery, but pleaded that he only knew the woman as "Florrie" and had no knowledge that she was married. Sir Henry Duke P. in his judgment, after dealing with

[1] [1922] P. 1; 38 T.L.R. 57.

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the question of damages and saying that it was well established that a plea of ignorance was no bar to an award, said on the question of costs [2]: "In these cases I am day by day impressed with "the consideration that the costs of divorce proceedings must in- "evitably fall upon one or other of the parties. The petitioner "comes to this court to claim redress for a wrong done to him, "wittingly or unwittingly, by the co-respondent. He cannot claim "relief for that wrong unless he resorts to this court. It is said "that, following an inveterate practice, the court should not award "costs against a co-respondent who was not informed and did not "ascertain that the respondent was a married woman; and that "the petitioner ought to be required to show that the co-respon- "dent had that guilty knowledge. I confess that I have never seen "the elementary justice on which that rule of practice is founded, "and I do not see it now. It is quite true that there has been "such a practice, but the Matrimonial Causes Act, 1857, section "51, put the question of costs entirely in the judicial discretion of "the court. That section has been repealed by the Statute Law "Revision Act, 1892, s. 1, only because the Judicature Act, 1890, "section 5,[3] gave the court a power as to costs of a more compre- "hensive character." Sir Henry Duke P. concludes: "I find "here a man of superior condition who committed adultery with "the wife of a soldier. He did not pause to consider whether she "was married or not, and in the exercise of my discretion I "condemn the co-respondent in the costs of these proceedings."

It is submitted that the order was made upon the basis that the co-respondent could have found out and established the status of the woman had he troubled to inquire.

[The commissioner: Sir Henry Duke P. referred [4] to *Lord* v. *Lord and Lambert*,[5] saying that in that case "where the peti- "tioner had adduced no evidence as to the co-respondent's know- "ledge that the respondent was a married woman, petitioner's "counsel said that he was not in law entitled to ask for costs "against the co-respondent. Gorell Barnes J. said: 'That is "'discretionary'; and after hearing a submission by co-respon- "dent's counsel, the learned judge said: 'The petitioner has not "'given the evidence,'—*i.e.*, as to the co-respondent's knowledge "—'and therefore, unless there is something exceptional, there "'will be the usual result in such cases: no order as to costs.'" It is the last part of the paragraph that I feel laid down a principle: it is undoubtedly general practice.]

That is what Gorell Barnes J. regarded as the usual order in 1900; but it is submitted that that is the case which Sir Henry Duke P. was considering when he said in *Smith* v. *Smith and Reed* [6] that he could find no justification for that being the normal rule.

[2] [1922] P. 1, 3.

[3] Replaced by s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925.

[4] [1922] P. 1, 3.

[5] [1900] P. 297, 301.

[6] [1922] P. 1.

It may well be that if a petitioner adduces no evidence of knowledge, and says that he cannot ask for costs because he has no proof of knowledge, no order for costs will be made; but *Smith* v. *Smith and Reed* [6] is the last reported case on the question, and Sir Henry Duke P. had made similar observations in *Langrick* v. *Langrick and Funnell* [7] where the respondent had taken the co-respondent to her home in which there were photographs of herself standing by the petitioner as a bride.

[The commissioner: That must have put him on inquiry as to what happened to the husband.]

Sir Henry Duke P. accepted absolutely the co-respondent's evidence that he had no personal knowledge of the petitioner before the events which were in question, and did not know that the respondent was the wife of a sergeant in his battalion; but he said in his judgment [8]: "if a man chooses to go about and, careless of "right or wrong, commit adultery with a woman, whom any "person of common sense could see was probably a married "woman, he must take the consequences," and an order for costs was made.

It is contended on behalf of the co-respondent that he ought not to pay the costs as he might not have known the respondent to be married; but the only person who really knows is the man himself, and he is not here to give evidence. He is not a man who had "picked up" a "Florrie Smith"; and he can only escape the inference of knowledge being drawn by the court if he comes here and satisfies the court first that he did not know that the respondent was married, and secondly, that by taking reasonable precautions he could not have found out. I might have been in greater difficulty if there had been no appearance as to costs, and no attendance by counsel on his behalf; this man, however, was in the hands of professional advisers and kept away. And the evidence shows that he never once protested his ignorance when interviewed by the inquiry agents. It is submitted that the reasonable inference is that he did know the respondent to be married.

[The commissioner: The cases show that the matter is one of discretion: they do not appear to go further. It is a rule of long standing and practice; but quite clearly the over-riding discretion in awarding costs remains. Each case must be decided on its own facts, a principle which I find laid down with particular clarity in *Langrick* v. *Langrick and Funnell*.[9] I am not prepared to say that in every case in which the co-respondent is not aware that the respondent is a married woman he cannot be ordered to pay costs: every case must be judged upon its facts. That seems

[6] [1922] P. 1.

[7] [1920] P. 90; 36 T.L.R. 308.

[8] [1920] P. 96.

[9] [1920] P. 90. The headnote reads: "There is no absolute rule of "law that a husband who claims "damages or costs against a co-"respondent must prove that the co-"respondent knew that the respon-"dent was a married woman. The "court has power to give damages "and costs if the circumstances show "that the co-respondent ought to "have known that fact."

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to be the principle running through the two cases which have been cited to me.]

Colin Sleeman in reply: Although the co-respondent knew that the respondent was married after the agents had entered the hotel bedroom, he should not be condemned in costs because he did not immediately abandon her.

JUDGE GRANVILLE-SMITH (sitting as a special commissioner), after finding that the adultery was proved against both respondent and co-respondent, said: It is submitted that if I find that both these persons have committed adultery on numerous occasions, I ought not to award costs against the co-respondent. The substantial ground for that submission is that there is a practice of some evidence being given that the co-respondent knew that the woman in question was a married woman. Undoubtedly, in case after case where the petitioner wants costs against the co-respondent he does tender that evidence, very often in the form of an admission from the co-respondent that he knew she was a married woman, which solves all difficulties. But although that may be the general practice, I am quite satisfied on the authorities which were cited to me that the practice is one which is subject to the over-riding discretion of the court over costs, the discretion as given by the statute.[1] I know also that Sir Henry Duke P. said [2] that he thought that it was a very unreasonable practice, and that he could never see the justice of it. That may or may not be so; but the point is that I am quite satisfied upon the authorities that I have got to consider the facts of the particular case before me, and in the exercise of my discretion award costs against the co-respondent or not.

One thing struck me in this case. Looking at the matter as a question of common sense, it seems astonishing in view of the position clearly occupied by these people, this man and woman, that a man of the world would not know what the situation was. It is a small world in which they move; they were going to exclusive hotels and restaurants; it was a small circle, so that everybody would know as much as there was to know about everybody else.

I am also interested in the argument put forward by Mr. Loudoun, that although there are cases where the co-respondent has come along and said: "I did not know, I had no reason to "know," we have a different picture in this case, one of a co-respondent who does not come here and say anything about it. After all, the one person who is in the best position to know is the co-respondent. He does not come here, however, but through his counsel asks me to make the assumption in his favour that he had no idea of what the respondent's status was.

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 50.

[2] *Smith* v. *Smith and Reed* [1922] P. 1, 3.

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LYCETT-GREEN v. LYCETT-GREEN AND DU PUY.

Judge Granville Smith.

I have considered the facts which refer to the position of these people, and the fact that the co-respondent himself has not denied it; and I think that in the circumstances it would be shutting one's eyes to the way of the world if I held that he had no reason to know. It is quite different where you have a man meeting a woman who is going about and behaving somewhat like a prostitute. In those circumstances a man may come forward and say: "I had no idea what she was, for I did not know her." That is not this case, or anything like it. In those circumstances, I think that it is right to make a finding of adultery against the co-respondent, and to order him to pay the costs.

Decree nisi, costs against the co-respondent.

Solicitors: *Withers & Co.; Ashurst, Morris, Crisp & Co.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

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July 2.

Pilcher, Ormerod and Donovan JJ.

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Licensing—Restaurant—"Rooms for the accommodation of the public"—Whether at least two rooms must be available for consumption of liquor—Licensing Act, 1953 (1 & 2 *Eliz.* 2, *c.* 46), *ss.* 32 (1) (*a*), 34 (2).

On an application to licensing justices by a local authority for an on-licence in respect of a large house acquired by the authority as a catering establishment, the justices granted the application subject to a condition that intoxicating liquor should be served only in an upstairs restaurant. In addition to the restaurant there were a number of rooms available to the public. On submitting the application to the confirming authority, that authority refused to hear the application on the ground that the house did not contain at least two rooms for the accommodation of the public as required by section 32 of the Licensing Act, 1953,[1] and that, accordingly, the grant was void by reason of section 34 of the Act. On an application for mandamus it was contended by the objectors to the grant of a licence that section 32 required that there should be at least two rooms available in which intoxicating liquor could be consumed:—

[1] Licensing Act, 1953, s. 32: "(1) Subject to the following provisions of this section, premises shall be disqualified for receiving a justices' on-licence—(*a*) if they do not contain, in addition to the rooms occupied by the inmates, at least two rooms for the accommodation of the public, or (*b*) if the premises are of an annual value below that set out in Part I of the Fifth Schedule to this Act . . . (4) Railway refreshment-rooms shall not be disqualified under this section by reason of their annual value."

S. 34 (2): "A justices' licence purporting to be held by a person disqualified for holding a licence, or attached to premises disqualified for receiving a licence, shall be void.

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Held, (1) that the words "rooms for the accommodation of the "public" in section 32 (1) (*a*) of the Act of 1953 should be given their ordinary meaning and should not be construed as requiring two rooms to be available for the consumption of liquor.

(2) (*Per* Pilcher and Ormerod JJ.) that it was for the justices to decide when an application was made to them for a licence whether the premises were qualified having regard to the provisions of section 32; and that in any event, in view of the terms of the condition attached to the grant, there was nothing to stop the public from consuming liquor in other rooms available to them on the premises and, therefore, on any view, the provisions of section 32 (1) (*a*) were complied with.

APPLICATION for an order of mandamus.

On February 3, 1956, Frederick Frost, the treasurer of the Willesden Borough Council, and Miss Amy Heath, the catering supervisor to the council, as nominees of the council, applied to the general annual meeting of the licensing justices for the district of Willesden for a justices' licence authorizing them to hold an excise licence to sell any intoxicating liquor by retail for consumption on premises at Gladstone Park in the borough known as Dollis Hill House, of which premises the council were the owners. The application was opposed by a number of local residents and by the Harrow, Willesden and District Licensed Victuallers' and Beer Retailers' Trade Protection Society through their chairman and secretary. At the hearing of the application a plan was produced which indicated the rooms in which it was desired to sell liquor, namely, the hall on the ground floor and the restaurant, terrace, landing and service room on the first floor. Having heard the application and opposition thereto, the justices decided to grant the application and to attach the following conditions: (1) That a monopoly value of £90 be paid. (2) That there should be no off-sales. (3) That there should be no bar on the premises; and (4) That intoxicating liquor should at all times be served only in the upstairs suite of rooms comprising restaurant, open terrace and service room and only with a bona fide meal, except on the occasion of organized parties or functions and on all occasions such intoxicating liquor was to be served by waiters or waitresses.

On April 27, 1956, the Middlesex County Confirming and Compensation Committee heard an application that the grant should be confirmed, but when the matter was called on, counsel for the Licensed Victuallers' Trade Protection Society objected to the committee hearing the application on the ground that the licence granted on February 3, 1956, was void and could not be confirmed, and relied for his objection on the provisions of sections 33 and 34 of the Licensing Act, 1953, namely, that Dollis Hill House did not contain in addition to the rooms occupied by the inmates at least two rooms for the accommodation of the public as required by section 32, and that, accordingly, the grant was void by reason of section 34. The rooms in Dollis Hill House occupied by the inmates were on the first floor and comprised a sitting room, bedroom, lobby, bathroom and kitchen. The hall, cloakroom, existing

café and new addition on the ground floor and the landing, restaurant, terrace and cloakrooms on the first floor were for the accommodation of the public. The committee refused to hear the application on the ground that the premises were disqualified and, accordingly, the licence granted by the licensing justices was void and could not be confirmed.

The applicant applied for an order of mandamus directed to the confirming committee requiring them to hear the application on the ground that their decision was bad in law because the premises did contain at least two rooms for the accommodation of the public in addition to those occupied by the inmates.

Percy Lamb Q.C. and *Graham Eyre* for the applicant.

Richard Elwes Q.C. and *Sidney Lamb* for the Licensed Victuallers' Trade Protection Society.

James Burge for the confirming committee.

The following cases were referred to in argument: *Stevens* v. *Dickson* [2] and *Customs and Excise Commissioners* v. *Griffith*.[3]

PILCHER J. I will ask Ormerod J. to give the first judgment.

ORMEROD J. stated the facts, and continued: It is abundantly clear on looking at the plan of the premises of Dollis Hill House that apart from the portion of the premises limited by condition (4) of the licence granted by the justices as the place where liquor could be sold, the house contains a substantial number of rooms in excess of that room. It certainly contains two rooms in addition to the rooms which are used by the inmates of the house. After taking into account the premises specified as being the part of the building where liquor could be sold, there were in addition the hall downstairs, which is quite a substantial room, the existing café, which is an even larger room, and it may well be, though it is not relevant to inquire into it, that there were other rooms which were open to the public and available for their accommodation.

The contention of the respondents is that the only room which was available, in view of the conditions imposed by the justices, for the sale of intoxicating liquor was the restaurant upstairs, and that, although the other rooms in the building may have been available for the accommodation of the public, they were not available for the accommodation of the public in the sense required by section 32 of the Act of 1953, because they were not available, as Mr. Elwes first of all put it, for the sale of liquor, and neither were they even available for the consumption of liquor, and that in those circumstances the premises did not qualify within the terms of section 32.

Section 32 repeats substantially the provisions of earlier

[2] [1952] 2 All E.R. 246.

[3] [1924] 1 K.B. 163; 40 T.L.R. 110.

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Licensing Acts, particularly the Acts of 1872 and 1910. [His Lordship read section 32 (1) and section 34 (2), and continued:] The only question which we have to consider is whether these premises at the time the licence was granted by the justices were disqualified from having a licence attached to them by reason of section 32 (1) (*a*) in that they did not contain in addition to the rooms occupied by the inmates at least two rooms for the accommodation of the public. It is interesting to note that subsection (4) of section 32 provides that railway refreshment rooms shall not be disqualified under this section by reason of their annual value, and that means, presumably, that railway refreshment rooms are on exactly the same basis of consideration from the point of view of qualification or disqualification for a licence as any other premises, except that they are not liable to be disqualified by reason of the fact that their annual value is below the prescribed value set out in the Fifth Schedule.

The construction that Mr. Lamb, on behalf of the applicant, asks the court to put on section 32 is that here are premises which contain, in addition to the rooms occupied by the inmates, at least two rooms for the accommodation of the public, although not necessarily rooms in which liquor is sold. His submission is that rooms "for the accommodation of the public" means what it says, accommodation for the public without qualification and, as those rooms are available, the premises cannot be said to be disqualified. As part of his argument on that basis he prays in aid subsection (4) of section 32, and contends that railway refreshment rooms which ordinarily contain one room only for the purpose of selling or consuming liquor, should be on the same footing so far as disqualification is concerned as any other premises in respect of which a licence is sought, presumably because there are other rooms available on a railway station for the accommodation of the public, even although they are not rooms in which intoxicating liquor is sold. Therefore, the contention is a very simple one, that on looking at these premises at the time the application was made, there were two and more rooms available for the accommodation of the public and that in those circumstances the premises could not be said to be disqualified.

In my view that is the proper view to be taken of this section, particularly having regard to the terms of section 34, which provides that the justices' licence shall be void if it is held by a person disqualified for holding a licence or attached to premises disqualified for receiving a licence. It appears to me that the time when qualification or disqualification is to be considered is when the premises as a whole are being considered by the justices when the application is being made, and not when the justices have considered the application and made their decision. If, in considering the application, they decide that there should be a licence attached to the premises, but that it should be limited by certain conditions which provide for the sale of liquor in one room only, it seems to me that at that stage it is much too late to say that

these premises are disqualified by virtue of sections 32 and 34 and that the licence must be void. The procedure appears to me to be, that when an application is made, it is for the justices to decide whether the premises are qualified or not qualified to have a licence attached to them, and if they decide that the premises are properly qualified having regard to the provisions of section 32, then they will consider whether in the circumstances a licence should be granted and the conditions under which that licence should be granted.

That, of course, is not necessarily the whole of the applicant's submission. The position can be put also in this way: a licence was granted by the justices not in respect of one room only, the restaurant upstairs, but in respect of Dollis Hill House subject to conditions. The important condition which we have to consider is the one limiting the sale of liquor to one room only, and then only under certain conditions. The point was put by Pilcher J. in the course of argument that if any customer in the restaurant chooses to take his coffee and brandy down into the hall after he has dined, there seems to be no reason why he should not. It may well be that this is not the intention of the local authority, and it may be he would be discouraged but, as I see the terms of the licence and the conditions attached to it, there is nothing to prevent him from doing that. Therefore, even if the submission of the applicant is wrong that the term "accommodation of the public" is generally accommodation of the public, it would seem that even so the applicant's submission is the correct one, that these rooms are available for the accommodation of the public not only in its general sense, but in the much more limited sense of accommodation for the public for the purposes of the licensed premises. In my own view that is putting much too narrow a construction on the words of the section 32. But even if that construction were the proper one, it appears to me that on the construction of the licence which has been granted there would be two rooms available for the public.

The submission of Mr. Elwes on behalf of the Licensed Victuallers' Association, who opposed, amongst others, the grant of this licence, is, that rooms, "for the accommodation of the "public" must mean rooms for the accommodation of the public for the purpose of purchasing liquor, and if not that, certainly for the purpose of consuming liquor. Mr. Elwes stated that for a long time it has been the practice of persons applying for licences in respect of premises to interpret section 32 as meaning premises containing at least two rooms if a spirit licence is required which can be used for the purposes of drinking. He says that is a universal practice which has been adopted and the interpretation of the words of the section which has been generally accepted by licensing authorities. This may have been the common practice, but I think the real answer is, that the particular circumstances of this case were not in the contemplation of the legislature certainly in 1872 and probably not in 1910, and that in the ordinary way

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persons applying for a licence are applying in respect of a public-house for a right to sell, supply and allow people to consume liquor in the rooms they have available. It goes without saying that in those circumstances they are going to apply for the right to sell liquor and allow its consumption in all the rooms they have available. It is not part of their business and not in their interest to have rooms available for the accommodation of the public if they are not rooms in which intoxicating liquor can be sold or at least consumed, and that, I think, is the answer to Mr. Elwes' argument.

But here there is a different situation. Here there are premises owned by a local authority, who have decided that, as part of the amenities which it is their duty to offer to the public, they should be in a position to sell liquor in a restaurant to persons wishing to have a meal there. They have, in addition, two other rooms available for the accommodation of the public, but these are not rooms in which necessarily they wish to sell liquor, or in which they invite or wish people to consume liquor. As I see it, having paid great attention to the argument of Mr. Elwes, and having heard the observations which Mr. Burge has made on behalf of the confirming authority, I have no doubt in coming to the conclusion that the proper construction of the words " accom- " modation of the public " in section 32 is the construction which is put on those words by the applicant and, in those circumstances, I think this application for mandamus should be granted.

PILCHER J. I agree, and my Lord has expressed so fully the reasons which also actuate me in coming to the same conclusion that I do not feel it necessary to add anything.

DONOVAN J. This is an application for an order of mandamus addressed to the Middlesex County Confirming and Compensation Committee, asking that they shall be directed to hear and determine an application for a licence which was granted by the Willesden licensing justices in respect of premises known as Dollis Hill House in Gladstone Park. That licence was granted by the justices on February 3, 1956, but the confirming committee refused to confirm it on April 27, 1956, on the ground that it was void. They held that it was void because of a restriction contained in the licence, to wit " Intoxicating liquor shall at all times " be served in the upstairs suite of rooms comprising a restaurant, " open terrace and service room and then only with a bona fide " meal " save at certain functions. It is admitted that this means in effect that liquor shall be served in only one room, the restaurant, because the terrace is not a room and the service room is a room where it would not be served anyway. So, said the confirming committee, the licence is void under section 32 (1) (*a*) of the Licensing Act, 1953, which provides that premises shall be disqualified from obtaining a licence if " they do not contain in addi- " tion to the rooms occupied by the inmates at least two rooms for

" the accommodation of the public." But it is admitted that the premises in question, to wit, Dollis Hill House, do contain more than two rooms or two rooms at least for the accommodation of the public. Why, then, are they disqualified from receiving this licence?—Because, says Mr. Elwes, on behalf of the objectors, two rooms for the accommodation of the public means on its true construction two rooms in which alcoholic liquor may be sold and consumed. He later modified that by saying that it meant two rooms in which alcoholic liquor may be consumed, and that is not true of this case. The Act, however, does not say it is to be two rooms in which alcoholic liquor may be consumed, nor is that construction, which, I think, is so oddly at variance with the words used, to be necessarily implied from the policy of the legislature as we were invited to find. So far as any policy can be discerned in the history of this section and the previous enactments, it seems to have been to get rid of the one room drinking den at least so far as spirits are concerned; but that object is achieved if there are other rooms in the house into which the public may go. The legislature would not have to go further and say that in one at least of these other rooms drink must be consumed as well. Why should it? If anything, that would seem to militate against the legislature's policy rather than to advance it. Again, if the objectors are right, almost every railway refreshment room where alcoholic liquor is served must be operating today under a void licence. The legislature exempted refreshment rooms from the rule about minimum annual value for a licence, but left them still under the necessity of providing two rooms at least for the accommodation of the public. Everybody knows that there are always two rooms at least available for the accommodation of the public on railway stations, the refreshment room and the waiting room. Parliament had this knowledge like everybody else, when it passed the section, and must be taken to have known that drink was consumed in the refreshment room only and not in the waiting room. Yet, when dealing with railway premises in subsection (4) of section 32, all that Parliament said in effect was that the rule about minimum annual value shall not apply but, like everywhere else, there shall be two rooms at least for the accommodation of the public.

It is said that there is no authority in favour of the construction of section 32 which is advanced by the objectors. That does not surprise me. It is said, further, that everyone has hitherto assumed that the section meant that there must be at least two rooms in which alcoholic liquor is sold and consumed, or at least two rooms in which it is consumed. Frankly, that does surprise me on the language of the section itself. Indeed one asks at once: What about railway refreshment rooms?, and to that question nobody knows the answer. As a matter of plain English (and we have to put the ordinary everyday meaning on these words unless the contrary appears), the words mean two rooms for the accommodation of the public, that is, where the public may seek

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and find accommodation. The argument that it means at least two rooms where alcoholic liquor may be served or drunk conflicts not only with the plain meaning of the words, but with the inferences to be drawn from the wording of sections 12 and 134 of the Act of 1953. Both those sections distinguish in terms between rooms in licensed premises where liquor may be sold and served and other rooms in the same premises. I think it is probably true in most cases that the rooms in licensed premises available for the accommodation of the public are also those rooms where liquor can be sold or consumed, but nothing in the section expressly requires that this must be the state of affairs, and no implication to that effect is, in my view, necessary. Here, in these licensed premises which are Dollis Hill House, there are at least two rooms for the accommodation of the public interpreting that expression in the sense I have indicated, and giving the words of the Act their plain and ordinary meaning I think the confirming committee were wrong, and I agree that this rule should be made absolute.

Order of mandamus.

Solicitors: *Sharpe, Pritchard & Co. for Town Clerk, Willesden Borough Council; J. E. Lickfold & Sons; Kenneth Goodacre.*

J. D. P.

[HOUSE OF LORDS.]

H. L. (Sc.)† 1956 *June* 11, 12, 13; *July* 19.

* WALSH . . . . . APPELLANT;

AND

LORD ADVOCATE . . . . . RESPONDENT.

National Service—Liability to—"Minister"—Exemption as "regular "minister of any religious denomination"—Officials of Jehovah's Witnesses—National Service Act, 1948 (11 & 12 *Geo.* 6, *c.* 64), *Sch. I, para.* 2.

Among Jehovah's Witnesses all members on baptism are recognized as ministers commissioned to preach the Gospel of the Kingdom. Within the organization a "congregation servant" is in charge of a congregation of not less than ten persons and a "pioneer publisher" ministers to persons in an assigned territory, preaching from house to house, conducting Bible services and giving spiritual advice:—

Held, that the functions performed by a person holding these appointments did not bring him within the exception "a regular "minister of any religious denomination" in paragraph 2 of Schedule I to the National Service Act, 1948, which was confined to persons having a spiritual status apart from other members of their denomination.

† *Present*: LORD MORTON OF HENRYTON, LORD GODDARD, LORD MACDERMOTT, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Decision of the Second Division of the Court of Session, 1955 S.L.T. 393 affirmed.

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APPEAL from the Second Division of the Court of Session.

This was an appeal against interlocutors of Lord Stracham, one of the Lords Ordinary of the Court of Session in Scotland, dated January 7 and 18, 1955, and of the Second Division of the Court of Session dated July 21, 1955, in favour of the respondent, the Lord Advocate, representing the Minister of Labour and National Service, in an action against him by the appellant, Douglas Walsh. The appellant, as pursuer in the action, sought a declarator "(a) that the body of Christian people known as "Jehovah's Witnesses forms and is a religious denomination for "the purposes of paragraph 2 of Schedule I to the National "Service Act, 1948, and (b) that the pursuer, by virtue of his "appointments as pioneer publisher and company servant of the "said body is a regular minister of that religious denomination" and "an order in terms of section 21 (1) (*a*) of the Crown Pro-"ceedings Act, 1947, declaring that the pursuer not being a "person subject to registration for the purposes of section 8 (1) "of the National Service Act, 1948, the Minister of Labour and "National Service has no power to serve or cause to be served "upon the pursuer a notice requiring him to submit himself for "medical examination."

The facts are fully set out in the opinion of Lord Morton of Henryton.

Sir Lynn Ungoed-Thomas Q.C. and *S. H. Noakes* (both of the English Bar) and *G. C. Emslie* (of the Scottish Bar) for the appellant.

Lord Advocate Milligan, *Harold Leslie Q.C.* and *Manuel Kissen* Q.C. (all of the Scottish Bar) for the respondent.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Simmonds* v. *Elliott* [1]; *Reg.* v. *Oldham* [2]; *Offord* v. *Hiscock* [3]; *Montgomerie* v. *Mackenna* [4]; *Nock* v. *Malins*.[5]

Their Lordships took time for consideration.

July 19. LORD MORTON OF HENRYTON. My Lords, the appellant was born on November 1, 1934. He holds the offices of "pioneer publisher" and "congregation servant" in the body now known as Jehovah's Witnesses. Shortly before January 10, 1953, the appellant had some discussion with officials of the Ministry of Labour and National Service as to his liability to be called upon to serve in the armed forces of the Crown under the National Service Act, 1948. On January 10, 1953, the Ministry sent him a letter in the following terms: "Consideration has

[1] [1917] 2 K.B. 894.
[2] (1869) L.R. 4 Q.B. 290.
[3] (1917) 86 L.J.K.B. 941.
[4] 1918 S.C.(J.) 55.
[5] (1917) 87 L.J.K.B. 62; 34 T.L.R. 3.

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" been given to your claim to non-liability under the above-named " Acts but this Department is of the view that a member of the " Society of Jehovah's Witnesses cannot be regarded as coming " within the definition of a regular minister of a religious " denomination for the purposes of exemption from liability under " paragraph 2 of Schedule I of the National Service Act, 1948. " I have, therefore, been instructed to inform you of this decision, " and request you to attend at this office as soon as possible in " order that your registration may be effected. Should you so " desire, you can register as a conscientious objector."

The result of this letter was that the appellant on January 15, 1953, issued a summons asking: " 1. For declarator (*a*) that the " body of Christian people known as Jehovah's Witnesses forms " and is a religious denomination for the purposes of paragraph 2 " of Schedule I to the National Service Act, 1948, and (*b*) that " the pursuer, by virtue of his appointments as pioneer publisher " and company servant of the said body is a regular minister of " that religious denomination. 2. For an order, in terms of " section 21 (1) (*a*) of the Crown Proceedings Act, 1947, declaring " that the pursuer not being a person subject to registration for " the purposes of section 8 (1) of the National Service Act, 1948, " the Minister of Labour and National Service has no power to " serve or cause to be served upon the pursuer a notice requiring " him to submit himself for medical examination." The office referred to in the summons as " company servant " is now known as " congregation servant."

The relevant provisions of the National Service Act, 1948, are as follows:—

1. (1): " Subject to the provisions of this Part of this Act, " every male British subject ordinarily resident in Great Britain " who has attained the age of eighteen years and has not attained " the age of twenty-six years and is not a person mentioned in " Schedule I to this Act shall be liable to be called upon to serve " in the armed forces of the Crown. . . ."

6. (1): " The Minister may from time to time by public notice " require male persons who have attained such age as may be " specified in the notice (not being less than seventeen years and " eight months), being persons who if they had attained the age " of eighteen would have become liable under this Part of this " Act to be called up for service in the armed forces of the " Crown, to be registered for such service under this Part of this " Act."

8. (1): " The Minister may from time to time cause to be " served on any person subject to registration a written notice in " the prescribed form requiring that person to submit himself to " medical examination by a medical board at such place and time " as may be specified in the notice; . . ."

Schedule I: " Persons not liable to be called up for service " . . . 2. A man in holy orders or a regular minister of any " religious denomination."

When the case was heard by the Lord Ordinary (Lord Strachan) there were two issues to be determined—(*a*) Was the body of persons known as Jehovah's Witnesses a "religious "denomination" within the meaning of the Act of 1948? (*b*) Was the appellant a "regular minister of a religious "denomination" within the meaning of the same Act?

The Lord Ordinary thus describes the evidence given before him[1]: "A very great deal of evidence was adduced for the "pursuer, the shorthand notes extending to no less than 760 "pages. In my opinion the relevant evidence could have been "stated within much shorter compass, but as this is a very "unusual case, and is indeed a test case from the point of view "of Jehovah's Witnesses, and as three of their headquarters "staff came specially from America to give evidence, I took the "view that it was desirable to give them the fullest opportunity "of putting forward their case and I was not disposed to curtail "the evidence which they offered. I had in mind also that this "is really the first opportunity in this country for an inquiry into "the relevant facts in a civil process. A similar question has "been raised in earlier cases but it has always previously been "initiated in a summary prosecution with the consequent "limitations upon a right of appeal."

In his judgment the Lord Ordinary described the history, beliefs and organization of the body now known as Jehovah's Witnesses, stated the facts relating to the appellant and to the offices which he holds, and arrived at the conclusion that Jehovah's Witnesses were a religious denomination within the meaning of paragraph 2 of Schedule I to the Act of 1948. As to the appellant the Lord Ordinary expressed his final views as follows[2]: "I therefore hold that the pursuer is not a regular "minister of a religious denomination by virtue of his appoint-"ment as a congregation servant, and that he is not such a "minister by virtue of his appointment as a pioneer publisher. "I am also of opinion that the combination of both appointments "does not make him a regular minister because, as I have "indicated, it seems to me that the pioneer appointment really "adds nothing material which could bring him within the "category of a minister. The pursuer's case therefore fails." The Lord Ordinary therefore granted decree of declarator in terms of conclusion 1 (*a*) of the summons but assoilzied the respondent from conclusions 1 (*b*) and 2.

From this decision the appellant appealed, and at the hearing of the appeal by the Second Division the respondent did not seek to challenge the finding of the Lord Ordinary that the body known as Jehovah's Witnesses was a religious denomination. Counsel for the respondent, however, intimated to the court that this concession was only made for the purposes of the present case. The same attitude was adopted by the Lord Advocate in this House, and in his written case the respondent stated that he

[1] 1955 S.L.T. 393–394. [2] Ibid. 399.

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desired to reserve his right, if so advised, to maintain in a subsequent case that Jehovah's Witnesses are not a religious denomination and, in any event, are not such within the meaning of the Act of 1948.

Thus the only question which arose for decision in the Second Division and now arises for decision in your Lordships' House is whether the appellant was, in January, 1953, " a regular minister " of any religious denomination " within the meaning of the Act of 1948.

The three learned judges of the Second Division—the Lord Justice-Clerk, Lord Patrick and Lord Mackintosh—concurred in answering this question in the negative and dismissed the appeal.

My Lords, notwithstanding a very able argument by Sir Lynn Ungoed-Thomas for the appellant, I find myself in agreement with each one of the three very powerful judgments delivered by the Second Division, and for this reason I have decided not to detain your Lordships by examining the whole matter afresh and stating my conclusion in words which can be no improvement upon the words chosen by these three learned judges.

I feel, however, that I should give my own answer to a question which naturally arose in the course of the hearing: Who can be said to be a regular minister of this denomination, if the appellant does not answer that description? In my view, the organization of Jehovah's Witnesses is of such a kind as to create no such office as a " regular minister " in the sense in which these words are used in the Act of 1948. At the head of the organization are the president and directors of the Watch Tower Bible and Tract Society, a non-profit making corporation incorporated under the laws of the State of Pennsylvania, U.S.A. To quote the appellant's condescendence 4: " All authoritative " pronouncements among Jehovah's Witnesses throughout the " world are made by the president of the society who is a witness " and chief spokesman of Jehovah's Witnesses. The seven direc- " tors of the society, who are elected by the members, are for " practical purposes, the spiritual governing body on earth of " Jehovah's Witnesses." At the other end of the organization is a person who has just become a member of the body of Jehovah's Witnesses by baptism, and I quote the appellant's condescendence 3: " It is one of the essential tenets of the body that every " member of the body is by virtue of his membership a Minister " or servant of God and his Gospel. Jehovah's Witnesses believe " that, in fulfilment of Biblical prophecy, they are members of " the earthly part of a theocratic organization. Each believes " that having dedicated himself to do the Will of God as " evidenced by baptism in the presence of witnesses, his ministry " and manner of witnessing is directed by Jesus Christ through " his visible instrument on earth after-mentioned and that he " must, as required by the Scriptures, preach to all who will " listen that the Kingdom of God is at hand. When an individual " determines to become a witness and minister he first begins to

" take courses of study with a company (now congregation). He " is then known as an adherent. The period of preparation is " variable depending upon individual diligence, aptitude and con- " centration. The ' company servant ' after-mentioned supervises " his development as shown by his participation in classes held " by the company and by his activities as a student gaining " practical experience of field ministry. His general course of " conduct, devotion to the Church, the renunciation of the affairs " and pleasures of the world are all factors considered to be " indicative of the adherent's preparedness for ordination. When " it is considered that an adherent is truly dedicating his life to " the service of God, a discussion is then held with him con- " cerning the meaning and responsibility attached to ordination. " It is once more emphasized to the adherent that the individual " who dedicates himself to the service of God and is ordained by " God cannot turn back and that all his future life time, energy " and assets become the property of God, following upon the " binding covenant of dedication. The adherent then attends a " baptism ceremony of Jehovah's Witnesses, which is held at " each circuit assembly (twice a year), district assembly (once a " year) and national assembly (once every three or four years). " At the ceremony there are prayers and a discourse on dedication " is given by the district servant or circuit servant who also " questions the candidate. If he satisfactorily answers the " questions put to him, he then proceeds to the final stage of the " ceremony, complete immersion in water, which is the outward " and visible symbol of the binding covenant of dedication. The " adherent once thus ordained becomes a witness and a minister " commissioned to preach the Gospel of the Kingdom and is " acknowledged as such by the governing authority of Jehovah's " Witnesses. He thereafter is required to devote his life, or such " part of it as is not occupied in the essential discharge of family " responsibilities, to preaching the Gospel in the same way as did " Jesus Christ and his disciples, by preaching from house to " house, conducting home Bible services, preaching on the street " corners, distributing literature containing printed sermons, " delivering public lectures and preaching in the schools and " congregations of Jehovah's Witnesses. There is no lower age " limit for ordination laid down in the Bible and accordingly the " body has no authority to impose one. In practice before a " person is recognized by the body as ordained, i.e., having a " commission to preach, he must bring himself into a fit condition " by his studies, actions, and conduct as condescended on." I have set out this condescendence in full because it shows so clearly that in the eyes of this body every member of it becomes a " minister " and comes under very extensive obligations, as soon as he is baptized; and he continues to be a " minister " for life unless he is expelled from the body.

The appellant was baptized at the age of 12 years and 3 months, nearly three years before he left school. He was

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appointed to the office of pioneer publisher when he was just over 15 years of age and had just left school, and to the office of congregation servant in the Dumbarton congregation on October 20, 1952, when he was nearly 18 years old. "In the "Dumbarton congregation" (to quote the Lord Ordinary [3]) "there are 29 persons consisting of 4 male adults, 18 female "adults and 7 children. Only 19 of the congregation are "baptized members of Jehovah's Witnesses." It is argued, on his behalf, that he became a "minister" on his baptism and a "regular minister," within the meaning of the Act, on his appointment as pioneer publisher or at latest on his appointment as congregation servant. I cannot accept this argument.

Having carefully studied the evidence as to the organization of this body, I think the true view is that while it contains a number of posts no one of them is of such a kind as to bring the holder within the description of "a regular minister of a religious "denomination" as these words are used in paragraph 2 of Schedule I to the Act of 1948. The reason why the organization is of this kind may be found in the following passage from the judgment of the Lord Justice-Clerk [4]: "The outstanding and "distinguishing feature of the beliefs of this body is broadly "speaking, that in this generation Christ has already returned to "this earth and set up his Kingdom. At some point within the "lifetime of those now living, the end of the world as we know it "will come. When that end comes, certain living members of "the body who attain the character of the anointed will join in a "Heavenly Paradise, those of the anointed who are already dead. "The other members of the body who do not number among the "anointed, will have conferred on them immortality on earth. "Those members of the human race who fall into neither of "these categories pass into death and oblivion. Two things "follow from this belief. First, the only hope of any sort of "salvation depends on becoming one of Jehovah's Witnesses. "Second, time is short—we cannot tell how short—and there is "a tremendous urgency if souls are to be saved. Accordingly, "the ruling impulse of the body is missionary zeal. The pro-"mulgation of the doctrine is of absolute and overwhelming "importance. It is only thus that knowledge of the one way of "salvation can be brought to the ignorant."

No doubt the president and directors of the Pennsylvania corporation thought that the best way to carry out this urgent task was to make every witness a minister and a preacher and to create a large number of posts for the ministers such as branch servant, district servant, circuit servant, congregation servant, pioneer publisher and some nine other named posts within the congregation (which may number as few as 10 persons). In so thinking they may have been right, but the result of setting up such an organization is that which I have already stated. My views as to the true construction of the words "regular minister

[3] Ibid. 397. [4] Ibid. 401.

"of a religious denomination," having regard to the context in which they are found, and my reasons for thinking that, so construed, they do not apply to the appellant, are to be found in the judgments of the Second Division.

Your Lordships were referred to a number of cases in the courts of England and Scotland and to one case decided in the Supreme Court of the United States, *Dickinson* v. *United States*,[5] decided on November 30, 1953. In that case the Supreme Court had to consider two sections of the Universal Military Training and Service Act. Section 6 (*g*) provided that: "Regular or duly "ordained ministers of religion, as defined in this title . . . shall "be exempt from training and service (but not from registration) "under this title." Section 16 (*g*) contained the definition, under three subheadings. The language of these subheadings is so far removed from the language which your Lordships have now to construe that I do not find *Dickinson's* case [5] of assistance in the solution of the problem before this House. Nor can I derive assistance in construing the Act of 1948 from the observations of Lord Justice-Clerk Inglis in *Lord Advocate* v. *Ballantyne* [6] as to the meaning of the word "ministers" in the Act 4 & 5 Will 4, c. 28, dealing with the celebration of marriages in Scotland "by "Roman Catholic priests or other ministers not belonging to the "Established Church of Scotland."

Three cases were cited in argument which dealt with officials of the denomination to which the appellant belongs. They were *Kipps* v. *Lane*,[7] *Guy* v. *Mackenna* [8] and *Saltmarsh* v. *Adair*.[9] In each of these cases the official contended that he was a regular minister of a religious denomination. In each case that contention failed, and in *Saltmarsh* v. *Adair* [10] the Lord Justice-General (Lord Normand) said "there was no such thing as a regular "ministry of the denomination."

I move that this appeal be dismissed with costs.

LORD GODDARD. My Lords, I agree that this appeal should be dismissed. While I agree with all the judgments delivered in the Court of Session, that of Lord Mackintosh so exactly expresses the opinion I have formed that it would be superfluous for me to give my reasons in detail. It is the spiritual or pastoral status and not the performance of functions that gives the right to exemption from military service. A clerk in holy orders is exempted whether or not he holds a benefice or preferment, so also is the minister, priest or pastor of any other religious body. While I will not attempt to define the expression "regular "minister of any religious denomination," at the risk of uttering a platitude I would say that a man cannot be a regular minister unless he is first a minister. He cannot for the purpose of the

[5] (1953) 346 U.S. 389.
[6] (1859) 3 Dru. 352, 371.
[7] (1917) 86 L.J.K.B. 735; 33 T.L.R. 207.
[8] 1917 S.C.(J.) 59.
[9] 1942 S.C.(J.) 58.
[10] Ibid. 64.

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National Service Act be regarded as a minister merely because that term is applied to him by fellow members of his sect. Considering that among Jehovah's Witnesses every person baptized into the sect is a minister regardless of sex, age, education or any other qualification, it follows that the sect has no ministers within the meaning of the Act and consequently no regular ministers. A pioneer publisher in this persuasion is no more than a colporteur of tracts and other of its literature, and a congregation servant appears to me to be no more than an organizer or secretary, perhaps honorary at that, of a group of adherents be it large or insignificant. True, he has a duty to preach, but so have all the other members to anyone whom they can persuade to listen. To put the pursuer, even though he is both a pioneer publisher and a congregation servant, on a level with a clerk in holy orders, the pastor of one of the great nonconformist congregations or a Jewish Rabbi, would, to my mind, be fantastic. There have been several attempts in the courts to get young men of this connexion exempted from their obligation of military service: they have all failed, and now that the matter has been before your Lordships' House I hope this case will be the last.

LORD MACDERMOTT. My Lords, the category within which the appellant would bring himself is set out in Schedule I to the National Service Act, 1948, thus: "A man in holy orders or a "regular minister of any religious denomination." These words are not easy to translate. A precise definition of either "holy "orders" or "a regular minister" appears impossible, and to search for one is to wander about between the realms of interpretation and application. The reason for this seems to flow from the legislature's manifest anxiety to avoid any semblance of religious discrimination. The language employed is accordingly wide in its scope and such as to embrace a great diversity of belief and organization; so much so that I think the legislature must have used the expression immediately in point—"a regular "minister"—to designate a fairly broad class rather than to describe the attributes of an individual. As I see it, therefore, the question of construction now to be resolved is as to the nature of this class. After that the issue ceases to be purely one of law and becomes substantially one of fact; the primary facts and circumstances must be weighed and considered and a finding reached as to whether or not they bring the person concerned within the ambit of the exemption.

This course was followed in the courts in Scotland, and I agree so fully with their conclusions on both branches of the inquiry that I do not propose to add more than a summary of my views on each.

In my opinion, the words "a regular minister" connote a class which forms but a part of the denomination in question and is acknowledged by that denomination as having a superior and distinct standing of its own in spiritual matters. The expression

itself, the earlier reference to "a man in holy orders," and the obvious desire of the legislature to attach the exemption to a circumscribed and identifiable category of some special quality, seem to me to justify this view which, to state it in another way, postulates the co-existence in the same denomination of at least two elements, namely, a ministering or clerical element and a lay element to which it can minister. If I may say so, Lord Mackintosh puts this requirement very clearly when, speaking of the "regular minister" he says[11]: "... he must have by "virtue of his appointment as a minister what might be called "'a clergyman status' which sets him apart from and places "him over the laity of his denomination in spiritual matters."

I turn, next, to the finding of fact. To my mind, the material offered by the oral and documentary evidence was more than sufficient to found the conclusion reached by the Lord Ordinary and the Second Division that the appellant was not within the class designated by the words "a regular minister." This is not to say that each of the several considerations canvassed by the courts in coming to this conclusion must have a particular cogency or carry the same weight with different minds. For my own part, for example, I would not be disposed to draw any very close analogy between "a man in holy orders" and "a regular minister," or to build much on a lack of traditional forms and solemnities on appointment to office. But these and the other matters that have been regarded on this issue were all relevant to it, and I can see no good reason for impeaching the decision under appeal because they were taken into account.

My Lords, what I have said is enough to dispose of the case; but its importance for the appellant and the denomination to which he belongs is such that I should make it plain that my concurrence in the decision of the Scottish courts rests on more than an inability to find any sufficient ground for disturbing it. Despite the full and careful argument submitted on behalf of the appellant, I am of opinion that no other decision was open on the evidence. Apart from anything else, the whole weight and tenor of the testimony, including that of the publications put in proof and regarded by this denomination as authoritative, appear to me to lead inevitably to the conclusion, so convincingly stated in the opinions of Lord Patrick and Lord Mackintosh, that in this particular body there is no distinction corresponding to that between the clerical and the lay and, accordingly, no class of regular ministers of which the appellant might claim membership. Disregarding mere adherents, this body considers itself to be a body of ordained ministers, its views as to the effect of baptism and the duties of the baptized being stated fairly and accurately, as I think, in a passage from the appellant's third condescendence which, after describing the baptismal ceremony, says: "The "adherent once thus ordained becomes a witness and a Minister "commissioned to preach the Gospel of the Kingdom and is

[11] 1955 S.L.T. 393, 408.

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" acknowledged as such by the governing authority of Jehovah's " Witnesses. He thereafter is required to devote his life, or such " part of it as is not occupied in the essential discharge of family " responsibilities, to preaching the gospel in the same way as did " Jesus Christ and his disciples, by preaching from house to " house, conducting home Bible services, preaching on the street " corners, distributing literature containing printed sermons, " delivering public lectures and preaching in the schools and " congregations of Jehovah's Witnesses."

The sense of urgency evoked by the tenets of this denomination goes some distance, I think, to explain the common standing in spiritual matters which is thus portrayed. But, be that as it may, this characteristic has not prevented the body from developing an elaborate structure for the furtherance of its objects, and it is clear that the opportunity and ability to serve may bring special duties and responsibilities to individual members either as congregation servants or in some other capacity. That, however, is something of a kind to be expected in any organized movement, and, to my mind, it falls far short of investing the appellant, and those chosen to discharge obligations such as his, with the distinguishing status in spiritual affairs which, as I would hold, the expression " a regular minister " signifies.

For these reasons I agree that the appeal fails and should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, I have little to add to the full and admirable judgments of the courts below. What I think is fatal to the appellant's case is that all the members of this religious denomination are regarded as ministers of the gospel. It was conceded before the Lord Ordinary, as it was conceded at the hearing of this appeal, that this does not make them all regular ministers within the meaning of the statutory exemption. What distinguished the appellant as a regular minister, it was said, was his functions or vocation. The appellant was discharging full-time spiritual functions as a congregation servant and pioneer publisher. This distinguished him from other members of his sect and made him a regular minister. The definition was satisfied by a person officially charged by his denomination with whole-time spiritual functions which constituted his vocation for the time being. But that is not, in my opinion, the test. It would exclude many ordained ministers who were not discharging any, or at least full time, spiritual functions and who would, according to ordinary conceptions, be regarded in this country as regular ministers. I would not be prepared to accept Lord Anderson's view expressed in *Guy* v. *Mackenna* [12] that in this field " regular " could be contrasted with " occasional." The judges of the Second Division were, in my opinion, right in regarding a regular minister under the statutory exemption as

[12] 1917 S.C.(J.) 59, 63.

someone set apart from the other members of his denomination. This cannot be said of the appellant. He is no doubt functioning full time and performing more spiritual duties than the other members, but these are differences of degree and not of kind.

It was next said that if function was not the test the appellant could be held to be a regular minister by virtue of a regular appointment. This refers to his appointment as a pioneer publisher when he was 15 years of age by the letter dated December 28, 1949, from the Watch Tower Bible and Tract Society to him and his appointment as congregation servant by the letter dated October 20, 1952, from the same society to him. But these letters did not make him a minister. He became a minister when he was baptized on January 31, 1947. They merely appointed him to carry out the functions of pioneer publisher and congregation servant. These functions, as I have said, were not sufficient to make him a regular minister, and a formal appointment to perform them did no more than stamp him as a person prepared to carry out these functions. The method of appointment was no doubt in accordance with recognized procedure of the denomination, but it did not confer on him any spiritual qualities or powers. In short, it did not set him apart from his co-religionists and so was ineffectual to confer on him the status of a regular minister.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree.

Appeal dismissed.

Solicitors: *Gouldens for Scott & Glover W.S., Edinburgh, and Burns, Reid & Tilston, Glasgow; Solicitor to the Ministry of Labour and National Service for Macpherson & Mackay W.S., Edinburgh.*

F. C.

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Town and Country Planning — Enforcement notice — Time of service — Notice served on occupier while appeal to Minister pending—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51) (*as amended*), *ss.* 16, 23.

On August 1, 1952, a county council as the local planning authority, extended for a further year a consent previously granted to the occupier of certain land in Cirencester under the Town and Country Planning Act, 1932, allowing him to use the site for coach parking and garaging vehicles, subject to the condition that such use was discontinued and the buildings removed by September 27, 1953. On

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September 14, 1952, the occupier appealed to the Minister pursuant to section 16 of the Town and Country Planning Act, 1947,[1] against the condition imposed, but asked that the consideration of his appeal be postponed pending negotiations with the county council. The negotiations failed, the period allowed by the condition expired, and on November 9, 1953, the county council served an enforcement notice requiring the occupier to discontinue the user of the land for coach parking and to remove the buildings thereon by a certain

[1] Town and Country Planning Act, 1947 (as amended by the Town and Country Planning (Amendment) Act, 1951, s. 2 (1)), s. 16: "(1) Where application is made "under this Part of this Act to a "local planning authority for per- "mission to develop land, or for "any approval of that authority "required under a development order, "and that permission or approval is "refused by that authority, or is "granted by them subject to condi- "tions, then if the applicant is "aggrieved by their decision he may "by notice served within the time, "not being less than twenty-eight "days from the receipt of notification "of their decision, . . . appeal to the "Minister: . . . (2) Where an "appeal is brought under this section "from a decision of the local plan- "ning authority the Minister may "allow or dismiss the appeal or may "reverse or vary any part of the "decision of the local planning "authority, whether or not the appeal "relates to that part, and deal with "the application as if it had been "made to him in the first "instance; . . ."

S. 23: "(1) If it appears to the "local planning authority that any "development of land has been carried "out after the appointed day without "the grant of permission required in "that behalf under this Part of this "Act, or that any conditions subject "to which such permission was "granted in respect of any develop- "ment have not been complied with, "then, subject to any directions given "by the Minister, the local planning "authority may within four years of "such development being carried out "or, in case of non-compliance with "a condition, within four years after "the date of the alleged failure to "comply with it, if they consider it "expedient so to do having regard to "the provisions of the development "plan and to any other material con- "siderations, serve on the owner and "occupier of the land a notice under "this section. (2) Any notice served "under this section (hereinafter "called an 'enforcement notice') "shall specify the development which "is alleged to have been carried out "without the grant of such permis- "sion as aforesaid or, as the case "may be, the matters in respect of "which it is alleged that any such "conditions as aforesaid have not "been complied with, and may "require such steps as may be "specified in the notice to be taken "within such period as may be so "specified for restoring the land to "its condition before the develop- "ment took place, or for securing "compliance with the conditions, as "the case may be; and in particular "any such notice may, for the pur- "pose aforesaid, require the demoli- "tion or alteration of any buildings "or works, the discontinuance of any "use of land, or the carrying out on "land of any building or other "operations. (3) Subject to the pro- "visions of the next following sub- "section, an enforcement notice shall "take effect at the expiration of such "period (not being less than twenty- "eight days after the service there- "of) as may be specified therein: "Provided that (a) if within the "period aforesaid an application is "made to the local planning autho- "rity . . . for permission for the "retention on the land of any build- "ings or works, or for the continu- "ance of any use of the land, to "which the enforcement notice "relates, the notice shall be of no "effect pending the final determina- "tion of that application, and if such "permission as aforesaid is granted "on that application, the notice "shall not take effect; (b) if within "the period aforesaid an appeal is "made to the court under the follow- "ing provisions of this section by a "person on whom the enforcement "notice was served, the notice shall "be of no effect pending the final "determination or withdrawal of the "appeal." Subs. (4) provides for an appeal to a court of summary juris- diction by a person aggrieved by the service of an enforcement notice, and subs. (5) gives a right of appeal to quarter sessions from the decision of the court of summary jurisdiction.

date. The occupier then requested the Minister to consider his appeal and on April 20, 1954, after a local inquiry, the Minister refused to extend the permission and dismissed the appeal. The occupier continued to use the land for coach parking.

Justices dismissed an information preferred against him in January, 1956, by the local planning officer for continuing to use the land contrary to section 24 (3) of the Act of 1947, holding that the enforcement notice was invalid as it was served while the appeal to the Minister was still pending:—

Held, that there was nothing in the Act of 1947 which limited the legal right of the planning authority to serve an enforcement notice pending the hearing of an appeal to the Minister, and the notice was valid.

CASE STATED by Cirencester justices.

On January 16, 1956, an information was preferred by the appellant, Guy H. Davis, the Town and Country Planning Officer of the Gloucestershire County Council, against the respondent, the occupier of certain land in Cirencester, alleging that whereas on November 10, 1953, the county council had served upon him an enforcement notice, pursuant to section 23 of the Town and Country Planning Act, 1947, requiring him within 15 weeks after the expiration of 28 days from the service of the notice to cease using the land for garaging and washing down of public service vehicles and to remove a coach garage situate thereon from the land, he had, on January 2, 1956, without the grant of permission under Part III of the Act, used the land for those purposes in contravention of the notice, and had not removed the coach garage from the land contrary to section 24 (3) of the Act.

At the hearing of the information on February 15, 1956, the justices found the following facts: On March 28, 1947, the respondent applied to the Cirencester Urban District Council, the interim development authority for the purposes of the Town and Country Planning Act, 1932, for planning consent for the use of the site for coach parking and washing space. Consent was refused on the grounds that such development would injure the amenities of the neighbourhood and constitute a nuisance and annoyance to adjoining residents. The respondent appealed to the Minister against this refusal and on September 27, 1947, the Minister, after hearing the appeal, issued his decision allowing the respondent to use the land for the desired purposes for five years, namely, until September 27, 1952. On December 10, 1947, the respondent applied to the Cirencester Urban District Council for consent to erect a temporary coach shelter upon the site and consent was given subject to the condition that the shelter should be removed at the expiry of the consent for use of the site. On June 17, 1952, the respondent applied to the Gloucestershire County Council, the local planning authority for the purpose of the Town and Country Planning Act, 1947, for permission to retain the coach shelter and to continue the use of the site for garaging and washing down vehicles, and on August 1, 1952, consent was granted for one year subject to a condition that the

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use of the site for such purposes should be discontinued and the shelter removed by September 27, 1953. On October 14, 1952, the respondent appealed to the Minister against the condition attached to the consent, but asked that the arrangements for a local inquiry should be postponed whilst he was negotiating with the county council. The negotiations came to nothing, the period allowed by the condition expired on September 27, 1953, and on November 10, 1953, the county council served an enforcement notice on the respondent pursuant to their powers under sections 23 and 24 of the Town and Country Planning Act, 1947, requiring him to cease using the site for garaging and washing down vehicles and to remove the coach garage therefrom within 15 weeks after the expiration of 28 days after the service of the notice upon him. On December 3, 1953, the respondent requested the Minister to arrange a date for the hearing of his appeal and on March 2, 1954, a local inquiry was held. On April 20, 1954, the Minister issued his decision, stating that he had decided not to extend the period of permission and dismissing the appeal. The respondent continued to use the premises as a coach station and on November 9, 1955, the county council informed him through his solicitor that unless he vacated the site by December 31, 1955, proceedings would be taken against him under section 4 (4) of the Act. On January 2, 1956, the area planning officer found that the site was still being used for garaging public service vehicles and that the shelter had not be removed.

It was contended by the appellant that the notice issued on November 9, 1953, was a valid notice under section 23 of the Act and was effective as from March 23, 1954. It was contended by the respondent that the notice was invalid as (a) it was served at a time when an appeal to the Minister was outstanding and no question of non-conforming user could arise until that appeal had been either determined or withdrawn, and (b) as it purported to take effect as from March 23, 1954, at which date the Minister's decision on the appeal was still outstanding, so that, if the notice was held to be valid, the occupier would have been committing an offence under section 24 (3) of the Act, and the county council would have been entitled to exercise powers conferred on them by section 24 (1) as from March 23, 1954, although the Minister's decision was not issued until April 20, 1954.

The justices, being of opinion that the contentions of the respondent were correct in law, dismissed the information. The planning officer appealed.

Frederick Mattar for the appellant.
Arthur Mildon for the respondent.

No cases were cited in argument.

DONOVAN J. stated the facts and continued: The enforcement notice had been issued in November, 1953, before the Minister

had given his final decision, and the point which arises on this appeal and which succeeded before the justices, is whether an enforcement notice can be issued under section 23 of the Town and Country Planning Act, 1947, while an appeal to the Minister is still pending. The appeal, be it remembered, had been lodged in October, 1952, and was finally disposed of in April, 1954, a few months after the enforcement notice was served. The question raised is purely one of construction of section 23 of the Act, which provides: "If it appears to the local planning authority that any "development of land has been carried out after the appointed "day without the grant of permission required in that behalf "under this Part of this Act, or that any conditions subject to "which such permission was granted in respect of any develop-"ment have not been complied with, then, subject to any "directions given by the Minister, the local planning authority "may within four years of such development being carried out "or, in case of non-compliance with a condition, within four "years after the date of the alleged failure to comply with it, "if they consider it expedient so to do having regard to the "provisions of the development plan and to any other material "considerations, serve on the owner and occupier of the land "a notice under this section," which by subsection (2) is called an enforcement notice, and that was done in the present case. The respondent argues that it was done too soon because the appeal was pending, and therefore was a nullity. It therefore becomes material to see whether in the Act there is any provision to the effect that once a notice of appeal has been lodged with the Minister against any conditions which are part of planning permission, that notice operates as a stay and prevents the planning authority thereafter from issuing an enforcement notice until the appeal is disposed of.

In the ordinary way, and as a matter of practice, one would suppose that planning authorities would wait until an appeal had been disposed of. But this is rather an exceptional case and obviously one which was not contemplated by the statute because the appeal had been outstanding for over a year. It had been held up originally at the instance of the respondent, and the planning permission which he had obtained had already expired before the enforcement notice was issued. The case can thus be differentiated from one where the local planning authority might serve their enforcement notice very soon after the conditions had been decided upon and before any appeal had been heard. The fact is that there is nothing either in section 16 of the Act of 1947 (which gives the right of appeal to the Minister), or in section 23, which limits the legal right of the planning authority to serve an enforcement notice pending the hearing of an appeal. We have been pressed with the curious consequences which might follow the exercise of such a right, and one sees that in an ordinary case there might be reasons for holding that an enforcement notice had been prematurely served. But here

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Donovan J.

there are no such circumstances. The appeal had been held up by the action of the respondent himself, at least mainly so; and there is certainly no stimulus towards reading into section 23 of the Act words which the respondent admits we must read in, that is to say, some such words as would postpone the serving of an enforcement notice until the appeal had been heard. If the appellant is asked to justify the enforcement notice, all he has to do is to point to section 23. The reply of the respondent is that that section is not applicable because an appeal is still outstanding: but there is nothing in section 23 which expressly postpones the right of the planning authority to serve an enforcement notice until the appeal has been disposed of, and there is nothing in the present case which would induce me to imply such a limitation. For these reasons, I think that the justices came to a wrong conclusion.

ORMEROD J. I agree. When I first considered the matter I was impressed to some extent by the anomaly which was likely to arise if the appellant's interpretation of the Act was a correct one, because the effect might be, that if the owner of the site, having been served with a notice under section 23, chooses to exercise his right under subsection (3), there is nothing to prevent him from doing so, and from making an application to the local authority to use the land, which would have the effect of postponing the notice until such application was determined in one way or another. That must mean that he has the right to make an application although he has already made one application which has been refused, an appeal from which refusal is pending to the Minister. This may be an anomaly and, on first consideration, seemed to be such as to make it necessary to imply into the section some provision to the effect that an enforcement notice should be stayed while an appeal was pending, but on considering the section I am satisfied that this is not so. The anomaly has arisen because of a situation which was not in the contemplation of the legislature and, in those circumstances, I am satisfied that the appeal must be allowed.

LORD GODDARD C.J. I agree. There is a perfectly simple way of safeguarding a person who has appealed to the Minister, and against whom proceedings are taken on an enforcement notice served before the Minister has given his decision. If those were the circumstances, that person could say to the justices before whom he was summoned: "I am waiting for the Minister's 'decision. If he has given me planning permission, it follows 'that I shall have committed no offence because the enforcement "notice will have been invalid." Upon that the justices would, I should think, in a proper case say that they would adjourn the case to hear whether or not the Minister allowed or dismissed the appeal. In that state of affairs I am sure that if the Minister was informed he would give his decision promptly. There is nothing

of that sort in the present case. The Minister had dismissed the respondent's appeal in 1954. Therefore, the respondent has been developing the land since without permission, and why it should be necessary to serve another enforcement notice I do not know. As has been pointed out, this point is not dealt with in the Act, but there is nothing which entitles us to say, because an appeal has been lodged which may or may not be successful, that the enforcement notice is of no avail during the pendency of that appeal. For these reasons, I think the justices came to a wrong decision, and the case must go back to them with a direction to convict.

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DAVIS v. MILLER.

Lord Goddard C.J.

Appeal allowed.

Solicitors: *Field, Roscoe & Co., for Guy H. Davis, Gloucester; Tarry, Sherlock & King for Townsends, Swindon.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

*EVANS *v.* WALKDEN AND ANOTHER.

1956
July 11.

Lord Goddard C.J., Ormerod and Donovan JJ.

Road Traffic — Third-party insurance — Driving without licence— Unlicensed driver accompanied by instructor—Instructor in control of driver—Not in position to assume control of car at any moment —Instructor not a driver of car—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 35.

Road Traffic—Disqualification—Special circumstances.

A fifteen year old boy, seated in the driver's seat, drove a motor-car for about 200 yards along a road in bottom gear at a speed of about four to five miles per hour. His father, a driver of 30 years' experience, was sitting beside him. The father was in a position to control his son's driving, and was in fact doing so, and could have stopped the car immediately at that slow speed; the steering wheel was within his reach, as also were the brake and clutch pedals, the ignition key and the gear handles on the steering wheel. The father was the holder of a motor-car insurance policy which covered third-party claims for damage "arising out "of or caused by the use of the car" but which did not extend to any loss or damage or liability arising whilst the car was being driven by an unlicensed driver. The son was charged with using, and the father with permitting the use of, the motor-car on the road, there not being in force in relation to the user a policy of insurance in relation to third-party risks, contrary to section 35 of the Road Traffic Act, 1935. The justices considered that having regard to the degree of control exercised by him, the father was a driver of the car at the material time, and they dismissed both informations. On appeal by the prosecutor:—

Held that, although the father might well have been in control of his son, and in a position to assume control and become the driver of the car at any moment, at the material time he was not in fact in control of or a driver of the car; the only driver therefore, was the son, and as he was an unlicensed driver both father and son were guilty of the offence charged.

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Langman v. *Valentine* [1952] 2 T.L.R. 713; [1952] 2 All E.R. 803 distinguished.

Per curiam. The decision in *Langman* v. *Valentine* (*supra*) cannot be extended nor should it be applied in any case where the facts are not strictly in line with it.

CASE STATED by Merioneth justices sitting at Barmouth.

On June 25, 1955, an inspector of police preferred the following informations against the defendants, David Walkden and his father, Bernard Walkden: (a) against the defendant David Walkden that he on June 2, 1955, at Beach Road, Fairbourne, in the parish of Llangelynin, unlawfully did use a motor-car on the road there not being in force in relation to the use of the vehicle such policy of insurance or such security in respect of third-party risks as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to section 35 of the Act [1]; (b) against the defendant Bernard Walkden that he on June 2, 1955, at Beach Road, Fairbourne, in the parish of Llangelynin did permit David Walkden to use a motor-car on the road there not being in force in relation to the user of the vehicle such policy of insurance or such security in respect of third-party risks as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to section 35 of the Act.

The following facts were found by the justices: at 9.45 a.m. on Friday, June 2, 1955, David Walkden was seated in the driving seat of a Hillman motor-car No. GJK 1762 and was driving the same along Beach Road, Fairbourne. He was under 17 years of age and was disqualified by reason of his age from holding a driving licence. Seated by his side in the front seat of the car was his father, Bernard Walkden, a driver of 30 years' experience. The road was perfectly level and there was no other traffic on the road at the time with the exception of a motor-car driven by a police constable who overtook the Hillman car, and called upon the driver to stop, which he did. On being questioned by the police constable David Walkden replied that he had never held a driving licence and that his date of birth was on March 12, 1940. On being questioned Bernard Walkden replied that it was a perfectly innocent thing, that his son had never driven along a big road and that he had been most strict with him and that he, Bernard Walkden, had a full comprehensive insurance. The car was being driven in bottom gear and was not doing more than 4–5 m.p.h., the total distance driven was about 200 yards and Bernard Walkden was in a position to control the driving of David Walkden and was in fact doing so and could have stopped the car immediately at that slow speed; the steering wheel was

[1] Road Traffic Act, 1930, s. 35 (1): "... it shall not be lawful for "any person to use, or to cause or "permit any other person to use, a "motor vehicle on a road unless there "is in force in relation to the user "of the vehicle by that person or "that other person, as the case may "be, such a policy of insurance or "such a security in respect of third-"party risks as complies with the "requirements of this Part of this "Act."

within reach of Bernard Walkden, as also were the brake and clutch pedals, the ignition key, and the gear handles on the steering wheel.

It was contended by the prosecutor that Bernard Walkden was not driving the car and that he had not discharged the onus of proof which was upon him of proving to the court that he was covered by insurance against third-party risks as required by statute.

It was contended by the defendant Bernard Walkden that on very clear evidence he had control of the car which was being driven by his son in bottom gear; that he was in the position of an instructor and not a passenger; and that he would have been liable in damages and would have been covered by his comprehensive policy of insurance, if an accident had occurred.

The justices were of opinion that Bernard Walkden had effective control of the car and that if an accident had happened his insurance company would have been liable, and they accordingly dismissed both informations.

The prosecutor appealed and on January 18, 1956, a case stated by the justices came before the court. The court reversed the determination of the justices and remitted the case to the justices to continue the hearing to enable Bernard Walkden to produce his policy of insurance if so advised for them to see what it covered, and then to consider the matter in relation to *Langman* v. *Valentine*.[2]

A further hearing of the informations took place on March 9, 1956, when the following documents were produced by Bernard Walkden:—(i) Lloyd's Service Motor Policy dated November 5, 1949, Policy No. 294,244. (ii) Endorsement attached thereto dated December 5, 1950, and two of May 1, 1952. (iii) Motor Renewal Notice in respect of the policy; and (iv) Certificate of Insurance No. 249,244 in the name of Bernard Walkden issued under the policy in respect of the year November 5, 1954, to November 5, 1955.

By the policy, a private car policy "specially arranged for "the Teachers Motoring Association Ltd.," the underwriters bound themselves to pay or make good to the assured [Bernard Walkden]:—"Section A. Third Party. (a) All sums which the "assured shall become legally liable to pay by way of compen- "sation or law costs for:—(1) Death or bodily injury to any "person. . . . (2) Accidental damage to property, including "animals . . . caused by or arising out of the use of the car. . . . "(c) The indemnity granted by this section will be extended to "any person who is duly licensed and who is driving the car with "the assured's knowledge and consent subject to the terms and "conditions of this policy, for which purpose such person shall "be deemed to be included in the expression 'the assured.' "Conditions. This policy is subscribed subject to the following "conditions. 3. The underwriters shall not be liable for any loss

[2] [1952] 2 T.L.R. 713; [1952] 2 All E.R. 803.

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" or damage or liability (*a*) arising whilst the car is being driven " by an unlicensed driver, or (*b*) arising whilst the car is being " used for any purpose other than ' private use.' . . . 9. Notwith- " standing anything contained in this policy, the insured car may " be used for tuition purposes subject to the following limita- " tions:—(b) There shall be present in the insured car as a tutor " a person under whose supervision the holder of a provisional " licence would be entitled to drive. . . . Definition. For the " purpose of this policy a driver shall be deemed to be duly " licensed provided such driver holds a licence to drive the " vehicle or had held and is not disqualified by order of a court " of law or by reason of age or disease or physical disability for " obtaining such a licence."

The justices considered those documents in relation to the decision in *Langman* v. *Valentine* [3] and in relation to the facts previously found by them, and were of the opinion that, having regard to the degree of control being exercised by Bernard Walkden he as well as David Walkden was a driver of the car, and that he would, under the terms of the policy, have been indemnified against any third-party claims under section A thereof inasmuch as he would in their opinion have been legally liable to any third party for injury or damage caused during the period when he and David Walkden were both drivers of the car. In those circumstances they were of the opinion that the user of the car at the material time was covered by insurance against third-party risks and they accordingly dismissed both informations.

The prosecutor appealed.

John Davies for the prosecutor.

A. J. Irvine for the defendants.

The following cases were cited in argument: *Langman* v. *Valentine* [4]; *Ellis (John T.) Ltd.* v. *Walter I. Hinds* [5] and *Marsh* v. *Moores (J.).* [6]

LORD GODDARD C.J. Ormerod J. will deliver the first judgment.

ORMEROD J. stated the facts as found by the justices and continued. It should be pointed out that, though it does not appear in the case, the hand-brake of the car was on the right-hand side of the driver and was not accessible to anybody sitting in the passenger seat, so that when the justices find that the brake was available for the use of Bernard Walkden if he wished to control the car, they must presumably be referring to the foot-brake only.

[3] [1952] 2 T.L.R. 713.
[4] Ibid.
[5] [1947] K.B. 475; 63 T.L.R. 181; [1947] 1 All E.R. 337.
[6] [1949] 2 K.B. 208; 65 T.L.R. 318; [1949] 2 All E.R. 27.

The justices came to the conclusion "that Bernard Walkden "had effective control of the car and if an accident had happened "his insurance company would have been liable" and they accordingly dismissed both informations.

The matter was considered by this court on January 18, 1956, when it was ordered that the determination of the justices should be reversed and the matter should be remitted to them to continue the hearing so that the defendant Bernard Walkden, the elder defendant, could, if he was so advised, produce his policy of insurance so that the matter could be further considered in relation to certain decisions, in particular to *Langman* v. *Valentine*.[1] The insurance policy was duly produced and the further hearing of the information took place on March 9, 1956. Apart from the documents in the case, no further evidence was called, and after consideration of the documents and after hearing arguments principally founded on *Langman* v. *Valentine*,[1] the justices came to the conclusion which is set out in the case and dismissed the informations. It is important to look at the terms of the policy which was in force at the time these events happened. The policy says, in Section A, dealing with third-party claims, that the underwriters will indemnify the assured for any claim for which he may become liable for death or bodily injury or damage to property and so on, caused by or arising out of the use of the car. If the terms of the policy stopped there, it might very well be said that this was a case where any injury which occurred—of course there was none—might have been covered by the policy because it came within the words "caused by or arising out of "the use of the car"; but the policy does not stop there, and there are certain conditions. Condition 3 is as follows: "The "underwriters shall not be liable for any loss or damage or "liability (*a*) arising whilst the car is being driven by an "unlicensed driver." It is abundantly clear from that, and I do not think that Mr. Irvine has argued to the contrary, subject to an argument on condition 9, that if the only driver of the car at the time had been David Walkden, the son, clearly an unlicensed driver, the policy would not be a cover at the time when he was driving. But the defendants' argument is that although David Walkden at that time may have been a driver of the car, Bernard Walkden, the father, was at the same time a driver of the car, and that, the justices having found so, and there being evidence to support their findings, in those circumstances the car was being driven by a driver who was licensed and therefore the policy was in force so far as this particular user of the car was concerned. If the justices were justified on the evidence before them in coming to the conclusion that Bernard Walkden was a driver of the car, then it may very well be that they were justified, in fact they would have been justified, in dismissing these informations; but looking at the facts upon which they found their decision, I am clearly of opinion that there was no

[1] [1952] 2 T.L.R. 713; [1952] 2 All E.R. 803.

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evidence by which they could come to the conclusion that Bernard Walkden was a driver of the car. It is argued that they took into account the whole of the circumstances, particularly the fact that the car was travelling in bottom gear and was only travelling at four to five miles an hour, and in those circumstances it would have been a simple matter for Bernard Walkden who was sitting beside the driver, either by putting his hand on the steering wheel or by in some way or other getting to the brake or by switching off the ignition or possibly by knocking the gear into neutral, or doing one or more of those things, to have stopped the car or to have had control of it in any way necessary, and that in those circumstances the justices could say that Bernard was a driver of the car. But I think that that is not so. It may well be that Bernard was in control of his son who was driving, but I do not think that he was in control of the car. He may have been in a position to assume control, but he was not in control at the time the car was being driven by his son. He may have been in a position to become at any moment a driver of the car, but in fact, on the facts as found by the justices, I fail to see how he can be regarded at that time as a driver of the car.

The justices were clearly influenced by the decision of this court in *Langman* v. *Valentine* [2] in which the owner of a motor-car was teaching a young woman to drive on a public road; she had no licence and at all material times the owner was sitting in the front passenger's seat and kept one hand on the hand-brake and the other on the steering wheel and at all material times he was able to steer the car, stop it or start it, the ignition switch being within his reach. It was said, too, that the girl who was learning to drive sitting in the driver's seat had her foot in a position to use the accelerator, the foot-brake and clutch pedal and, in those circumstances, the justices held that the owner was the driver of the car. This court on appeal on a case stated said that the justices were justified in coming to the conclusion that the owner was the driver, not necessarily because there could be two drivers but because, in those circumstances, he was the driver. Those circumstances appear to me to be very different from the circumstances set out in the statement of the case we are considering at the moment. Here, the defendant Bernard did not have his hand on the steering wheel; he did not have his hand on the hand-brake, which was in fact not accessible to him; and the only brake he could have applied would have been the foot-brake, which is on the right-hand side of the driver, and could only have been reached by him with very considerable difficulty. It is true, I suppose, that he could have switched off the ignition and that he could have taken hold of the steering wheel and possibly put the gear into neutral, because it appears that the gear lever was on the steering wheel, but in fact he had done none of those things. He was not in fact touching any of

[2] [1952] 2 T.L.R. 713.

the instruments of control and, in the circumstances, I think that this case is on its facts distinguishable from *Langman* v. *Valentine*,[3] and that here there was no evidence which could justify the justices in coming to the conclusion that Bernard Walkden was a driver of this car. In those circumstances, if he was not a driver of this car, it follows that the driver of the car, and the only driver, was David Walkden. As he was an unlicensed driver it follows so far as that user of the car is concerned that there was no policy of insurance in force.

The other point raised by Mr. Irvine on behalf of the defendants, is that, even supposing Bernard was not a driver of the car, and therefore there was no policy of insurance in force having regard to the provisions of condition 3, condition 9 does in fact bring the policy back into force under the circumstances because it deals with the car while it is being driven by a person under tuition. Condition 3 limits the user of the car, amongst other things, to the user for private purposes and does not include amongst the uses to which the car may be put that of tuition, but condition 9 says: "Notwithstanding anything to the contrary "contained in this Policy, the insured car may be used for tuition "purposes subject to the following limitation"; then it sets out three conditions, the material one of which is condition (b): "There shall be present in the insured car as a tutor a person "under whose supervision the holder of a provisional licence "would be entitled to drive."

Mr. Irvine argues that the words at the beginning of that condition "Notwithstanding anything to the contrary contained "in this Policy" exclude the opening words of condition 3 and that condition 9 must be construed as though condition 3 were not there, and that in those circumstances the words of condition 9 are not sufficiently explicit to permit of the construction that the person under tuition must be in possession of a provisional licence. It may be that if condition 9 were being construed entirely without condition 3 that might be a proper construction of paragraph (b) of condition 9, but condition 3 must be taken into consideration unless it is in fact contradicted by condition 9 because the opening words of condition 9 are: "Notwithstand-"ing anything to the contrary contained in this Policy." As I see condition 9, there is nothing there contrary to the provision that this insurance policy shall not be in force, or rather that the underwriter shall not be liable for loss or damage arising while the car is being driven by an unlicensed driver. In those circumstances the defendants cannot get very much help from the construction which they seek to put upon condition 9. It follows that in my opinion this appeal must be allowed, and the case must be sent back to the justices for them to convict. It may very well be that in these circumstances the offence which has been committed is not a serious one, but that is a matter for the justices and a matter entirely for their consideration.

[3] [1952] 2 T.L.R. 713.

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DONOVAN J. I agree. It is true that this was in all the circumstances a venial and not a serious offence, but on the facts I do not think that the father, Bernard Walkden, could be said to be the driver. In *Langman* v. *Valentine* [3] the person there concerned had one hand on the steering wheel and the other on the hand-brake. In the present case the father was out of immediate reach of the hand-brake, he would have had to displace his son's foot in order to get to the foot-brake, and he had no hand on the steering wheel. It is true of course that he could have switched off the engine.

It is argued that because he was in the immediate vicinity of the steering wheel, ignition switch and foot-brake he was in such control as to be a driver of it, particularly when the car was travelling at only four miles an hour; but I cannot agree that that conclusion was open to the justices. Control is not the same thing as the possibility of assuming control, and in a matter of this importance I do not think the decision in *Langman* v. *Valentine* [3] ought to be made the starting-point for more indulgence.

As regards the policy itself, I do not regard condition 9 as antagonistic to that part of condition 3 which excludes cover if the car is driven by an unlicensed driver because condition 9 is dealing with the qualification of the tutor and does not touch the question of the pupil having, as by law he should have, a provisional licence.

LORD GODDARD C.J. I agree. I confess that I had some doubt at first as to whether we could in the circumstances of this case differ from the finding of fact of the justices; but I do not think that they applied the proper test and, moreover, I do not desire to be a party to any extension of *Langman* v. *Valentine* [3] or any application of the decision in that case to facts which are not strictly in line with it. I think that *Langman* v. *Valentine* [3] went as far as it was safe to go; we felt in that case that there were facts on which we could not have differed from the justices, though I think we should have if we had felt able to do so.

The only other point I may mention is this: in sending this case back to the justices, although it is strictly a matter for them, considering that they dismissed these informations twice they may be glad to find special circumstances if they could, and we think that in the circumstances of this case, if the justices do find that there were special reasons for not disqualifying, we should not differ from them.

Appeal allowed.

Solicitors: *Horace Davies & Co. for J. Charles Hughes & Co., Dolgelley; Amery-Parkes & Co.*

J. F. L.

[3] [1952] 2 T.L.R. 713.

[COURT OF APPEAL.]

C. A.

1956
July 4, 5.

Lord Evershed M.R., Jenkins and Hodson L.JJ.

* FLEET ELECTRICS LTD. *v.* JACEY INVESTMENTS LTD.

[Plaint No. M. 85.]

WILLS *v.* JACEY INVESTMENTS LTD.

[Plaint No. M. 172.]

Landlord and Tenant — Act of 1954 — *Business premises (security of tenure) — Landlord's intention to reconstruct — Meaning of "intends"—Time of intention—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (*f*), 33.

The landlord company were the lessees of a block of four shop premises in Park Street, Walsall. They had sublet two of the shops to an associated company and the other two they had respectively sublet to the two applicant companies. The leases of all four shops were due to expire in September, 1956. On February 7, 1955, the board of directors of the landlord company resolved that the Park Street premises should be developed by the conversion of the four shops into a single store, and that an architect be instructed to prepare plans, and further, that the existing tenancies should be determined. On October 4, 1955, the landlords gave notice to the respective applicant tenants pursuant to the provisions of the Landlord and Tenant Act, 1954. In those notices the landlords stated that they would oppose an application to the court under Part II of that Act for the grant of new tenancies on the ground that on the termination of the existing tenancies they intended to carry out "substantial works of reconstruction." Both tenants applied under section 26 of the Act to the county court to have new leases granted to them. In December, 1955, the landlords' architect prepared a plan of the proposed works of reconstruction. That plan was submitted to the planning authority, who indicated that there was no objection to it. The consent of the superior landlords to the proposed alterations was given on March 20, 1956. On May 10 the tenants' applications were heard. At that date the landlords had had no specifications of the proposed works prepared. It appeared from the evidence that the landlords' intention was that the reconstructed store should be let to their associated company. That company, however, had in fact not considered the matter. The county court judge held that the landlords had failed to prove their objection to the grant of a new lease, since they had not established that they had a firm and settled intention to carry out the proposed works, and he ordered that a lease for a term of five years should be granted to each tenant.

The landlords appealed both against the grant of new leases and against the length of the terms granted:—

Held, (1) that where a landlord opposed the grant of a new lease to a tenant on the ground in section 30 (1) (*f*) of the Act of 1954 that he "intends" to demolish or reconstruct the premises, the landlord has to establish that he had at the requisite dates a firm and settled intention to demolish or reconstruct; and that where the landlord was a limited company the existence of that intention could be established only through the directors or other principal officers of the company and that, there being evidence on which the county court judge could hold that the intention expressed in the

C. A.

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formal resolution of the landlord company to reconstruct had not the necessary quality of being firm and settled, his decision should not be interfered with; and further that, if a landlord had formed a definite intention to reconstruct, it was not necessary that he should have a specific tenant in mind for the reconstructed premises; but the fact that the suggested tenant had not considered the proposals and that no consideration had been given to the cost of the work were relevant facts to be considered in determining whether the landlord had the necessary intention.

The observations of Asquith L.J. in *Cunliffe* v. *Goodman* [1950] 2 K.B. 237, 254; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720 applied; *Edwards* v. *Bairstow* [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48 and *Reohorn* v. *Barry Corporation* [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742 considered.

(2) That section 33 of the Act made the question of the length of a tenancy granted under the Act one pre-eminently for the discretion of the judge, and there was nothing which would justify the court in altering the length of the term fixed by the county court judge.

Reohorn v. *Barry Corporation* [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742 distinguished.

Semble, that where a landlord opposes the grant of a new lease under section 30 (1) (*f*) on the ground that he intends to demolish or reconstruct the premises, he must not only show that such intention existed when he gave the notice of opposition, but he must also show that such intention persisted up to the date of the hearing, and that evidence of what happened between the date of the service of the notice and the date of the hearing will be relevant and admissible evidence both as throwing light on the nature of the intention at the former date and as showing that the intention was a real and persisting intention up to the date of the hearing.

APPEALS from Judge Norris sitting at Walsall County Court.

These two appeals were heard together both in the county court and in the Court of Appeal.

Jacey Investments Ltd. were, as landlords, the appellants in both appeals. They were the head lessees of a block of four shop premises known as nos. 48, 50, 52 and 54 Park Street, Walsall, Staffordshire. Nos. 48 and 50 they had sublet to Stanley Martin Ltd. an associated company of theirs. They had sublet no. 54 to Fleet Electrics Ltd., the respondents to the first appeal, and no. 52 to a Mr. Percy Newman who had since died and whose executors were the respondents to the second appeal. The leases of all four shops were for terms expiring on September 29, 1956.

At a meeting of the directors of the landlords held on February 7, 1955, it was resolved that the Park Street premises should be developed by the conversion of the four shops into one store and that an architect should be directed to prepare the necessary plans. The landlords' solicitors were directed to take the necessary preliminary steps in due course to terminate the tenancies. On October 4, 1955, the landlords gave notice both to Fleet Electrics Ltd. and to the executors of Mr. Percy Newman under section 25 of the Landlord and Tenant Act, 1954, to terminate their respective tenancies, stating in such notices that the landlords would oppose an application to the court under Part II

of that Act for the grant of new tenancies on the ground that they intended to carry out substantial works of reconstruction.

Both tenants gave notice to the landlords that they would apply for new tenancies and were not willing to give up possession on September 29, 1956. Both tenants applied under the Act to the county court to be granted new leases. It appeared from the evidence that Fleet Electrics Ltd. carried on the retail business of selling electrical appliances at no. 54 Park Street and they asked for a renewal of their lease for a term of five years. The executors of Mr. Newman, who were carrying on at no. 52 the retail business of selling furniture formerly carried on by him, asked to have their lease renewed for a term of ten years.

The landlords opposed both tenants' applications for a new lease on the ground that on the termination of the tenancies they intended to carry out substantial works of reconstruction. Further, in the event of new terms being granted, they objected to the terms proposed by the tenants.

It appeared from the evidence that the landlords' architect had prepared a plan of the proposed works of reconstruction in December, 1955. That plan had been submitted to the Walsall Corporation and the necessary planning permission and permission under the local by-laws was obtained on January 4, 1956. The headlessors' consent to the proposed works of reconstruction was given on March 20, 1956. The applications were heard by the county court judge on May 10, 1956. At that date the landlords had not obtained any specification with regard to the cost of the proposed works. It was stated in evidence before him that the landlords intended to let the premises to their associated company, Stanley Martin Ltd. It further appeared that the board of that company had in fact not considered taking a tenancy of the whole of the reconstructed premises. The landlord company and Stanley Martin Ltd. were family companies, in that the directors were members of the same family. The evidence is fully stated in the judgment of Lord Evershed M.R.

The county court judge held that the proposed works involved substantial work and that the landlords required possession in order to carry out that work. He further held that the landlords had not reached such a firm and settled intention to carry out the works in question as amounted to an intention within section 30 (1) (*f*) of the Landlord and Tenant Act, 1954,[1] and he ordered that new tenancies should be granted to the tenants, each tenancy being for a term of five years.

The landlords appealed on the ground that there was no evidence on which the county court judge could properly hold that the landlords did not intend to reconstruct the premises within the meaning of section 30 (1) (*f*) of the Act of 1954.[1] They

[1] Landlord and Tenant Act, 1954, s. 30 (1): "The grounds on which a landlord may oppose an application under subsection (1) of section 24 of this Act are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say: . . . (*f*) that

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also were granted leave to appeal against the length of the terms granted.

R. E. Megarry Q.C. and *John Montgomerie* for the landlords.

F. W. Beney Q.C. and *David J. Stinson* for the tenant, Fleet Electrics Ltd.

Harold Heathcote-Williams Q.C. and *Paul Layton* for the tenants, the executors of Mr. Percy Newman.

The following cases were referred to in argument and were not cited in the judgment: *Gilmour Caterers Ltd.* v. *St. Bartholomew's Hospital (Governors)*[2]; *Fisher* v. *Taylors Furnishing Stores Ltd.*[3]; *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[4]

LORD EVERSHED M.R. These two appeals, in which I shall deliver, as did the county court judge, a single judgment, arise out of applications for new tenancies under the Landlord and Tenant Act, 1954, to which applications the landlords, Jacey Investments Ltd. common to both tenants, had objected on the specific ground set out in section 30 (1) (*f*); that is to say, that "on the termination of the current tenancies the landlord intends "to demolish or reconstruct the premises comprised in the hold-"ing or a substantial part of those premises . . ."

The premises in question were two contiguous shops in Park Street, Walsall, bearing the numbers in that street 52 and 54. The former had been occupied, as we have been informed, for nearly twenty years by one Newman for the sale of furniture; and Newman having recently died, the tenants of those premises at all material dates were his executors. The other shop, no. 54, was and is occupied by Fleet Electrics Ltd. and they sell on those premises such things as electric vacuum cleaners and the like. Their occupation has not been of so long a duration as that of Mr. Newman; I think we were told that they had been there some ten years.

These two premises, nos. 52 and 54, form part of a block of four shops owned by the landlords. The other two, nos. 48 and 50, are and were at all material times in the occupation of a company called Stanley Martin Ltd. who carry on at nos. 48 and 50, as a single unit, the sale of ladies' clothing of various kinds.

According to the evidence, the tenancies of all four of these premises—including, that is, the two occupied by Stanley Martin

"on the termination of the current "tenancy the landlord intends to "demolish or reconstruct the premises "comprised in the holding or a sub-"stantial part of those premises or "to carry out substantial work of "construction on the holding or part "thereof and that he could not reason-"ably do so without obtaining "possession of the holding."

[2] [1956] 1 Q.B. 387; [1956] 2 W.L.R. 419; [1956] 1 All E.R. 314.

[3] [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.

[4] [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497.

Ltd.—were due to expire in September, 1956. That fact was drawn to the attention of the board of directors of the landlord company by its chairman (one other director besides himself being present) at a meeting on February 7, 1955. The minute signed by him on the same day reads as follows: "It was pointed out "by the chairman that the tenancy and leases of the shops "owned by the company at Park Street, Walsall, would expire "in September, 1956. After discussion, it was resolved that "the company's property at Park Street, Walsall, Staffs., be "developed by the conversion of the existing four shops into "one store and that Mr. H. Werner Rosenthal, A.R.I.B.A. be "instructed to prepare the necessary plans and the company's "solicitors be instructed to take all the necessary preliminary "steps in connexion with the proposed reconstruction, and in "due course to proceed to terminate the existing tenancies." So far as the evidence in the case is concerned, no other board meeting at which any record was made pertaining to this matter appears in the books of the appellant company.

On October 4, 1955, in pursuance of the machinery of the Landlord and Tenant Act, 1954, the Landlords gave a notice of termination of the tenancy in which there was set out under paragraph 3 that they "would oppose an application to the court "under Part II of the Act for the grant of a new tenancy on the "ground" stated, namely, that on the termination of the tenancies they intended to carry out "substantial work of "reconstruction." In due course, at a date in November and on December 1 respectively, Mr. Newman's executors and Fleet Electrics Ltd. gave notice to their landlords (the appellant company) that they would apply for new tenancies, and would not, therefore, be willing to give up possession on September 29, 1956.

The next document to which I should refer is a plan—what I think has been called an 8 ft. plan—which was prepared by Mr. H. Werner Rosenthal, bearing date December, 1955. The plan shows on a rather small scale, but no doubt sufficiently, what the proposed alteration would amount to. There is a plan of the ground and of the first floor, and each of those floors is shown to be part of a single store or unit, skirts and gowns and various other things being sold on the ground floor, and coats and costumes and other things being sold on the first floor. The plan also includes a front and rear elevation, a block plan and a section. A plan which everyone has assumed (and I do not doubt correctly) to be a copy of that which I have described was in the middle of December put before the planning authority, the County Borough of Walsall, and that authority in due course, in the following month, intimated that there would be no planning objection to the alteration shown on the plan. Furthermore, in January, 1956, the appellant company, whose interest was as lessees for a long term, made application to their superior landlords, the British Transport Commission, for their consent to what again I assume no doubt correctly to have been the same

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plan, indicating a proposed alteration. In the case of the British Transport Commission, it was necessary for the solicitors for the landlords to write one or two letters of reminder, but ultimately on March 20 the commission said that they consented, or would consent, to alterations in accordance with the plan. The case, I understand, had been stood over in the meantime at the request of the landlords, and it came on for hearing on May 10.

I have stated that outline of things done, as shown on the materials to which I have referred, because it has been the main burden of Mr. Megarry's argument for the landlords that the only criticism which could be made of the landlords is their failure to have done more—in other words, that they could be criticised only for acts of omission. Mr. Megarry has said that the things done of themselves lead (and lead, as I understand it, inevitably) to the conclusion, in the absence of challenge of their bona fides, that there was here an "intention" within the meaning of the relevant subsection and that the finding to the contrary of the county court judge cannot be supported; and moreover that it does not in truth amount to a finding of fact.

In his reply, Mr. Megarry cited the recent decision in the House of Lords of *Edwards* v. *Bairstow*,[1] which was a tax case, where the question for determination by the Special Commissioners had been whether a certain transaction constituted an adventure in the nature of trade. The Special Commissioners found that it had not constituted an adventure in the nature of trade, and this court was of opinion that that was a finding of fact which we could not disturb. The House of Lords, however, came to the conclusion (and I read from the headnote) "that "the facts found"—that is to say the facts found by the Commissioners—"led inevitably to the conclusion that the transaction "was an adventure in the nature of trade." Lord Simonds is also cited in the headnote as saying: "The finding that the "transaction was not an adventure in the nature of trade is an "inference of fact but can be set aside because it appears that "the commissioners have acted without any evidence or on a "view of the facts which could not reasonably be entertained." It has been Mr. Megarry's case that *Edwards* v. *Bairstow* [1] provides a close parallel to the present case, and that the facts which I have mentioned lead inevitably to the conclusion that there was here the requisite intention, and that this court accordingly is entitled to controvert the county court judge's conclusion on that ground.

I must say at once that I am quite unable to accept that premise to the landlords' case. It is not now in doubt that the import of the word "intend" in section 30 (1) (*f*) of the Act is that at the appropriate date or dates—a matter which I will mention later—there must be a firm and settled intention not likely to be changed, or in other words that the proposal for doing the work has moved "out of the zone of contemplation into the

[1] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.

" valley of decision." The language that I have just used is part of the felicitous language used by Asquith L.J. in an earlier case concerning section 18 (1) of the Landlord and Tenant Act, 1927, in which in point of actual fact the word " intends " or " intention " did not appear at all. But recent decisions under the present Act of 1954 have, I think, now laid it down for us to follow that the language which Asquith L.J. used is appropriate to a question under section 30 (1) (*f*).

The case in which Asquith L.J.'s language is found is *Cunliffe* v. *Goodman*.[2] But in more than one very recent case—including particularly the last of them, *Reohorn* v. *Barry Corporation*[3]—this court made it clear that the test for " intention " within the meaning of section 30 (1) (*f*) is to be found in this language taken from Asquith L.J.'s judgment in *Cunliffe* v. *Goodman*[4]; and indeed it has been so accepted in this court by Mr. Megarry for the landlords as well as by Mr. Beney and Mr. Heathcote-Williams for the tenants.

It follows, then, that what the court in a case such as this has to do is to decide whether the landlord has established that he had at the requisite dates a firm and settled intention so to reconstruct the premises. It is, of course, clear that when, as in the present case, the landlord is a limited company, the existence of the intention (and particularly the proof of the quality of the intention, that it is firm and settled) can be established only through the directors or other principal officers of the company. In the present case Mr. Joseph Cohen—who plainly is not only the chairman but the most important director of the landlord company, and of a number of other companies associated with it, as we understand—gave evidence before the county court judge.

Before I make some reference to Mr. Joseph Cohen's evidence I should explain the position in the case of Stanley Martin Ltd. We were told by Mr. Megarry that it is a company associated with the appellant landlords. We understand that the company has two directors, Stanley Cohen (a son of Mr. Joseph Cohen) and Martin Rose, who is also, we were told, connected by marriage or otherwise with the Cohen family; and Mr. Stanley Cohen was the managing director. I have said that the tenancy of nos. 48 and 50 Park Street vested in Stanley Martin Ltd. also expired on September 29, 1956; but no doubt the closeness of the association between Stanley Martin Ltd. and the landlords, Jacey Investments Ltd., would not in practice create any problem of conflict whether a new tenancy should or should not be given (and if so on what terms) to Stanley Martin Ltd.

That slight exposition about Stanley Martin Ltd. will, I think, make clear what I am going to read from the notes of the evidence of Mr. Joseph Cohen. But the point that I desire to

[2] [1950] 2 K.B. 237, 254; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

[3] [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742.

[4] [1950] 2 K.B. 237.

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make plain is this: Unlike the case of *Edwards* v. *Bairstow*[5] the question here is and was: did the company, through its directors, or otherwise, have at the requisite dates an intention having the quality that I have described? And that matter is beyond a peradventure, I should have thought, a question of fact to be determined by the judge upon all the evidence, including the oral testimony given by the principal officer of the company, Mr. Joseph Cohen.

Now what did Mr. Cohen say? He said, among other things: "We have in mind that Stanley Martins will be interested in the "whole of the premises when reconstructed." That is what he said on May 10. "We have in mind that they will be." He went on to say: "Plans are for a ladies' gown shop. Stanley ':' Martin Ltd. or a similar firm. We have no idea what the "reconstruction will cost." He said later that he thought it would cost £10,000 to £12,000. In cross-examination he said: "It is a family arrangement to improve Stanley Martin Ltd."

It is quite plain that the judge was not very impressed in certain respects with Mr. Joseph Cohen's evidence. In the course of his judgment he commented on the fact that Mr. Joseph Cohen, when asked, could not really remember whether he was or was not himself a director of Stanley Martin Ltd., though eventually he decided that he was not. Mr. Megarry said that that was an unfair criticism. He told us that Mr. Joseph Cohen was a director of some thirty associated companies, and that it was not unnatural that he could not really closely remember of which of a large number of associated companies he was or was not a director. I must say that I for my part sympathise with the judge over this, because after all Mr. Joseph Cohen had said that this proposed reconstruction was a family arrangement to improve Stanley Martin Ltd. It is plain from what I have read (and I am not going to take time to comment further) that the statements of Mr. Joseph Cohen were not in all respects entirely consistent.

The architect was called, and he was not in fact asked when he received any instructions in the matter. December, 1955, the date of his plans, is somewhat far removed from February, 1955, when the board, according to the minute, resolved that he be instructed as well as solicitors. Mr. Stanley Cohen, the managing director of Stanley Martin Ltd. was not called at all. Mr. Martin Rose was called, and a problem arose because an objection was taken, and I must say that this at one time troubled me somewhat. It appears that he was asked the general question, "What "was the attitude of Stanley Martin Ltd.?" I think that a question in that precise form might well have been objectionable on more than one ground; but I think the objection was intended to be based on the fact that if it was proposed to prove what Stanley Martin Ltd. were doing about it, then they should first

[5] [1956] A.C. 14.

produce the company's minutes. I am not satisfied that it would have been right to object to Mr. Martin Rose giving any evidence at all about what he and his co-director were doing or thinking in the matter.

However, the point was not pressed at the trial, and the judge himself asked Mr. Martin Rose a question as the result of which, according to the judgment, Mr. Rose said that the scheme had never been discussed by the board of Stanley Martin Ltd.—this scheme which, according to Mr. Joseph Cohen, was a family arrangement for the improvement of Stanley Martin Ltd. The result was that the judge—who commented on the various points in the evidence to which I have referred—eventually concluded thus: "I have had great difficulty with this part of the case, but "I do not think that at this stage this proposal has reached a firm "and settled intention. It is too early a stage. The landlords "have failed to make out their objection."

I confess, having heard Mr. Megarry's argument, to the feeling that the landlords might have made a very much better showing, and they may, therefore, deserve the sympathy of the unlucky. Nobody has suggested (and I do not want any of the criticisms that I have made of Mr. Joseph Cohen's evidence to be taken as suggesting) that there was any lack of good faith or false swearing in this case. It is also right to say that it is no objection to a scheme of reconstruction, which a landlord intends to carry out, that what prompted him was that he might meet a claim by the tenant (if made) for a new lease. But it seems to me plain on this evidence, and as I read this judgment, that the judge—though having difficulty with this part of the case—was not satisfied that the intention originally expressed in the formal resolution had the necessary quality of being firm and settled. In other words, he thought that the landlords had failed to satisfy him that this proposal had moved from the realm of aspiration or contemplation and had become a really firm decision.

It appears to me quite impossible for this court to say that there was no basis in the evidence to support the judge's conclusion. He heard the evidence, and without pressing one point particularly, the fact that Stanley Martin Ltd. never proved that they had ever given a thought to a proposal which was, according to Mr. Joseph Cohen, a family arrangement for their particular improvement, is obviously an impressive point, to say no more, in determining the quality of the intention which the Board of Jacey Investments Ltd. had formulated in February, 1955. Moreover, the fact that no consideration whatever had apparently been given to the cost or to the finances of the company which would under the scheme be the new tenant carrying on a business twice the size of its present business at a very much larger rent is to my mind no less impressive—all these matters were left in the air. I quite agree that if the landlord forms a specific intention, it does not necessarily require that a specific tenant should be in mind. But in this case the scheme was, according to the

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evidence, part and parcel of something being done for the improvement of Stanley Martin Ltd.

I have more than once used the phrase "at whatever are the "requisite dates." There has been in the cases some question whether the right date to look at for discovering the "intention" is the date when the landlord gives his notice of objection, or the date of the hearing. In this case it is not necessary to express final conclusions on that matter, but I think it has been agreed by all the counsel that a landlord who gives a notice of opposition, in which he says that on the termination of the tenancy he intends to reconstruct, etc., must at any rate prove that, when he gave it, he did in fact so intend. But it would also appear (and again counsel agree) that he would have to show that the intention persisted up to the date of the hearing, and had not by that date gone. Of course, if that is so (and it is only for this reason that I find it necessary to refer to it) evidence of what happened between the date of the notice and the date of the hearing will be relevant and admissible evidence, both as throwing light on the nature of the intention at the former date and, of course, as showing that the intention was a real and persisting intention up to the date of the hearing. But no problem of dates arises here because the county court judge took into account, in arriving at his conclusion, all the material which I have mentioned, from the originating resolution of the company in February, 1955, down to the very last matter of fact, namely, the arrival eventually from the British Transport Commission of their consent to the proposal indicated on the plans on March 20, 1956, and, of course, including also the oral testimony given at the hearing.

The case being of the nature that I have indicated, I think that in truth this is a question of fact, and, if that is so, then this court under the County Courts Act, 1955, cannot disturb the judge's finding, unless it be established that there was in effect no evidence to support the finding. I confine myself accordingly to saying that in my judgment this court cannot disturb the conclusion at which the judge arrived.

I have said, and I repeat, that the landlords may have been less than fortunate here, and that had their case been worked out and put forward somewhat otherwise (and by saying that I am not, of course, making any criticism of the counsel who was then appearing for them) and had the evidence adduced been somewhat different in character, it may be that the judge would have tipped the balance in the other direction. But if the landlords were unfortunate, there is no reason why that should be visited on the tenants.

But in all the circumstances, and bearing in mind that it may be that the fortunes of war went hard against them, there remains the subsidiary question: Should this court vary the length of the tenancy which in each case the judge thought it right to grant, namely, five years? This is not, I think, a case at all like

Reohorn v. *Barry Corporation* [6] where the tenant was saying: "If and when this scheme of the corporation is ripe, then I am "only too willing to support it, and I will let them have the "premises." This is a case in which the tenants are themselves desirous of carrying on their respective trades as before. As Mr. Beney pointed out, section 33 seems to me by its language to make this question of the length of the tenancy pre-eminently a matter for the discretion of the judge—"such a tenancy as may "be determined by the court to be reasonable in all the circum-"stances"—and I am unable to find that there is here any material which would justify this court in altering the conclusion as to length of term at which the county court judge arrived. Certainly I am satisfied that it would not be right to do so by the exercise of a kind of unregulated benevolence towards the landlords.

I think, therefore, on the whole circumstances of the case that this court can do no other than say that it is not open for us to interfere, and to dismiss the appeal.

JENKINS L.J. I agree.

HODSON L.J. I also agree.

Solicitors: *Beckingsales for Joseph Cohen & Cowen, Birmingham; Kimbers; T. D. Jones & Co. for W. Douglas Clark, Brookes & Co., West Bromwich.*

B. A. B.

[6] [1956] 1 W.L.R. 845.

[PRIVY COUNCIL.]

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*MIDLAND RAILWAY CO. OF WESTERN AUSTRALIA LTD. . . . . APPELLANT;

AND

STATE OF WESTERN AUSTRALIA . . RESPONDENT.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Contract—Construction—Government contract—Reference to regulations—Change of regulations—Railway—Grant of lands to contractor in prescribed statutory form—Reservation of "gold, silver and other "precious metals"—Subsequent statutory reservation of petroleum under all land in State—Effect on pre- and post-Act grants—Land Regulations, 1882 *and* 1887 (*W.A.*), *second scheds.—Western Australia Constitution Act,* 1890 (53 *&* 54 *Vict. c.* 26), *s.* 4 (2)—*Petroleum Act, No.* 36 *of* 1936 (*W.A.*), *ss.* 9, 10.

Australia—Western Australia.

† *Present*: LORD OAKSEY, LORD RADCLIFFE, LORD TUCKER, LORD COHEN.

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By the terms of a contract entered into in 1886 between the contractor, whose rights and interests were assigned to the appellant in 1890, and the Government of Western Australia, it was provided, inter alia, that the government would "grant in fee "simple to the contractor by Crown grants in the form prescribed "by the Land Regulations of the Colony" a subsidy in land at the rate of 12,000 acres for every mile of the 250 miles of railway which the contractor was to build under the contract. The form of grant in fee simple prescribed by the then Land Regulations of 1882 reserved "all mines of gold, silver, and other precious "metals in and under the said land." The Western Australia Constitution Act, 1890, which by section 3 vested the management and control of the waste lands of the Crown in Western Australia in the legislature of the Colony, provided by section 4 (2) that: "Nothing in this Act shall affect any contract or prevent the "fulfilment of any promise or engagement made before the time "at which this Act takes effect in the Colony of Western Australia "on behalf of Her Majesty with respect to any lands situate in "that Colony, . . ."

No Crown grants were in fact made pursuant to the contract before the coming into force of the Constitution Act of 1890, but thereafter grants were made in the form prescribed by the Land Regulations, and those grants contained no reservation of petroleum or mineral oil. Grants were also made after the commencement of the Petroleum Act, 1936, of Western Australia, which provided by section 9 that "notwithstanding anything to the "contrary contained in any . . . grant . . . whether made or issued "before or after the commencement of this Act, all petroleum on "or below the surface of all land within this State, whether "alienated in fee simple or not so alienated from the Crown is "and shall be deemed always to have been the property of the "Crown," and section 10 provided that all Crown grants issued after that Act should contain a reservation of petroleum.

A permit having been given in 1952 by the respondent State of Western Australia under the Petroleum Act, 1936, to a petroleum company to explore for petroleum over lands which included lands granted to the appellant pursuant to the contract, the appellant began proceedings against the respondent claiming, inter alia, a declaration that the Petroleum Act of 1936, and in particular sections 9 and 10 thereof, had no application to the lands granted to the appellant.

Held, that on construction of the contract, and reading it as a whole, it imposed on the Crown no more than an irrevocable obligation to grant a fee simple of the surface of the land in whatever might be the form current at the date when any particular grant was called for, without the addition of a further obligation to ensure that the legislature would not at any time during the currency of the contract alter the prescribed form of grant. Accordingly, the grants made after the commencement of the Petroleum Act, 1936, were made at a time when under section 10 of that Act it became obligatory to include a reservation of all petroleum in all Crown grants.

With regard to grants made before the Act of 1936, and assuming that some were made at a time when the Land Regulations then in force did not require the reservation of petroleum, the provisions of section 4 (2) of the Western Australia Constitution Act, 1890, did not exempt those grants from the operation of section 9 of the Petroleum Act, 1936. On the construction as above placed on the contract it would have involved no breach of it if the Crown, the day after executing it and before the issue

of any grant, had decided to modify the regulations so as to extend the reservation in the form of grant to cover petroleum. The contract by its terms exposed the appellant to the risk of such Acts as the Petroleum Act, 1936, and accordingly the appellant could not be heard to complain if the risk materialized.

Judgment of the Supreme Court of Western Australia affirmed in part and reversed in part.

APPEAL AND CROSS-APPEAL (No. 7 of 1956) from a judgment of the Supreme Court of Western Australia (June 10, 1955).

By a contract made in 1886 between the Crown and one Waddington, the predecessor in interest of the appellant company, Waddington was to build some 250 miles of railway in Western Australia, and the contract obliged the Crown to grant to Waddington in fee simple in the form prescribed by the Land Regulations of the Colony a subsidy of 12,000 acres of Crown land for each mile of the railway completed and opened for traffic. The form prescribed by the regulations then in force provided for the reservation in the Crown of gold, silver and other precious metals, but not of petroleum or mineral oil. Those regulations had been made on the instructions of the Secretary of State for the Colonies under the provisions of the Waste Lands Act, 1885, an Imperial Act. In 1890 the Western Australian Constitution Act, of the Imperial Parliament, provided for the establishent of a legislature in the Colony with power to make laws for the peace, order and good government of Western Australia. The Act of 1890 also provided that the entire management and control of the waste lands in the Colony should be vested in the legislature of the Colony; it also provided in section 4 (2) that nothing in that Act should affect any contract or prevent the fulfilment of any promise or engagement made before the time when the Act took effect on behalf of Her Majesty in respect of any lands situate in the Colony.

The railway was completed in 1895, and from time to time grants of Crown land were made to the appellant company pursuant to the Waddington agreement. The grants were all made in the form scheduled to the Land Regulations in force in 1887 and did not reserve to the Crown petroleum or mineral oil. In 1936 the Western Australian legislature passed the Petroleum Act of that year, which provided, inter alia, for the reservation to the Crown of all petroleum in all lands in the State. Pursuant to that Act permits were granted to a petroleum company to explore for petroleum over lands which included those which had been granted to the appellant, who thereupon instituted the present proceedings claiming a declaration that the material provisions of the Petroleum Act of 1936 had no application to the lands granted to them.

The Supreme Court of Western Australia (Dwyer C.J.) held that the Act of 1936 did not apply to an area of 41,872 acres granted to the appellant after the coming into operation of the Act, but did apply to other large parcels of land granted to the

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appellant before the Act of 1936 came into force. The appellant company now appealed against the latter of the above decisions, and the respondent cross-appealed against the decision that the Act did not apply to the 41,872 acres.

The facts and relevant statutory provisions appear more fully from the judgment of the Judicial Committee.

1956. June 11, 12, 13, 14. *Bernard MacKenna Q.C.* and *R. I. Threlfall* for the appellant company.

Sir Garfield Barwick Q.C. and *Kevin G. Walsh* for the respondent State.

The following cases were referred to in argument: *Attorney-General for Alberta* v. *West Canadian Collieries Ltd.*[1]; *O'Keefe* v. *Williams*[2]; *Fletcher* v. *Peck*[3]; *Attorney-General for Alberta* v. *Majestic Mines Ltd.*[4]; *Beekman* v. *Saratoga & Schenectady Rail Road Co.*[5]; *Charles River Bridge* v. *Warren Bridge*[6]; *Moore and Scroope* v. *State of Western Australia*[7]; *Williams* v. *Attorney-General for New South Wales*[8]; *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan*[9]; *Attorney-General* v. *Eager.*[10]

July 11. The judgment of their Lordships was delivered by LORD COHEN: This appeal relates to petroleum on or below certain lands which were granted to the appellant in fee simple pursuant to a contract (hereinafter referred to as the Waddington agreement) made on February 27, 1886, between the government of Western Australia of the one part and John Waddington (hereinafter called the contractor) of the other part.

That agreement obliged the contractor to build a railway from Guildford to the southern terminus of a railway then about to be built from Geraldton to Greenough Flats. The railway was to be some 250 miles in length and was to be built by sections. Their Lordships were informed that the terms of the agreement showed that the railway was expected to take some seven years to build. The agreement further obliged the contractor within that period to procure the introduction into the Colony from Europe of 5,000 adults of European extraction. The provisions of the agreement which gave rise to the present dispute are those obliging the government of the Colony to make fee simple grants of land to the contractor. Those provisions are to be found in clauses 46 and 49 which read as follows:—"46. The Government will at "the expiration of three calendar months from the arrival in the "Colony of any such immigrants grant to the contractor or his "nominees in fee simple for each such statute adult 50 acres of

[1] [1953] A.C. 453; [1953] 2 W.L.R. 801; [1953] 2 All E.R. 965.
[2] (1910) 11 C.L.R. 171, 190.
[3] (1810) 6 Cranch 87, 136.
[4] [1942] S.C.R.(Can.) 402.
[5] (1831) 3 Paige (N.Y.Ch.Rep.) 45, 72.
[6] (1837) 36 U.S. 420, 640.
[7] (1907) 5 C.L.R. 326, 340.
[8] (1913) 16 C.L.R. 404, 459.
[9] (1931) 46 C.L.R. 73, 106.
[10] (1864) 3 S.C.R., N.S.W. 234, 271.

" land to be selected as next hereinafter provided in blocks of " not less than 10,000 acres each in extent, to be held in accord- " ance with and in the form prescribed by the Land Regulations " of the Colony. 49. In consideration of the premises the Govern- " ment agrees to grant in fee simple to the contractor by Crown " grants in the form prescribed by the Land Regulations of the " Colony a subsidy in land for and in respect of each section or " deviated section as hereinbefore defined at the rate of 12,000 " acres for every mile of the Railway which shall be duly com- " pleted and open for traffic in accordance with the provisions of " these presents and a proportionate quantity for and in respect " of such length of line less than 20 miles which shall be over " from the end of the last of such sections to the actual com- " pletion of the line."

The agreement entitled the contractor, subject to certain conditions, to select the lands to be granted to him under those provisions and provided (clause 52) that on the completion and opening of each section of the line and as soon as he had made his selection the Government would issue to him certificates or deeds of grant of one moiety of the land so selected and (clause 53) that on the completion and opening of the whole railway the Government would issue to the contractor like certificates or deeds of grant for the remaining moiety of the lands so selected.

On June 23, 1890, the contractor's rights and interest under the Waddington agreement were assigned to the appellant. Prior to June, 1898, the appellant encountered financial difficulties. As a result an agreement (hereinafter referred to as the debenture agreement) was entered into on June 29, 1893, between the appellant and the respondent and others pursuant to which the appellant issued certain debentures which were guaranteed by the respondent. It was a condition of the debenture agreement that by way of security for any moneys which the respondent might pay under its guarantee the respondent should have a first charge on, inter alia, 2,400,000 acres of the land which the appellant was or might be entitled to select by way of subsidy under clause 49 of the Waddington agreement, and that such 2,400,000 acres should accordingly be vested in nominees of the Government to be held subject to the charge aforesaid in trust for the appellant its successors and assigns.

At this stage their Lordships must refer to the provisions of the law of Western Australia in relatioin to Crown lands. At the date of the Waddington agreement the governing provision was section 7 of the Australian Waste Lands Act, 1855, an act of the Imperial Parliament. It provided as follows: " It shall " be lawful for Her Majesty, by instructions under Her Signet " and Sign Manual, or through one of Her Principal Secretaries " of State, to regulate the sale, letting, disposal, and occupation " of waste lands of the Crown in Western Australia, and the dis- " posal of the proceeds arising therefrom, until Parliament shall " otherwise provide."

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In exercise of the powers thereby conferred regulations were made on October 11, 1882. The material regulations for the purpose of this appeal are regulations 3 and 8, which read as follows:—"3. The Governor is authorized in the name and on "behalf of Her Majesty, to dispose of the Crown lands within "the Colony in the manner and upon the conditions prescribed "by these regulations, or by any regulations amending or substi- "tuted for the same, and all grants and other instruments "disposing of any portion of Crown lands in fee simple or for "any less estate made in accordance with such regulations shall "be valid and effectual in the law to transfer to and vest in "possession in the purchasers the land described in such grants "other instruments for the estate or interest therein mentioned. "The Governor is authorized to make such grants and other "instruments upon such terms and conditions as to resumption "of the land or otherwise as to him shall seem fit."

"8. The Governor in Council may from time to time by "order under his hand, to be published in the Government "Gazette, prescribe the forms of Crown grants, leases, licences, "and other instruments requisite for carrying these regulations "into effect. Until otherwise notified, Crown grants, leases, and "licences will be issued in the forms given in the schedules "hereto, with such variations as may be necessary to meet the "circumstances of any particular case. The forms given in the "schedules hereto for applications and other matters under these "regulations may be used with such variations as circumstances "may render necessary in any particular case."

The relevant form is that in the second schedule to the regulations which provided for a grant in fee simple to the grantee subject to a peppercorn rent and to the reservation of "all mines "of gold, silver, and other precious metals, in and under the said "land, with full liberty at all times to search and dig for, and "carry away the same; and, for that purpose, to enter upon the "said lands or any part thereof."

In 1887 these regulations were repealed, and new regulations substituted. Section 1 of the new regulations contained a saving clause for transactions under the previous regulations, but it is not necessary to consider the effect of the 1887 regulations in detail since the relevant form scheduled thereto corresponded in all relevant respects to that set forth in the 1882 regulations.

In 1890 the Imperial Parliament passed the Western Australia Constitution Act. The new constitution which had been passed as a bill by the legislative council of Western Australia was scheduled to the Act and by section 1 of the Imperial Act Her Majesty was authorized to consent to the bill. Prior to the passing of the Act the management and control of Crown lands in Western Australia had been exercisable by the Colonial Office. Special provision was therefore necessary to vest that control in the Western Australian legislature. Section 3 of the Act provided as follows: "The entire management and control of the

" waste lands of the Crown in the colony of Western Australia, " and of the proceeds of the sale, letting, and disposal thereof, " including all royalties, mines, and minerals, shall be vested in " the legislature of that Colony."

It was a necessary corollary of this provision that section 7 of the Australian Waste Lands Act should be repealed. Section 4 (1) of the Act accordingly provides as follows: " Section seven " of the Act of the session held in the eighteenth and nineteenth " years of Her present Majesty, chapter fifty-six, is hereby " repealed, but all regulations made under that section, and in " force at the commencement of this Act, shall continue in force " until altered or repealed in pursuance of the powers conferred " by this Act; . . ."

Section 4 (2), the effect of which on the appellant's rights under the Waddington agreement has been the principal topic of discussion before their Lordships, reads as follows: " Nothing in " this Act shall affect any contract or prevent the fulfilment of " any promise or engagement made before the time at which this " Act takes effect in the Colony of Western Australia on behalf " of Her Majesty with respect to any lands situate in that " Colony, nor shall disturb or in any way interfere with or " prejudice any vested or other rights which have accrued or " belong to the licensed occupants or lessees of any Crown lands " within that colony."

Returning to the facts of the case, no Crown grants had been made pursuant to the Waddington agreement before the coming into force of the Western Australia Constitution Act, 1890. From time to time after October 20, 1890, Crown grants pursuant to the Waddington agreement were made to the appellant of various lands in Western Australia between Perth and Geraldton. All such grants were made in a form which corresponded to that prescribed by the Land Regulations, 1882. The grants contained no reservation of petroleum or mineral oil. The last such grant was issued on May 20, 1953, and grants of a total of approximately 41,866 acres were made to the appellant after the commencement of the Petroleum Act, 1936, hereinafter mentioned.

Further, from time to time prior to 1911 Crown grants of various lands in Western Australia between Perth and Geraldton were made, in similar form, pursuant to the Waddington agreement and the debenture agreement, to the Commissioner of Crown Lands and the Minister for Lands as nominees of the Government.

By 1911 the debentures had been redeemed and in that year the nominees of the Government, to whom grants had been made pursuant to the debenture agreement, assigned to the appellant all lands then vested in them pursuant to the debenture agreement and the benefit of all reservations of minerals made by such nominees on the sale of portions of the land which had been vested in them under that agreement. In the result it is plain

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that, subject to the question as to the effect on the Waddington agreement of any statutes passed by the Western Australia Parliament after the coming into force of the Western Australia Constitution Act, 1890, the petroleum in or under the land granted to the appellant pursuant to the Waddington agreement became vested in the appellant.

Their Lordships' attention was called to two such statutes, the Land Act (No. 37 of 1898) and the Petroleum Act, 1936. The material provisions of the Land Act are sufficiently set forth in paragraph 10 of the appellant's case as follows: "This Act "repealed, inter alia, the existing Land Regulations, including "the Land Regulations of 1887 so far as not already repealed. "Section 2 of the Act provided that such repeal should not affect "any right, interest or liability already created, existing or "incurred."

The material provisions of the Petroleum Act, 1936, are to be found in sections 2, 9 and 10, which read as follows: "2. This "Act shall be read and construed subject to the provisions of "section four of the Western Australia Constitution Act, 1890 "(Imperial), so far as the same may be applicable."

"9. Notwithstanding anything to the contrary contained in "any Act, or in any grant, lease or other instrument of title, "whether made or issued before or after the commencement of "this Act, all petroleum, on or below the surface of all land "within this State, whether alienated in fee simple or not so "alienated from the Crown is and shall be deemed always to "have been the property of the Crown."

"10. All Crown grants and leases under any Act relating to "Crown land issued after the passing of this Act shall contain a "reservation of all petroleum on or below the surface of the land "comprised therein, and also a reservation of the right of access, "subject to and in accordance with the provisions hereinafter "contained, for the purpose of searching for and for the opera-"tions of obtaining petroleum in any part of the land."

Having stated the relevant provisions of the Imperial and Western Australia statutes, their Lordships must now turn to the facts which led to the present proceedings. On October 23, 1952, a permit to explore for petroleum was granted to the West Australian Petroleum Proprietary Ltd. (hereinafter called W.A.P.P. Ltd.) under the Petroleum Act, 1936, over lands which included lands granted to the appellant pursuant to the Waddington agreement. On July 16, 1954, the appellant commenced proceedings against the respondent and W.A.P.P. Ltd. claiming, inter alia, a declaration that the Petroleum Act, 1936, and in particular sections 9 and 10 thereof, had no application to the lands granted to the appellant and that the permit granted to W.A.P.P. Ltd., in so far as it purported to extend to such lands, was void and of no effect. At the hearing before the Supreme Court of Western Australia (Dwyer C.J.) it appeared that the permit granted to W.A.P.P. Ltd. had expired and all proceedings

against that company were stayed. Dealing with the issues between the appellant and the respondent the Chief Justice decided that sections 9 and 10 of the Petroleum Act, 1936, had no application to lands granted by Her Majesty to the appellant after the coming into force of that Act but that these sections did apply to all lands granted to the appellant or to a nominee as trustee for the appellant under the debenture agreement. The ratio decidendi of the Chief Justice appears to have been as follows.

(1) As he construed the Waddington agreement, it bound the Government for all time to issue land grants to the appellant in the form prescribed in the schedule to the 1882 regulations. (2) Section 4 (2) of the Western Australia Constitution Act, 1890, obliged the Government to continue to issue grants in that form, but it went no further and did not restrict the plenary legislative powers conferred on the Western Australia Parliament by the 1890 Act. Therefore, (3) if the Parliament of Western Australia in exercise of its plenary powers passed an Act affecting grants of Crown land effect must be given to such Act. (4) The Petroleum Act, 1936, was such an Act, but as he construed section 9 thereof it only applied to land alienated prior to the coming into force of the Act and was not appropriate to future grants. It is not clear from his judgment why he thought that section 10 did not apply to such grants.

From this decision both parties appealed to this Board. Two main questions were argued: (1) as to the construction of the Waddington agreement; (2) as to the effect of section 4 (2) of the Constitution Act, 1890. On the first question Mr. MacKenna, for the appellant, supported the opinion of the Chief Justice. Sir Garfield Barwick, for the respondent, argued that the references in clauses 46 and 49 of the Waddington agreement to "the "Land Regulations of the Colony" were references to the regulations in force at the time when in accordance with the provisions of that agreement the Government might become bound to issue certificates or deeds of grant to the contractor.

He pointed out that by the very terms of the contract the grants were not to be made until (1) each section of the rail was completed; (2) the completed section was opened; (3) the land had been selected. The period for completion of the railway was fixed by clause 11 at seven years, but there was power to postpone the opening until certain works of the government were completed. The selection of the land could be deferred until such time as the contractor or his assigns desired. It was therefore apparent that the contract was one with regard to the making of grants which might be called for at an indefinite future date under a system whereby the authorized form of grant at any particular moment would depend upon the form prescribed by regulations which were themselves subject to amendment from time to time.

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Mr. MacKenna sought to meet this argument by saying (1) that the more natural construction of the agreement was that the reference to the regulations was a reference to the regulations in force at the date of the agreement, and (2) that it was improbable that the contractor would have been willing to leave himself at the mercy of the government who would be free to extend the reservations beyond that of gold, silver and other precious metals for which provision was made in the second schedule to the 1882 regulations.

The choice between these two constructions is by no means easy, but their Lordships have come to the conclusion that Sir Garfield's argument must prevail. Reading the agreement as a whole, and having regard to the provisions already referred to, their Lordships are satisfied that it imposes upon the Crown no more than an irrevocable obligation to grant a fee simple of the surface of the land in whatever might be the form current at the date when any particular grant was called for, without the addition of a further obligation to ensure that the legislature will not at any time during the currency of the contract alter the prescribed form of grant. Such a construction does not by any means leave the contractor at the mercy of the government or the legislature, for he has as his security the fact that he will get no less favourable a grant than any other applicant could get at the time when it is made.

This conclusion is sufficient to decide the cross-appeal in favour of the respondent since the grants made after the commencement of the Petroleum Act, 1936, were made at a time when under section 10 of that Act it had become obligatory to include a reservation of all petroleum in all Crown grants. What, then, is the effect of this conclusion on the appeal?

Their Lordships were not informed as to the dates on which the various deeds of grant were made, but it is clear that many were made before the commencement of the Petroleum Act, 1936, and their Lordships will assume for the purposes of this judgment that some were made before the commencement of the Land Act (No. 37 of 1898) and therefore at a time when the form scheduled to the Land Regulations then in force did not require the reservation of petroleum. The question then is whether these last mentioned grants were exempt from the operation of section 9 of the Petroleum Act, 1936, by reason of the provisions of section 4 (2) of the Western Australia Constitution Act, 1890. In their Lordships' opinion this question must be answered in the negative.

If, as Sir Garfield argued, section 4 (2) was merely a saving provision intended to preclude any argument that the validity of pre-1890 agreements had been in some way affected either (1) by the fact of the transfer to the legislature of Western Australia of the management or control of the waste lands of the Crown in that Colony or (2) by the repeal of section 7 of the Australia Waste Lands Act, 1885, that would conclude the matter in his

favour since the plenary powers in relation to peace, order and good government conferred on the legislature of Western Australia would remain unaffected. But even if the true view be as Mr. MacKenna argued, that section 4 (2) involved some restriction on those plenary powers, the appeal in their Lordships' opinion must fail.

On the construction which their Lordships have placed on the Waddington agreement, it would have involved no breach of it if the Crown the day after executing that agreement and before the date on which the Government were bound to issue any deed of grant had decided to modify the regulations so as to extend the reservation in the form in the second schedule to cover petroleum. In these circumstances it seems to their Lordships impossible to hold that the provisions of either the Land Act of 1898 or the Petroleum Act, 1936, affected the Waddington agreement or prejudiced the rights of the appellant thereunder. The contract by its terms exposed the appellant to the risk of such acts as the Petroleum Act, 1936, and accordingly the appellant cannot be heard to complain if the risk materializes.

In reaching this conclusion their Lordships have not overlooked section 2 of the Petroleum Act, 1936. That section cannot extend the ambit of section 4 (2) of the Act of 1890, and their Lordships have already expressed the opinion that whatever be the effect of the subsection it does not assist the appellant in the case before the Board.

In the course of the argument their Lordships' attention was called to a number of decisions of this Board, of Australian courts, and of the Supreme Court of the United States. These might have been of great assistance had it been necessary for their Lordships to determine (1) whether section 4 (2) was a mere saving provision or a restriction on the powers of the legislature or (2) if it was restrictive, the extent of the restriction. Since their Lordships' conclusion depends solely on the construction they place on the contract no useful purpose would be served by a consideration of these authorities.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed, the cross-appeal allowed and the action dismissed. The appellant must pay the respondents' costs in the Supreme Court of Western Australia and before this Board.

Solicitors: *Markby, Stewart & Wadesons; M. L. Moss & Son.*

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[COURT OF APPEAL.]

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Jenkins and Hodson L.JJ.

*COMMISSIONERS OF CUSTOMS AND EXCISE *v.* ANCO PLANT AND MACHINERY CO. LTD.

[1956 C. No. 1045.]

Practice and Procedure—Summary procedure under Order 14B—*Application to sign judgment under Order* 14, *r.* 1 (*a*)—*Conditional leave to defend granted by master—Order reversed by judge—Unconditional leave to defend—Remedies under Order* 14 *and Order* 14B *not concurrent—Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31 (1) (*c*), *R.S.C. Ord.* 3, *r.* 6, *Ord.* 14, *r.* 1 (*a*), *Ord.* 14B, *rr.* 1, 2 (1).

Revenue — Customs and Excise — Application by Commissioners to forfeit goods—Customs and Excise Act, 1952 (15 *&* 16 *Geo.* 6, *&* 1 *Eliz.* 2, *c.* 44), *Sched. VII, paras.* 6, 10 (1) (2).

The plaintiffs, the Commissioners of Customs and Excise, by specially endorsed writ under R.S.C. Ord. 3, r. 6 claimed judgment condemning certain goods seized by them as forfeited pursuant to the Customs and Excise Act, 1952, Sched. VII, para. 6; and pursuant to paragraph 10 (1) of that schedule required the defendants to make oath that the goods were the property of the defendants. The writ was endorsed with a notice pursuant to Order 14B, r. 1 that "If the defendants enter an appearance to "this writ the plaintiffs will apply under Order 14B of the Rules "of the Supreme Court for trial without further pleadings." Subsequently, the plaintiffs applied by summons asking under Order 14 for leave to enter judgment unless the defendants should make the required oath as to ownership of the goods and, in the alternative, under Order 14B that the action should be entered for trial without further pleadings. The master made an order in the first of the two alternatives sought by the summons, namely:—he made an order under Order 14 giving to the defendants conditional leave to defend. The judge in chambers reversed his decision and made an order in the second alternative, namely:—under Order 14B. The Commissioners appealed:—

Held, (1) that the judge's order, on its true construction, granted to the defendants unconditional leave to defend and, accordingly, there was no appeal against that decision having regard to the provisions of section 31 (1) (*c*) of the Supreme Court of Judicature (Consolidation) Act, 1925.

(2) That, in any event, rule 2 (1) of Order 14B was imperative in its terms and that if a plaintiff had elected to proceed under Order 14B by including the appropriate notice on his writ he could not combine proceedings under Order 14B with proceedings for summary judgment under Order 14.

Decision of Collingwood J. affirmed.

APPEAL from a decision of Collingwood J.

The plaintiffs, the Commissioners of Customs and Excise, on January 11, 1956, in exercise of their statutory powers served notice of seizure of certain tank tracks on the defendants, Anco Plant and Machinery Co. Ltd., which the defendants were exporting. The defendants denied that the goods were liable to seizure. By specially endorsed writ under R.S.C., Ord. 3, r. 6,

the commissioners claimed against the defendants pursuant to the Customs and Excise Act, 1952, Sched. VII, para. 6, an order condemning as forfeited the goods referred to in the notice of seizure. The commissioners pursuant to paragraph 10 (1) [1] of that schedule required the defendants or their solicitors to make oath that the goods seized were at the time of seizure to the best of the knowledge and belief of the deponent the property of the defendants. No such oath had been made at the date of the hearing of the appeal.

The usual printed note on the writ issued by the commissioners that, if the defendant entered an appearance, he must deliver a defence within 14 days otherwise judgment might be entered against him, was struck out and in its place was typed the following note: "If the defendants enter an appearance to "this writ the plaintiffs will apply under Order 14B of the Rules "of the Supreme Court for trial without further pleadings."

The commissioners applied by summons asking for leave to enter judgment condemning as forfeited quoad only the defendants the goods in question, unless the defendants or their solicitors before the application should make oath that the defendants were the owners of the goods and further, in the alternative, that the action should be entered for trial without pleadings, with ancillary relief. The commissioners filed the affidavit required by Order 14 that they believed that there was no defence to the action. Master Harwood gave leave to the defendants to defend the action upon condition that the necessary affidavit as to ownership of the goods was filed.

The defendants appealed against the master's order and Collingwood J. allowed the appeal and ordered that the parties' affidavits should stand as pleadings.

The commissioners appealed.

Rodger Winn for the plaintiffs.
W. R. Rees-Davies for the defendants.

No cases were cited in argument.

JENKINS L.J. This is an appeal by the Commissioners of Customs and Excise, the plaintiffs in the action, from an order of Collingwood J. sitting as vacation judge, dated May 29, 1956, whereby he reversed an order of Master Harwood. The appeal concerns the relationship of Orders 14 and 14B of the Rules of the Supreme Court.

[1] Customs and Excise Act, 1952, Sched. VII, para. 10: "(1) In any "proceedings for condemnation instituted in England, Wales or "Northern Ireland, the claimant or "his solicitor shall make oath that "the thing seized was, or was to the "best of his knowledge and belief, "the property of the claimant at the "time of the seizure; (2) In any such "proceedings instituted in the High "Court, the claimant shall give such "security for the costs of the proceedings as may be determined by "the court; (3) If any requirement of "this paragraph is not complied with, "the court shall give judgment for "the commissioners."

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The plaintiffs brought the action by writ dated April 10, 1956, against the defendants, Anco Plant and Machinery Co. Ltd., for the condemnation of certain goods, consisting, I understand, of a quantity of old tank tracks, as forfeited under the Export Control Regulations. I need not go in detail into the technicalities of condemnation proceedings, but some reference must be made to the terms of Schedule VII to the Customs and Excise Act, 1952, which provides the commissioners with their warrant for bringing proceedings of this character in the High Court. I think for the present purposes I can confine my citation to paragraph 10 of the schedule. [His Lordship read paragraph 10 (1), (2) and (3), and continued:]

It appears that the goods in question were at one time covered by an export licence, but it is alleged by the commissioners that this licence was subsequently revoked. As I understand the matter, apart from the question of the ownership of the goods, to which I will return, the sole effective issue between the commissioners and the defendants consisted of the question whether the licence, to which I have referred, had been validly revoked or not. It would, I apprehend, have been open to the commissioners to issue a specially endorsed writ under Order 3, r. 6, and apply for summary judgment under Order 14 unless the defendants complied with paragraph 10 (1) of Schedule VII to the Act of 1952, by swearing an affidavit or causing an affidavit to be sworn to the effect that the goods were, or were to the best of the knowledge of the defendants or the deponent, the property of the defendants. The commissioners, however, did not take that simple course; they preferred to issue a writ bearing upon it the note prescribed by Order 14B, which is the order containing provisions under which an order may be made to the effect that the case is to go to trial without further pleadings, that is to say without pleadings beyond the endorsement upon the writ and the affidavits sworn in support of or in opposition to the application.

The commissioners, having issued a writ with that note upon it, applied to the court by a summons dated April 25, 1956, in which they asked for alternative relief, the relief primarily sought being leave to enter judgment condemning as forfeited quoad only the defendants and any alleged rights of theirs the goods referred to in the statement of claim, which were particularized, "unless the defendants or their solicitors before the hearing of "this application shall have made oath that they the defendants "were at the time of seizure of the said goods the owners "thereof to the best of their knowledge and belief." Then, in the alternative, an order was sought that "provided that within "seven days of the hearing of this application the defendants "shall pay into court such sum as the court shall fix as security "for the plaintiffs' costs for an order that the affidavits filed "herein shall stand as pleadings, and that this action shall be "entered for trial without further pleadings, and for such further "orders and directions as to the court may seem right, and that

" in default of such security judgment be entered for the plaintiffs " for the relief above set out." That summons was supported by an affidavit by Mr. Kenneth Stacey, a person employed by the commissioners, which consisted largely of verification of the statement of claim attached to the writ and concluded with the statement " I verily believe that there is no defence to this " action."

On this application coming before Master Harwood, he made an order in the first of the two alternative forms sought by the summons, his order being: " It is ordered the defendant be " given leave to defend this action upon condition that within " seven days from the 17th day of May, 1956, he or his solicitor " shall have made and filed an affidavit that the goods seized " were or were to the best of his knowledge and belief, the " property of the defendant at the time of the seizure. In default " of such affidavit leave be given to the plaintiffs to sign judg- " ment for the relief claimed on the writ with costs to be taxed or " agreed. Fit for counsel. If the affidavit hereinbefore referred " to be sworn and filed as aforesaid liberty be given to restore " for directions. Costs to be the costs in the cause."

From that order the defendants appealed to the judge in chambers, who allowed the appeal and made an order, in effect, in the second alternative sought by the plaintiffs, that is to say, an order under Order 14B.

The issue raised by the appeal is, really, in effect, whether the plaintiff in an action can issue his writ and endorse it with the note prescribed by Order 14B, and then make an application under that order combined with an application under Order 14. The master appears to have thought that this procedure was permissible, but Collingwood J. took the contrary view; and we are now asked to reverse Collingwood J.'s decision and restore the decision of the master.

Mr. Rees-Davies, for the defendants, raised in the forefront of his argument an objection to the effect that the appeal now before us was an appeal from an order of a judge giving unconditional leave to defend, which was not a proper subject for appeal to this court in view of section 31 (1) (*c*) of the Supreme Court of Judicature (Consolidation) Act, 1925. That section provides, by subsection (1): " No appeal shall lie . . . (*c*) from " an order of a judge giving unconditional leave to defend an " action." Mr. Winn argued that the order made by Collingwood J. was not an order giving unconditional leave to defend but merely an order ruling that relief under Order 14 could not be obtained in circumstances such as these, that is to say in a case where the plaintiff had elected, by including the appropriate note on his writ, to proceed under Order 14B.

I find it impossible to accept that argument. The position was that Master Harwood made an order giving the defendants conditional leave to defend. That order, I understand Mr. Winn to admit, was an order which could only be made under Order 14.

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The order which came before Collingwood J., being an order granting conditional leave to defend under an application purporting to have been made under Order 14, the judge allowed the appeal and gave the appropriate directions under Order 14B. It seems to me that, by allowing the defendants' appeal from an order giving conditional leave, what the judge did was to grant unconditional leave to defend; and, if that is right, there is an end of the application, because of the prohibition against any appeal from such an order contained in section 31 (1) (*c*) of the Judicature Act, 1925.

Although the objection taken by Mr. Rees-Davies is sufficient to dispose of this application, I will briefly consider the merits of the case, which have been the subject of considerable argument before us. As I have said, the only issue between the parties concerned the alleged revocation of the licence covering the goods in question, apart from the question of ownership, with respect to which the defendants had to provide an affidavit under paragraph 10 (1) of Schedule VII to the Act of 1952, in default of which the plaintiffs would, by the terms of sub-paragraph (3) of the same paragraph, be entitled to judgment.

One should, I think, look first of all at Order 3, r. 6. That is the rule which provides that in any action in the Chancery Division or the Queen's Bench Division, with certain exceptions, the writ of summons may, at the option of the plaintiff, be specially endorsed with or accompanied by a statement of his claim. It is not in dispute that this was such an action, and therefore the plaintiffs were justified in issuing a writ, as they did, with their statement of claim in extenso endorsed upon it. The writ being of that nature, it would have been open to the plaintiffs to proceed under Order 14, which provides by rule 1 (*a*): "Where the defendant appears to a writ of summons specially "endorsed with or accompanied by a statement of claim under "Order 3, r. 6, the plaintiff may on affidavit made by himself or "by any other person who can swear positively to the facts, "verifying the cause of action and the amount claimed (if any "liquidated sum is claimed), and stating that in his belief there "is no defence to the action except as to the amount of damages "claimed if any, apply to a judge for liberty to enter judgment "for such remedy or relief as upon the statement of claim the "plaintiff may be entitled to. The judge thereupon, unless the "defendant shall satisfy him that he has a good defence to "the action on the merits or shall disclose such facts as may be "deemed sufficient to entitle him to defend the action gener-"ally, may make an order empowering the plaintiff to enter such "judgment as may be just, having regard to the nature of the "remedy or relief claimed."

If the plaintiffs had proceeded under that rule they would, I apprehend, have been justified in seeking leave to sign judgment in default of an affidavit being sworn as to the ownership of the goods under paragraph 10 (1) of Schedule VII to the

Customs and Excise Act, 1952. But they were not content with starting the proceedings simply with a specially endorsed writ; they preferred to proceed under Order 14B; and, accordingly, this note was included in the writ: "If the defendants enter an "appearance to this writ the plaintiffs will apply under Order 14B "of the Rules of the Supreme Court for trial without further "pleadings." That note was included in the writ; and the cautionary note as to the delivery of a defence, which appears on a specially endorsed writ not designed for procedure under Order 14B, was struck out.

Order 14B provides as follows: "A writ of summons specially "endorsed with or accompanied by a statement of claim under "rule 6 of Order 3 may, at the option of the plaintiff, include "(instead of the notice, if any, to the defendant that if he "enters an appearance he must also deliver a defence) a notice "that, if an appearance is entered to the writ, the plaintiff "intends to apply under this Order for trial without further "pleadings." Rule 2 provides: "(1) Where an appearance has "been entered to any writ of summons which includes such a "notice as aforesaid, the plaintiff shall apply to the court or a "judge for an order that the action shall be tried without "further pleadings. (2) Any such application shall be made by "summons served within seven days from the entry of appear-"ance and returnable not less than twenty-one days after the "service thereof. . . . (3) Any such application shall be supported "by an affidavit, made by the plaintiff or by any person who can "swear positively to the facts: (*a*) summarising the questions "believed to be at issue between the parties; and (*b*) indicating, "so far as necessary, the grounds for the contention that the "case is suitable to be tried without further pleadings. (4) A "copy of the said affidavit must be served with the summons. "(5) If the plaintiff fails to perform his obligations under this "rule within the time limited, the defendant may, at the "expiration of that time, apply to the court or a judge to dismiss "the action with costs for want of prosecution; and on the "hearing of the application the court or judge may order the "action to be dismissed accordingly or make such other order on "such terms as the court or judge may think just."

The summons and Mr. Stacey's affidavit in support were duly served on the defendants. It is to be noted that the affidavit was endorsed with the words "Affidavit in support of summons "under Order 14B."

Mr. Winn, for the plaintiff commissioners, submits that it is open to a plaintiff to pursue concurrently his remedies under Order 14 and Order 14B, so that in this case the plaintiffs were justified in issuing their writ as for proceedings under Order 14B and then issuing a summons serving the double purpose of a summons to lead to relief under Order 14B or, alternatively, to relief under Order 14.

I find it impossible to accept that view. It seems to me

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Jenkins L.J.

reasonably plain, on the language of Order 14B, that, once a plaintiff elects to proceed under Order 14B by including in the writ the notice referring to Order 14B, which I have read, he commits himself to the course marked out by Order 14B. It will be seen that rule 2 (1) is in imperative terms: "Where an "appearance has been entered to any writ of summons which "includes such a notice as aforesaid, the plaintiff shall apply to "the court or a judge for an order that the action shall be tried "without further pleadings." That seems to me to mean that it is obligatory on the plaintiff to make such an application once he has elected to proceed under Order 14B by including the appropriate note in his writ. I think the imperative language used is inconsistent with the view that a plaintiff, who has elected to proceed in this way, should combine his proceedings under Order 14B with proceedings under Order 14.

I think the general principle to be applied in construing these rules is that, prima facie, a defendant is entitled to go to trial and defend himself at the trial in the ordinary way unless there is something in the rules to cut down that right. One set of provisions in the rules drastically cutting down that right is to be found in Order 14; but, if that order is to be relied on, then it seems to me that the plaintiff should frame his proceedings accordingly and cannot, while proceeding under Order 14B, properly introduce into his application under that Order an application for summary judgment under Order 14.

The point is one which does not admit of any great elaboration; but, giving the best consideration I can to the matter, I come to the conclusion that the decision of the judge in this case was right. I reach that conclusion, I confess, with no great satisfaction, since it is apparent from the provisions of Schedule VII to the Act of 1952 that, unless and until an affidavit is sworn to the effect that the goods here in dispute are the property of the defendants, the defendants can have no locus standi to defend this action; but that does not mean that it is possible for us here and now to compel them to provide such an affidavit on pain of being excluded from defending the action. It may well be that the plaintiffs could have secured that result if they had proceeded under Order 14; but, in my view, by adopting the alternative procedure under Order 14B, they missed their opportunity, and the master's order giving leave to defend conditionally upon the affidavit being sworn was an order which, in the proceedings as constituted before him, it was not open to him to make.

In these circumstances I hold, first, that this court has no jurisdiction to entertain the appeal and, secondly, that, even if there is jurisdiction to hear it, the appeal must fail for the reasons which I have endeavoured to indicate.

HODSON L.J. I am of the same opinion. I also have reached this conclusion without any great satisfaction, because the

defendants, according to the terms of the Schedule of the Customs and Excise Act, 1952, have not so far indicated that they have any locus standi at all. So far as this appeal is concerned, the plaintiffs are, I think, precluded by the Judicature Act, 1925, s. 31 (1) (*c*), from bringing an appeal from the judge. That section provides that no appeal shall lie from an order of a judge giving unconditional leave to defend an action. The plaintiffs have brought an action, and the master gave conditional leave to defend. It was from that decision that the defendants successfully appealed; and the effect of the judge's decision allowing the appeal, together with the directions which he subsequently gave, was to give unconditional leave to defend. We were told by Mr. Rodger Winn, who appeared on behalf of the plaintiffs, that that was not what the judge's intention was. When he was told, or reminded, as no doubt he well knew, that, if he gave unconditional leave to defend, there would be no possibility of any further appeal, he indicated that that was not his intention, but his intention was simply to direct that the action should proceed not under Order 14 but under Order 14B. In my opinion, however, whatever his intention was, the effect of what he did was to give unconditional leave to defend.

The second matter is not, I think, capable of great elaboration. I agree with what my Lord has said, that the course taken by the plaintiffs of giving notice under Order 14B, as they did by their endorsement on the writ, compelled them to follow the provisions of Order 14B, r. 2: "Where an appearance has been "entered to any writ of summons which includes such a notice "as aforesaid, the plaintiff shall apply to the court or a judge for "an order that the action shall be tried without further "pleadings." They were, I think, by the course which they took, committed to follow that course to the end, and I agree with the view which the judge took upon that matter also. Therefore this appeal must be dismissed.

Appeal dismissed.

Solicitors: *M. G. Whittome; Philip Conway, Thomas & Co.*

B. A. B.

[CHANCERY DIVISION.]

1956
July 6.

Harman J.

* GREIG (INSPECTOR OF TAXES) *v.* ASHTON.

Revenue — Income tax — Double taxation relief — Rate of exchange — Profits made in the United States—Tax over-paid in the United States — Repayment of tax — Alteration in exchange rate between payment and repayment—Crown not entitled to take alteration into account in computation of tax relief—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 347, *Sched.* 16—*Double Taxation Relief* (*Taxes on Income*) (*U.S.A.*) *Order*, 1946 (*S.R. & O.*, 1946, *No.* 1327), *Sched., Pt. I, art. XIII* (2).

A taxpayer resident in the United Kingdom in 1946 paid some $24,000 to the United States tax authorities in respect of her earnings as a writer there. In 1950 she was repaid some $12,000 odd in respect of tax over-paid. In 1946 the rate of exchange was $4 to the £ sterling, but by 1950 the rate of exchange had fallen to $2.80 to the £. She was entitled under the Convention between the Governments of the United Kingdom and the United States (reproduced in the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946), and under Schedule 16 to the Income Tax Act, 1952, to credit against any United Kingdom taxes payable in respect of income in United States which had borne tax there; and the Crown contended that the alteration in the rate of exchange when the credit was repaid should be taken into account when the taxpayer's credit under the Convention was adjusted by reason of the repayment of tax in 1950:—

Held, that the payment of United States tax in 1946 and the repayment in 1950 was one transaction, and the fact that owing to the delay by the United States fiscal authorities there had been an alteration in the rate of exchange was irrelevant, and the Crown was not entitled to take it into account in the computation of the taxpayer's credit in respect of tax paid by her in the United States.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The following facts appear from the case stated:

1. The respondent taxpayer, Miss Winifred Ashton (known as Clemence Dane), appealed to the Special Commissioners against additional assessments to income tax under Case II of Schedule D in the sum of £1,362 for the year 1947–1948 and in the sum of £664 for the year 1949–1950. The only matter in dispute for each of the two years was the amount of credit allowable for United States tax payable on her earnings in that territory.

2. The relevant statutory provisions were contained in the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946, article XIII (2)[1] which reproduced arrangements specified in a

[1] Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946, Schedule: "Part 1. Convention "between the Government of the "United Kingdom of Great Britain "and Northern Ireland and the "Government of the United States of "America for the avoidance of double "taxation . . . Article XIII (2): "Subject to such provisions (which "shall not affect the general principle "hereof) as may be enacted in the

convention made between the Government of the United Kingdom and the Government of the United States of America, and in the Income Tax Act, 1952, Schedule Sixteen.[2]

3. The taxpayer did not appear personally before the commissioners but the following matters were common ground between the parties:—(a) the taxpayer was resident in the United Kingdom in each of the material years and was assessable to income tax under Case II of Schedule D in respect of her professional emoluments as script-writer, playwright and producer whether those emoluments arose in the United Kingdom or elsewhere. (b) In each of the calendar years 1946 and 1948 she earned professional emoluments in the United States of America and which were included in the profits assessed to income tax in the United Kingdom in certain assessments (not before them) called first assessments for the years 1947–1948 and 1949–1950. The particular assessments which were the subject of the present appeal were additional assessments by which the inspector of taxes sought to reduce the amount of credit for United States tax which he had previously allowed to the taxpayer against United Kingdom tax assessed in the first assessments. (c) Under Schedule 16 of the Act of 1952 and of article XIII of the Convention she was entitled to a credit against United Kingdom tax payable by her for "United "States tax payable in respect of income from sources within "the United States." In respect of such income which arose in the calendar year 1946 (assessed to United Kingdom Income Tax for the year 1947–1948) the "United States tax payable" was $11,614. In respect of such income which arose in the calendar year 1948 (assessed to United Kingdom Income Tax for the years 1949–1950) the "United States tax payable" was $16,438. (d) The amounts of United States tax actually paid in respect of her income for those calendar years, the manner of payment of that tax and the amounts of subsequent repayments of that tax were as follows:—In the year 1946 the taxpayer's employer in the United States withheld from her earnings the sum of $21,250 in respect of United States tax for that year.

"United Kingdom, United States tax "payable in respect of income from "sources within the United States "shall be allowed as a credit against "any United Kingdom tax payable in "respect of that income . . ."

[2] Income Tax Act, 1952, Sched. 16: "PROVISIONS AS TO RELIEF FROM "INCOME TAX AND THE PROFITS TAX "BY WAY OF CREDIT IN RESPECT OF "FOREIGN TAX." Para. 2 (1): "Subject to the provisions of this "schedule, where, under the arrange-"ment, credit is to be allowed against "any of the United Kingdom taxes "chargeable in respect of any income, "the amount of the United Kingdom "taxes so chargeable shall be reduced "by the amount of the credit." Para. 15: "Where the amount of any "credit given under the arrangements "is . . . excessive . . . by reason of "any adjustment of the amount of "any tax payable . . . nothing in this "Act . . . limiting the time for the "making of assessments on claims for "relief shall apply to any assessment "or claim to which the adjustment "gives rise, being an assessment or "claim made not later than six years "from the time when all such . . . "adjustments . . . have been made, "whether in the United Kingdom or "elsewhere, as are material in deter-"mining whether any and if so what "credit falls to be given."

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She paid a further sum of $3,226 United States tax for that year before she left for England in October, 1946, making a total sum of $24,476 United States tax paid by her or on her behalf. In May, 1948, her agents in New York sent a claim for repayment to the United States authorities for part of the tax paid for the calendar year 1946, and she received a refund of United States tax on some date in 1950 amounting to $12,862 plus interest. Accordingly, the net amount of United States tax borne by her for the calendar year 1946 was $11,614 (being $24,476 minus $12,862). In the year 1948 her employer in the United States withheld $23,699 in respect of United States tax and she received a refund of United States tax in respect of the year 1948 on some date in 1950 amounting to $7,261 plus interest. Accordingly, the net amount of United States tax borne by the taxpayer for the calendar year 1948 was $16,438. (e) The rate of exchange both in 1946 and 1948 when the taxpayer paid the United States tax then required in respect of her earnings for those years was $4.03 to the £ sterling.

In September, 1949, the £ sterling was devalued in terms of United States dollars and the rate of exchange in 1950, when she received the refunds of part of the tax was $2.80 to the £ sterling.

4. (a) Figures presented on behalf of the taxpayer based on the contentions set forth in paragraph 5 of this case, put the amount of the relief at £2,882 for the first year (that is, $11,614 converted at the rate of $4.03 to the £) and at £4,079 for the second year (that is $16,438 converted at the rate of $4.03 to the £).

(b) Figures presented to them on behalf of the Inspector of Taxes, based on the contentions set forth in paragraph 6 of this case, put the amount of the relief at £1,480 for the first year (that is the difference between (i) the total United States tax payments of $24,476 for that year converted at the rate of $4.03 to the £ and (ii) the United States tax refund of $12,862 converted at the rate of $2.80 to the £) and on the same principle H.M. Inspector of Taxes computed the relief at £3,287 for the second year.

5. It was contended on behalf of the taxpayer: (a) that the word "payable" in article XIII (2) of the Convention was not used to refer to a term of time but was used to measure the amount of the foreign tax; (b) that the foreign tax "payable" was constant throughout and therefore (taking the calendar year 1946 to illustrate the principle) the amount paid or suffered, $24,476, did not enter into the computation of the foreign tax "payable"; (c) that the foreign tax "payable" within the meaning of article XIII (2) for the calendar year 1946 was never more nor less than $11,614 and the balance was never a part of the foreign tax "payable" because it belonged to the taxpayer, and that it was significant that the United States authorities paid interest on the refund; (d) that the $11,614 having been paid or suffered when the rate of exchange was $4.03 to the £ the credit to be given in sterling against United Kingdom tax should be

calculated accordingly; (e) that the same principle should be applied in relation to the calendar year 1948; (f) that the additional assessments under appeal for the income tax years 1947–1948 and 1949–1950 should be adjusted in accordance with the foregoing contentions.

6. It was contended on behalf of the Crown: (a) that the amount of United States tax payable by the taxpayer was not ascertained until her claims for repayment were approved by the proper United States authorities and the consequential repayments made; (b) that, accordingly, the amount of the credit allowable to her against United Kingdom tax was to be taken as the difference between the sterling equivalent of the payments by her and the sterling equivalent of the repayments to her; (c) that on this principle the credit allowable to the respondent for the year 1947–1948 was £1,480 and no more, and that for the year 1949–1950 £3,287 and no more; (d) that the additional assessments under appeal should be confirmed.

7. The commissioners came to the conclusion, on the facts before them, that the United States tax which qualified for relief under the terms of the Convention and the relevant Statutory Rule and Order, which was admitted to be $11,614 in respect of 1946 and $16,438 in respect of 1948, was payable in the years 1946 and 1948 respectively and was paid in those particular years. The taxpayer did not pay any United States tax in the year 1950 nor was any United States tax payable in that year; she received a refund in 1950 of United States tax which had been wrongly paid by her in 1946 and 1948. They held that in computing the amount of the relief due to her the rate of exchange to be adopted was $4.03 to the £ sterling, the rate in force in 1946 and 1948, and that the additional assessments should be discharged.

The Crown appealed from their decision.

J. G. Foster Q.C. and *Sir Reginald Hills* for the Crown.
Hilary Magnus for the taxpayer.

Cases cited in argument not referred to in the judgment: *Magraw* v. *Lewis* [3]; *In re Tatham*.[4]

HARMAN J. I find this a confusing matter. The respondent taxpayer, Winifred Ashton, better known under her nom de plume of Clemence Dane, following her vocation as an author, made profits in the United States of America in 1946. In respect of part of those profits sums were deducted by her employer, apparently under a system analogous to our P.A.Y.E., to the tune of some 21,000 dollars. When she left the United States in October, 1946, she was required to pay a further 3,000 dollars odd. She had, therefore, suffered tax up to that point of 24,000

[3] (1933) 18 T.C. 222.

[4] [1945] Ch. 34; 61 T.L.R. 76; [1945] 1 All E.R. 29.

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dollars. That was not, however, her true liability to the United States tax, because some years later she recovered through her United States agents 12,862 dollars over-assessed, the correct liability being thus ascertained at 11,614 dollars. This, however, did not happen until the year 1950.

Miss Dane, being resident in the United Kingdom, is liable to pay tax here on her United States earnings, but there is between the United Kingdom and the United States a convention which regulates double taxation, re-enacted by section 347 of the Income Tax Act, 1952, which repeated section 51 of the Finance (No. 2) Act, 1945, which was applicable to these transactions. The machinery is worked out in Schedule 16 to the Act of 1952, the only part of which really affects this matter being paragraph 15, which permits of reassessments in respect of foreign tax liability six years after any readjustment may have been made by the foreign tax authority.

The portion of the Convention providing for double taxation relief with the United States appears as the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946, and the only article with which I need trouble is article XIII (2). [His Lordship read article XIII (2) and continued:] It is agreed, of course, that "payable" in one sense must mean "paid"; in other words, one cannot get credit in England for tax which has not been paid in the United States. So that anybody who has, in respect of income from sources within the United States (in this case, the work done by Miss Dane in the United States), found himself liable for tax to the United States shall be allowed a credit against the United Kingdom tax payable in respect of the same income. Here the ultimate tax for which she was liable in respect of this source of income was some 11,000 dollars, and that is the credit for which she applied and which she obtained against her United Kingdom liability for these same profits.

That, I suppose, would have been the end of the matter but for the fact that when she got the relief in 1950 the rate of exchange between the United Kingdom and the United States had altered from that which it was in 1946 or 1947. In one case it was roughly 4 dollars to the £, in the other case 2.80 dollars to the £; that alteration occurred in 1949. The result is, that if Miss Dane gets a credit of 11,000 dollars at 4 dollars to the £, and by reason of the dilatory repayment made by the United States fiscal authorities gets repaid at a time when dollars are 2.80 to the £, she will in a sense have made a profit on the exchange. It is that profit in effect which the Crown seeks to charge by way of additional assessment.

To that her answer was that this was quite wrong, because the credit to which she was entitled was credit against her tax for the year 1947 on activities in 1946, and in fact what she had was too great a credit, because she should have had only the credit for the net sum and not for the gross sum; and a readjustment in the amount of the credit ought to be made; but the

whole transaction was that which was or should have been completed in 1947, when the state of things ruling in 1947 had to be the governing factor. To that the Crown answered that there should have been two transactions: first, the credit of 24,000 dollars in 1947; then, when she in fact recovered 12,862 of those 24,000 dollars, they could say that those were their's, because they gave her too much credit, and when she received the 12,000 dollars odd the rate was 2.80 dollars to the £. The Crown contended, therefore, that that was the rate at which they were entitled to treat themselves as in credit against her.

All this is highly artificial, because in fact none of those things happened. There never was any claim by the taxpayer of a credit of 24,000 dollars. As one knows, fiscal wheels grind slowly. She claimed credit for 11,000 dollars at the rate of 4 dollars to the £, that was the credit she got and that was the right credit she should have had, because that follows the words of article XIII of the Convention. The fact that the United States authorities were slow about repaying or that the exchange had altered in the meanwhile, so that when they repaid her the amount repaid was worth more to her in pounds, seems to me, when one looks at it carefully, to be entirely irrelevant. I do not think that it has anything to do with the Crown at all. The money might have been repaid earlier and left in the United States and the same profit would have been made, which is not a profit which the Crown could tax. It is a mere accident, in my judgment, and the special commissioners were quite right in upholding the taxpayer's contention, and the Crown's contention in this case is wrong.

I was told that some question of principle was involved, and that I ought to make some kind of rule that would apply to all cases. I am quite unable to do that. I have trouble enough with the puzzling matter which is before me, and in that I think that the special commissioners came to the right conclusion; whether I should have stated it quite as they have does not really matter. But I reject the Crown's contention because the alteration in the rate of exchange is purely an outside circumstance which has nothing to do with the liability for tax nor the way in which the Convention ought to be related to the law. What effect that has on other cases I am happy to say that I need not consider. The like considerations apply to the second year in question.

The result is that I propose to dismiss this appeal and leave the figures to be calculated on the same basis as they were for the special commissioners.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Heald, Johnson, Garton & Co.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

1956
July 12.

Lord Goddard C.J., Ormerod and Donovan JJ.

* REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL. *Ex parte* COURAGE & CO. LTD.

Trade Dispute—Industrial Disputes Tribunal—Jurisdiction—Brewery—Claim by union on behalf of small proportion of employees—Whether a dispute in "an undertaking"—Whether union represented a "Section of trade or industry"—"Section"—Industrial Disputes Order, 1951 (*S.I.* 1951, *No.* 1376), *art.* 1.

In December, 1955, a group secretary of the Transport and General Workers Union put forward a demand on behalf of about 10 per cent. of the employees of a brewery company, who were members of the union, for an increase in wages. This demand was refused by the employers and the matter was reported by the union to the Minister who referred it to the Industrial Disputes Tribunal. On an application by the employers for an order of prohibition to prevent the tribunal from proceeding with the reference on the grounds that there was no dispute between the employers and their workers and that the union did not represent a substantial proportion of the workers in the company's employ:—

Held that, in the circumstances, there was a "dispute" within the meaning of article 12 of the Industrial Disputes Order, 1951 [1]; that the brewery was an "undertaking" within article 1 of that Order, and that the term "section of trade or industry" in article 1 (*b*) referred to functions and not to localities; and that, as the union represented a substantial proportion of the brewing industry as a whole, the Minister was entitled to refer the report of the union to the tribunal.

APPLICATION for an order of prohibition.

The applicants, Courage & Co., Ltd., brewers of Alton, Hants., applied for an order prohibiting the Industrial Disputes Tribunal and the Transport and General Workers Union from

[1] Industrial Disputes Order, 1951, art. 1: "Where a dispute exists in "a trade or industry or section of a "trade or industry or in an undertaking and that dispute is reported "to the Minister in accordance "with this Order by— . . . (iii) a "trade union, on behalf of workers "who are parties to the dispute; and "it appears to the Minister—(*a*) that "there is machinery for the voluntary "settlement of terms and conditions "of employment in that trade or "industry . . . or (*b*) that there is "no such machinery as aforesaid and "that, where the report is made by "an organisation of employers or a "trade union, that organisation or "trade union represents a substantial "proportion of employers or workers, "as the case may be, in the trade "or industry or section of trade or "industry concerned; that dispute "shall be dealt with in accordance "with the subsequent provisions of "this Order."

Art. 8: "(1) Where a dispute has "been reported to the Minister in "accordance with this Order . . . "the dispute shall, if not otherwise "settled, be referred to the tribunal "for settlement, and such reference "shall be made within 14 days of "the date on which the dispute was "reported to the Minister, provided "that the Minister may extend the "period of 14 days aforesaid if he "thinks it desirable to do so."

Art. 12 (1): "In this Order, unless "the contrary intention appears, the "following expressions have the "meanings hereby respectively as-"signed to them, that is to say:— "'dispute' . . . means any dispute "between an employer and workmen "in the employment of that employer "connected with the terms of the "employment or with the conditions "of labour of any of those workmen."

further proceeding with a reference of a dispute alleged to exist between the applicants and certain members of the union in the employment of the applicants which was referred to the tribunal by the Minister of Labour and National Service on March 29, 1956. The grounds on which relief was sought was that the reference was invalidly made and the tribunal had no jurisdiction in respect of the reference because: (1) there was no dispute between the applicants and any of their workers; (2) the Transport and General Workers Union in reporting to the Minister an alleged dispute were not acting on behalf of any workers who were parties to any dispute with the applicants; (3) the Minister had referred the dispute only because it appeared to him that the union represented a substantial proportion of the workers in the whole of the brewing industry, but the whole industry was not concerned in this industry; (4) the union did not represent a substantial proportion of workers in the section of the trade or industry or in the undertaking concerned in this dispute namely in the applicants' brewery; (5) the dispute, if any, existed in an undertaking and even though reported by a trade union on behalf of workers in that undertaking who were parties to the dispute, yet could not be referred to the Minister under article 1 (*b*) of the Industrial Disputes Order, 1951, because that article did not provide for such reference in such circumstances; (6) references by the Minister under article 8 were invalid unless the matters set out in article 1 (*a*) and (*b*) or article 2 existed and in this case they did not exist.

The facts are stated in the judgment of Lord Goddard C.J.

John Hobson for the applicants.

N. R. Fox-Andrews Q.C. and *Michael Lee* for the union.

S. B. R. Cooke for the Ministry.

Case referred to in argument: *Rex* v. *National Arbitration Tribunal, ex parte Keable Press, Ltd.*[2]

LORD GODDARD C.J. In this case Mr. Hobson has moved on behalf of Courage & Co., Ltd., the well-known brewers, to prohibit the Industrial Disputes Tribunal from proceeding with a reference dated March 29, 1956, sent to them under the Industrial Disputes Order, 1951, by the Minister of Labour and National Service in these terms: "The Minister of Labour and "National Service in exercise of the power conferred on him "by article 8 of the above-mentioned Order hereby refers to "the Industrial Disputes Tribunal for settlement the dispute "particulars whereof are specified in the schedule hereto. "Schedule. Particulars of the dispute. A. The parties: "Employers, Courage and Co. Ltd., the Brewery, Alton, Hants. "Workers, Members of the Transport and General Workers' "Union, in the employment of the said employers. B. Description

[2] [1943] 2 All E.R. 633.

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" of the Dispute: The dispute arises out of an application by " the said workers for a further wage increase of 4s. per week " on the basic minimum rates to adult male general brewery " workers and for proportionate increases in the wages of women " and juveniles with effect from December 29, 1955. C. Nature " of the Report: The dispute was reported to the Minister on " January 28, 1956, by the Transport and General Workers' " Union, 52, Henstead Road, Southampton, on behalf of the " workers."

[His Lordship read article 1 of the Order of 1951 and continued:] Before I go to the facts of the case, which are now quite clearly before the court, I will refer to two short matters of construction which have been argued. It will be observed that the dispute may exist in a trade or industry or section of a trade or industry or in an undertaking. There is no difficulty in giving a meaning to the word " undertaking." That means a unit, such as a factory or it may be in this case a brewery or many other units of industry which are generally referred to as undertakings. The dispute may, therefore, arise not in the trade generally, not even in a section of the trade generally, but in one particular undertaking. If it does happen to be in one particular organisation, an order may be made referring the dispute if the report is made by a trade union that represents a substantial proportion of workers in the trade or industry or section of trade or industry concerned. Of course, a trade union as a rule represents workers in an industry or possibly in a branch of industry. As Ormerod J. has pointed out, in the textile trade practically every class of worker has its own particular union. I suppose spinners have one, and weavers have another, and throwers have another, and so forth; so it is clear from the wording of the Industrial Disputes Order, 1951, that if there is a dispute in an undertaking, that is to say, in some unit in the industry, the Minister may refer it if a report is made by a trade union which represents workers in the industry. Nor do I think anything favourable to the applicants can be made out of the words " section of trade or industry." I think " section " clearly refers to functions and does not refer to localities. It does not refer, for instance, to all breweries in the County of Hampshire or in the County of Sussex. It refers to the section of trade or industry which is some particular part of the trade or industry. You can easily take the mineworkers and refer to surface workers and winders, and it can represent all of them though the dispute may only be in one section; or for instance with the National Union of Railwaymen, the dispute might only be in the section of carriage cleaners or permanent way men; it need not be a dispute relating to the industry as a whole. It does not mean a geographical section.

The particular facts we have to deal with are these: It seems perfectly clear from the affidavits that whereas the majority of Messrs. Courage & Co.'s workmen at Alton are not members of

the Transport and General Workers' Union, there are some 50 or 60 workers who are; and the Minister was satisfied and stated that that union represented a substantial proportion of workers in the brewing industry, and no one disputes that taking the brewing industry all over the kingdom. Therefore, they seem to me clearly, in the terms of the Order, to be entitled to speak on behalf of their members, if their members desire that they should do so.

In the summer of 1955 the union entered into negotiations with the applicants with the object of raising the wages of their members; and of course if they succeeded in obtaining an increase for their members the wages of the other workers in the brewery would have to be raised whether they were members of the union or not, because if the union got more money for some workers it would follow that there would have to be a general increase. That is no doubt one of the reasons why employers so often dispute these cases where they have an undertaking in which hitherto they have been on friendly terms with their workers who appear to be satisfied. But we are not concerned with, and cannot be concerned with, the policy of this Order. I dare say a great deal can be said against it; but that is not a matter for the court. All we have to do is to interpret this Order.

It is clear that in the summer of 1955 the question was raised by the members of the Transport and General Workers' Union employed at the applicants' brewery at Alton, and raised for them by the union, which resulted in negotiations taking place; and although there was a reference then by the Minister to the Industrial Disputes Tribunal, an agreement was come to under which an increase of 8s. a week was given to those on the basic wage and proportionate increases to women and juveniles. It is clear from a letter which was written on June 8, 1955, that that was accepted for the time. The group secretary of the union wrote to the managing director of Courage's: "I have "to refer to my letter of May 19, 1955, in which I advised you "of my reference of our dispute to the Ministry of Labour "under Statutory Instrument 1376, and to say I have since "received information from our membership to the effect not "only were the wage rates of your transport drivers increased "by 8s. per week as from May 23 but that you have now decided "to increase the wages of your workpeople in other departments "of the brewery by 8s. establishing a rate of pay for adult male "brewery workers of 140s. per week of 44 hours. I have to "say, therefore, in view of the circumstances and that you "have to some extent made the wage adjustments which we "desired we see no reason at this stage for a continued reference "to the Industrial Disputes Tribunal and we have, therefore, "requested the withdrawal of our reference to the Ministry. I "would take this opportunity of suggesting, however, that we "should much prefer that these matters be dealt with directly "rather than indirectly and should there be a necessity in the

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"future we should address ourselves to you on such matters as "may come to hand."; in other words: "Let us negotiate "between ourselves and not have matters sent to the tribunal "if we can help it." I think it is pretty clear from that letter that the position as from June 8, 1955, was: "Although we have "referred this matter, you have now met us to the extent set out "in the letter, and therefore for the present we accept that," and I dare say the applicants had every reason to suppose that that was final; I do not think that anybody would blame them for thinking so, but unfortunately this matter arose again in December. In December, 1955, a further demand was put forward, and it seems to me that it is impossible to say that in putting forward the demand in December the Transport and General Workers' Union were not acting on behalf of their members. It is perfectly true that they put forward the claim perhaps too widely. It may well be that they were saying that the increase should apply to all workers; but I think that is really a matter of form rather than substance because, as I have said already, if a proportion of the workers get a rise it follows almost as automatically as night follows day that the increase will have to be general; at any rate, that is a matter for the Industrial Disputes Tribunal.

On February 11, 1956, the Minister wrote to the employers and said: "I am directed by the Minister of Labour and National "Service to inform you that he thinks it desirable in the case of "the under-mentioned dispute reported under the Industrial "Disputes Order, 1951, to extend the period of 14 days specified "in article 8 (1) of the Order." Then he sets out the parties to the dispute, Courage & Co., Ltd. and the members of the Transport and General Workers' Union; that it was reported by the union on January 28, 1956. Then: "Particulars of the "Dispute: The dispute arises out of an application by the said "workers"—that is the members of the Transport and General Workers' Union—"for a further wage increase of 4s. per week "for adult male general brewery workers on the basic minimum "rates as from December 29, 1955, and for a proportionate "increase in the wages of women and juveniles."

The report of January 28 was contained in a letter dated January 27 in which the group secretary of the union wrote to the Ministry of Labour saying: "I am instructed by my execu- "tive to report that a dispute has arisen between the union and "[Messrs. Courage & Co., Ltd.] in relation to an application sub- "mitted by the union for an increase of 12s. per week on the basic "minimum rates for adult male general brewery workers dated "December 12, 1955, and as modified by the union in a com- "munication dated January 10, 1956, wherein the union "requested an increase of 10s. per week on the basic rates "of adult male general brewery workers." Then he goes on to say that there will be certain other adjustments, and that that is the dispute to be referred.

It seems to me to be clear that there is a dispute here. The applicants did not see fit to grant that increase, and therefore at once there was a dispute, and the secretary has sworn in an affidavit that the workers authorized him to make the report. He has also given us the approximate number of the workers, although it is not necessary to show a substantial proportion of the workers, at Messrs. Courage's Brewery. It is clear that there is a dispute, that the dispute has been reported by a trade union representative of those workers who are members of the union to the Minister, and therefore the Minister had power and, indeed it was his duty, to refer it to the Industrial Disputes Tribunal. For those reasons, I think an order for prohibition should be refused.

ORMEROD J. I agree. The prinicpal point made by Mr. Hobson on behalf of the applicants was that no dispute had arisen here which would warrant the Minister in making the reference. "Dispute" is defined in article 12 of the Order of 1951 as meaning "any dispute between an employer and "workmen in the employment of that employer connected with "the terms of the employment or with the conditions of labour "of any of those workmen." It has always been clear from the beginning that if there was a dispute it was a dispute connected with the terms of employment or with the conditions of labour of some of the workmen employed in this brewery because the matter was a question of wages; but it was argued by Mr. Hobson that there never was in fact a dispute because the negotiations were never instigated or authorized by employees of the applicants and were in fact nothing more than what was described in one of the cases as a frolic on the part of the trade union acting entirely independently. It is quite clear on the evidence which has subsequently come to light in this court that such is not the position. Not only does a second affidavit of the group secretary make it clear that he was acting under the express instructions of certain members of the union who were employed by the applicants, but the correspondence disclosed in that affidavit amply bears out the fact that the trade union was acting, not only in the earlier dispute, but in the continuation of that dispute or a new dispute which arose in December, 1955. In those circumstances, I do not think it can possibly be said that there was no dispute here between the applicants and certain of their workers. But it is argued on behalf of the applicants that this in itself is not sufficient, that the claim was made in much too vague a manner, and that the reference to arbitration was so vague that it was not possible to say which particular class of workmen was engaged in the dispute and which particular class of workmen employed by the applicants was intended to benefit by any award which might be made in favour of the workmen. Again, I think on reading article 1 and article 10 of the Order, and the reference of February 11, 1956, it

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is clear that the subject-matter of the dispute and the persons who were intended to benefit by it or otherwise are quite sufficiently defined. It may be that the matter has not been done in accordance with the strict rules of pleading, but it has been made sufficiently clear for everyone to know what the dispute was and what were the matters which were to be referred to arbitration. In those circumstances, it appears to me that there has been sufficient compliance with the conditions of article 1.

With regard to the third point which has been made on behalf of the applicants, that the trade union were not representing a substantial proportion of a section of the trade or industry concerned, I respectfully agree with the construction which the Lord Chief Justice has put on that part of the Order. It appears to me that the term "section of trade or industry" refers to function rather than to geographical situation and, in those circumstances, those particular words in article 1 (*b*) do not apply to this case; but even if they did, the figures which are before the court are that some 50 or more members of this trade union are included in the 350, the total number of employees in this brewery, and apart from any other consideration that could be regarded as a substantial proportion of the workmen engaged in this particular section of the industry. But I do not agree that the contention of Mr. Hobson is the correct one. I think the words that apply here are that the trade union "represents a substantial proportion of employers or "workers, as the case may be, in the trade or industry." That is admitted by everybody and, in those circumstances, there is no reason why this tribunal should not act in accordance with the terms of the Order. I agree that the order for prohibition should be refused.

DONOVAN J. I agree. I think there is a dispute as defined in article 12 of the Order because of the evidence before us that the union was acting on behalf of its members when putting forward the claim for an increase of wages in December, 1955. It is said that—there being some members who would not be concerned—there is no evidence that the union was acting on behalf of those very members who were seeking an increase; but that, I think, can be reasonably inferred.

On the point of construction arising on article 1 (*b*) of the Order, I do not think that an individual brewery can be said to be a section of the brewing industry for the purpose of the Order. Of course, it is a part of the industry and is a section in that sense, but article 1 (*b*) is contemplating, in my opinion, something quite different, namely, a conglomerate industry divided into sections in which different functions making up an industry are performed, for example, the tinplate section of the steel industry, the spinning section of the cotton industry or, to come right up to date, the nuclear energy section of the

electricity industry. Therefore, both points taken on behalf of the applicant I think fail, and I concur with the other members of the court that this motion should be dismissed.

Application refused.

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Solicitors: *Speechly, Mumford & Craig for Lamport, Bassitt & Hiscock, Southampton; G. Howard & Co.; Solicitor, Ministry of Labour and National Service.*

J. D. P.

[HOUSE OF LORDS.]

* SOUTH OF SCOTLAND ELECTRICITY BOARD AND ANOTHER . . . . . APPELLANTS;

AND

BRITISH OXYGEN CO. LTD. . . . RESPONDENTS.

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June 4, 5, 6, 7; *July* 19.

Electricity—Tariff—"Undue discrimination"—High voltage and low voltage consumers—"Class of persons"—Differential—Electricity Act, 1947 (10 & 11 *Geo.* 6, *c.* 54), *s.* 37 (8).

House of Lords—New point raised on appeal—Discretion of House—General rule.

By section 37 (8) of the Electricity Act, 1947: "An area "board, in fixing tariffs . . . shall not show undue preference to "any person or class of persons and shall not exercise any undue "discrimination against any person or class of persons . . ."

A company, being an industrial consumer of high voltage electricity (which required more fuel to produce than low voltage electricity) complained that "undue discrimination" had been exercised against it, as against low voltage consumers, in that (a) although, in the case of one tariff, that tariff granted it a fair differential reflecting the respective fuel costs when fuel was X shillings a ton dividing those costs fairly between the two sets of consumers, a fuel variation clause (providing for an increase or reduction in the unit charge if the cost of fuel was more or less than X shillings a ton) vitiated the tariff when fuel costs rose by distributing the additional cost equally per unit between the two sets of consumers, and (b), in the case of another tariff, the differential in the basic unit charges was itself unfair:—

Held, (1) that an excessive discrimination might be an "undue "discrimination" although not necessarily exercised for a corrupt reason; and (2) that the high voltage and low voltage consumers constituted two classes within the meaning of the subsection.

Decision of the Second Division of the Court of Session, 1955 S.L.T. 306 affirmed.

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† *Present:* VISCOUNT SIMONDS, LORD NORMAND, LORD TUCKER, LORD COHEN and LORD KEITH OF AVONHOLM.

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APPEAL from the Second Division of the Court of Session.

This was an appeal by leave of the Court of Session against an interlocutor of that court in an action of declarator and damages in which both appellants, the South-West of Scotland Electricity Board, now the South of Scotland Electricity Board, and the British Electricity Authority, now the Central Electricity Authority, were defenders and the respondents, British Oxygen Co. Ltd., were pursuers. Both appellants tabled pleas to the relevancy of the respondents' averments. On January 7, 1955, the Lord Ordinary (Lord Hill Watson) sustained those pleas and dismissed the action. On motion for review the Second Division on June 10, 1955, recalled the interlocutor of the Lord Ordinary and allowed a proof before answer (excluding certain averments immaterial to these appeals).

The facts are fully set out in the opinions of Lord Normand and Lord Keith of Avonholm.

J. O. M. Hunter Q.C. (of the English Bar, Q.C. of the Scottish Bar), *E. S. Fay* (of the English Bar) and *R. M'Donald* (of the Scottish Bar) for the appellants.

Sir Andrew Clark Q.C. (of the English Bar), *Ian Shearer Q.C.* and *W. Hook* (both of the Scottish Bar) for the respondents.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *Attorney-General* v. *Hackney Corporation*[1]; *Reg.* v. *Railway Commissioners*[2]; *Liverpool Corn Traders' Association* v. *Great Western Railway Co.*[3]; *Lever Brothers Ltd.* v. *Midland Railway Co.*[4]; *Holwell Iron Co. Ltd.* v. *Midland Railway Co.*[5]; *Association of Master Lightermen and Barge Owners* v. *Southern Railway Co. (No. 2)*[6]; and *Hozier* v. *Caledonian Railway Co.*[7]

Their Lordships took time for consideration.

July 19. VISCOUNT SIMONDS. My Lords, I had prepared an opinion in this case in which I found it necessary to discuss and determine a number of questions raised for the first time in your Lordships' House. I did so with the reluctance which an appellate tribunal must always feel when deprived of the assistance of the learned judges of the Court of Session. I have now had the advantage of reading the opinion of my noble and learned friend, Lord Normand, and am satisfied that the course which I proposed to take was not only unnecessary but would not be in accordance with the practice and procedure in Scottish appeals I propose, therefore, only to say that I concur at all points with

[1] [1918] 1 Ch. 372; 34 T.L.R. 166.
[2] (1889) 22 Q.B.D. 642; 5 T.L.R. 333.
[3] (1892) 8 Ry. & Can.Tr.Cas. 114, 122.
[4] (1909) 101 L.T. 438; 25 T.L.R. 768.
[5] [1910] 1 K.B. 296, 305; 26 T.L.R. 110.
[6] (1934) 21 Ry. & Can.Tr.Cas. 126.
[7] (1855) 17 D. 302; 1 Ry. & Can Tr.Cas. 24.

the opinion Lord Normand will deliver and that, in my opinion, this appeal should be dismissed with costs.

LORD NORMAND. My Lords, the South-West of Scotland Electricity Board, being an area board under the Electricity Act, 1947, and the Central Electricity Authority, appeal against an interlocutor of the Second Division of the Court of Session, so far as it recalled the interlocutor of the Lord Ordinary and allowed the parties a proof before answer of certain of their averments with leave to appeal. The respondents are in receipt of a supply of electricity for industrial purposes from the board at a voltage metered above 6,000. The Lord Ordinary had sustained the appellants' pleas in law to the relevance and had dismissed the action. The Second Division agreed with the Lord Ordinary that a severable part of the respondents' case was irrelevant and excepted from the allowance of proof their averments in support of it. With that part of the case, as no appeal has been taken on it, we are not concerned. The question now to be decided is whether the Second Division was wrong in remitting any of the averments to probation.

In the conclusions which survive for consideration the respondents seek declarators that in fixing three successive industrial demand tariffs the area board exercised undue discrimination against industrial consumers of supplies of electricity metered at or above a voltage of 6,000, contrary to the provisions of the Electricity Act, 1947, s. 37 (8); declarators that the tariffs are illegal and ultra vires; reduction of the tariffs; and repayment by the area board to them of the sum of £10,000 with interest thereon at the rate of 5 per cent. per annum from the date of citation until payment.

The following provisions of section 37 are material to the decision of the appeal: "... (3) Subject to any directions of "the central authority ... the prices to be charged by area "boards for the supply of electricity by them shall be in accord- "ance with such tariffs as may be fixed from time to time by "them, and those tariffs shall be so framed as to show the "methods by which and the principles on which the charges are "to be made as well as the prices which are to be charged, and "shall be published in such manner as in the opinion of the area "board will secure adequate publicity for them: ... (8) An area "board, in fixing tariffs ... shall not show undue preference "to any person or class of persons and shall not exercise any "undue discrimination against any person or class of persons, and "the central authority shall, in exercising their powers under this "section in relation to the fixing of tariffs and making of agree- "ments by area boards, secure compliance by area boards with "this subsection."

The three tariffs alleged to have contravened section 37 (8) came into operation respectively on January 1, 1952, October 1, 1953, and April 1, 1954. It is not necessary for me to repeat the

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averments for the respondents. The essence of them is that the amount of fuel required to produce and supply a given amount of electricity at a high voltage is substantially less than that required to supply the same amount at a low voltage; that the first tariff granted the high voltage consumers a fair differential, truly reflecting fuel costs when fuel was costing 38s. a ton, by fixing the original unit charges for them at ·45d. and for the low voltage consumers at ·475d., but that the fuel variation clause vitiated the tariff when fuel cost rose above 38s. a ton, by distributing the additional cost equally per unit between the two sets of consumers, and that the vicious effect of the clause was not rectified in the second and third tariffs.

The original gap, as it was called in argument, between the unit price for the high voltage and the unit price for the low voltage was narrowed as the price of fuel rose. It is in this narrowing of the gap that the respondents profess to find the undue discrimination against them.

My Lords, when the case was before the Lord Ordinary and at the hearing of the reclaiming note the appellants maintained that the averments were irrelevant on two grounds and on two only. First, they said that a "discrimination" was not an "undue "discrimination" within the meaning of section 37 (8) unless it had been "exercised" for illegitimate reasons, and that as there was no averment of illegitimate reasons there was no ground of action. Secondly, they said that the high voltage consumers and the low voltage consumers did not constitute two "classes" within the meaning of section 37 (8). On the first point the respondents answered that an excessive discrimination might be an "undue discrimination" and that the issue between them and the appellants might become one of degree and of fact. The Lord Ordinary accepted the argument of the appellants on this point and sustained their pleas to relevance. The Second Division rejected the arguments of the appellants. I agree with the opinions of the Second Division and I think they are supported by the authority of Lord Herschell and Lindley L.J. in *Phipps* v. *London & North Western Railway Co.*[1] The judgments of Sargant J. in *Attorney-General* v. *Long Eaton Urban District Council*[2] and of my noble and learned friend, then Simonds J., in *Attorney-General* v. *Wimbledon Corporation*,[3] are entirely consistent with the view that the Second Division has taken.

On the other question, whether the high voltage consumers and the low voltage consumers form two "classes," the Lord Ordinary did not find it necessary to come to a decision. The Second Division were of opinion that the appellants' contention failed. Again I agree with the opinions of the learned judges of

[1] [1892] 2 Q.B. 229; 8 T.L.R. 419.
[2] [1914] 2 Ch. 251; 30 T.L.R. 537; (C.A.) [1915] 1 Ch. 124; 31 T.L.R. 45.
[3] [1940] Ch. 180; 56 T.L.R. 242; [1940] 1 All E.R. 76.

the Second Division. The appellants argued that the two classes must be classes which are in competition with one another. That may be so, but I respectfully think that the appellants' conception of the kind of competition desiderated is too narrow and antiquated. In the conditions of our time all industries are in competition for capital and labour and for public favour. The customer's choice between buying an article of dress, a piece of furniture or a bicycle often depends on the prices of the goods and on his purse, and there is an effective competition between the most heterogeneous products of industry.

I am humbly of opinion that the Second Division took the appropriate course in allowing a proof before answer, leaving the pleas to relevance available so that any question of relevance can be argued in the light of the evidence after the proof. I would dismiss the appeal, the costs of which should be borne by the appellants.

At the hearing of the appeal the appellants submitted a new argument on relevance which they had omitted to state either to the Lord Ordinary or in the Inner House. They said that on the averments it was clear that the respondents and other high voltage consumers were charged less per unit per month under all three tariffs, and that the test whether a preference had been shown to one class as compared with another was simply a matter of price. Thus, if all consumers were charged the same price per unit per month, there would be no discrimination and no preference. In the present case, according to the argument, the preference was shown to the high voltage consumers who paid less, and the discrimination was exercised against the low voltage consumers who paid more, but the preference and discrimination were justified by the greater cost per unit of supplying the low voltage consumers. This new submission is crucial to the decision of the action and it is of the greatest importance to all users of electricity and also of gas. It is in substance a new case that this House is asked to consider without the aid of the judgments of the Court of Session. It was not in the contemplation of the Second Division when they granted leave to appeal, and if the appellants had informed the court when they applied for leave to appeal that they intended to put forward a new question of such magnitude, it is scarcely conceivable that the application would have been granted. I am not, of course, suggesting that there was concealment or bad faith, for I think that this new case had not occurred to the appellants till after leave to appeal was granted. This House sometimes entertains a question which has not been argued in the courts below when justice requires that it should do so, because there is no other means at hand by which the question can be brought to a judicial determination. In *Stonehaven Magistrates* v. *Kincardineshire County Council*[4] it even entertained and decided a point which had been expressly abandoned in the court below. But in the present case justice

[4] 1940 S.C.(H.L.) 56.

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does not require that the House should entertain the question now proposed to it, and the appellants are not entitled to force the House to play for their convenience the part of a court of first instance. Appeals against an allowance of proof are not to be encouraged, and it would be a grave departure from correct practice to allow it to be thought that when leave to appeal is granted the appellant has the right to expect that any new question which he chooses to raise will be entertained by this House. The case should proceed as the interlocutor of the Second Division has directed; it will then be open to the appellants after the proof has been led to take the point that there has been no discrimination against the respondents. The Lord Ordinary will deal with it, and a reclaiming note and a subsequent appeal, if necessary, will be competent. That is the normal and regular procedure. It may result in a second appeal but that is a risk which the appellants have taken with their eyes open.

The appellants put forward another new contention, that the conclusions of the summons or some of them are incompetent. This contention also can be dealt with by the Lord Ordinary with such amendments of the conclusions or pleadings as may be proposed and may be deemed by him to be necessary for the disposal of the action.

LORD TUCKER. My Lords, I concur in the opinion of my noble and learned friend, Lord Normand, which has just been delivered.

LORD COHEN. My Lords, I too have had the advantage of reading the opinion of my noble and learned friend, Lord Normand. Like my noble and learned friend on the Woolsack, I concur at all points with the reasons which Lord Normand has given for thinking that this appeal should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, in this case the respondents, the British Oxygen Co. Ltd., complain that the appellants, the South-West Scotland Electricity Board (now the South of Scotland Electricity Board) have unduly discriminated against them in fixing certain tariffs for supplies of electricity for industrial purposes, known as industrial maximum demand tariffs. Three tariffs are in question, the first operating as from December 15, 1951, superseded by the second operating as from October 1, 1953, superseded in turn by the third operating as from April 1, 1954. It will be convenient to call the respondents the pursuers and the appellant board the defenders. The Central Electricity Authority were also called as defenders for any interest they might have and appear here as appellants but they take no pleas distinct from those of the board.

The action is based on subsection (8) of section 37 of the Electricity Act, 1947, which runs as follows: [His Lordship read the subsection and continued:] The conclusions of the summons

are for declarator, in respect of each of the tariffs, that the defenders exercised undue discrimination against industrial users of supplies of electricity metered at or above a voltage of 6,000, including the pursuers, contrary to the provisions of the Electricity Act, 1947, s. 37 (8); and that the tariffs are illegal and ultra vires and of no force and effect; for production and reduction of the tariffs as applied to users metered at or above a voltage of 6,000; and for payment by the defenders to the pursuers of the sum of £10,000 with interest at the rate of 5 per cent. per annum from the date of citation until payment.

The Lord Ordinary held the averments of the pursuers to be irrelevant and dismissed the action. The Second Division has recalled the Lord Ordinary's interlocutor and allowed a proof before answer. It is against this judgment of the Second Division that the defenders have appealed to this House.

I do not find it necessary to set out the tariffs in full. They are made up of various components. It will be sufficient to indicate the components of which complaint is made. In the first tariff there was fixed a price per unit of ·45 of a penny for high voltage users and ·475 of a penny for low voltage users, with a proviso that this unit charge should be increased or reduced at the rate of ·0008 of a penny per unit for each penny by which the fuel cost per ton to the defenders in the previous month was more or less than 38 shillings. The pursuers accept the respective prices of ·45 of a penny and ·475 of a penny as making a fair differentiation between them and low voltage users when coal is 38 shillings a ton, but they say that to add a flat rate of ·0008 of a penny, for each penny of increase in fuel cost per ton above 38 shillings per ton, progressively diminishes the differential advantage to them. The cost of coal in the relevant period has never, it would appear, been below 60 shillings a ton. In the twelve months ended March 31, 1953, the average cost of fuel was admittedly 67s. 3d. per ton. Under the second tariff of October, 1953, a change was made in the unit charge. The basic unit charge for high voltage users became ·661 of a penny and for low voltage users ·686 of a penny, with a proviso that the unit charge should be increased or reduced at the rate of ·00075 of a penny per unit for a high voltage supply and ·0008 of a penny per unit for a low voltage supply for each penny by which the fuel cost per ton to the defenders in the previous month was more or less than 60 shillings. The complaint of the pursuers here is not in the sliding scale applied to the basic unit charge in respect of increase of fuel costs above 60 shillings per ton. They are satisfied with the differential in the sliding scale as between high voltage and low voltage users now introduced in so far as it operates in the case of an increase in fuel cost above 60 shillings a ton. But they complain of the basic unit charge which they say has been reached by taking a flat rate of ·0008 of a penny per ton for both high voltage and low voltage users in respect of the difference in the cost of fuel between 38 shillings

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per ton and 60 shillings per ton and adding the resultant ·211 of a penny to the basic unit charges of ·45 of a penny and ·475 of a penny fixed by the first tariff. In the result the basic unit charge in the second tariff is, they say, more unfair to them than the basic unit charge in the first tariff. Whereas the differential in their favour in the first tariff in this respect was 5·55 per cent. it has now been reduced to 3·78 per cent. They further point out that if fuel costs fell below 60 shillings per ton there would be an even greater inequity, as under the sliding fuel adjustment clause they would receive a deduction of ·00075 of a penny for each penny per ton of fall in fuel cost, while the low voltage users would receive a deduction of ·0008 of a penny. The third tariff complained of is similar to the second tariff, with certain small modifications in the figures of charge, and requires no special notice.

It will be observed from the foregoing that the pursuers as high voltage consumers pay a lower rate for their electricity than low voltage consumers. The reason lies in the difference in the cost of supply. The following is the averment of the pursuers: "It is less costly for the defenders to supply electricity at high "voltage than at low voltage. The low voltage supply of the "defenders (generally 400–440 volts) involves transformation "from high voltage causing losses in transformation and also "losses in low voltage distribution to be sustained. The amount "of fuel required to produce and supply to the user a given "amount of electricity for a high voltage supply is accordingly "substantially less than that required to produce and supply the "same amount of electricity for a low voltage supply as the latter "involves greater losses in transformation and distribution."

The complaint made by the pursuers is that in fixing the tariffs the defenders have discriminated unfairly against them in the rates fixed respectively for high voltage users and low voltage users. The pursuers themselves are high voltage users. The Lord Ordinary has held the pursuers' averments to be irrelevant because they have not averred that the differentiation between the two classes of users was made "for an illegitimate reason." The words "undue preference" and "undue discrimination" in section 37 (8), he holds, do not mean "excessive preference" and "excessive discrimination" but mean a preference or discrimination shown or exercised for illegitimate reasons. The judges of the Second Division took the opposite view and held that "undue "preference" and "undue discrimination" could be established by mere excessive differentiation. The matter, they said, was one of degree and should be treated as a jury question, broadly and fairly in all the circumstances of the case. In my opinion, the judgment of the Second Division was right.

There is no doubt that an undue preference may be shown to, or undue discrimination exercised against, a person for an illegitimate reason. This does not necessarily mean for a corrupt reason, a case which would rarely arise, but for a reason which

would, on the face of it, be bad. Sargant J. in *Attorney-General* v. *Long Eaton Urban District Council*[5] gave as illustrations, charging A less than B merely to overcome a greater reluctance on the part of A to become a customer, or to induce A to become a customer in respect of another supply. "On the other hand," he said, "any circumstances which render it less costly or otherwise "more profitable to supply A than B constitute a legitimate "reason for making a lower charge to A for the same supply." But a preference or a discrimination may, in my opinion, be undue also on the ground of excess, if the excess is substantial. This was, in my opinion, implicit, if not expressly recognized, by Buckley J. in *Metropolitan Supply Co. Ltd.* v. *Ginder*,[6] and by Sargant J. in *Attorney-General* v. *Long Eaton Urban District Council*.[7] There are indications to the same effect in *Denaby Main Colliery Co. Ltd.* v. *Manchester, Sheffield & Lincolnshire Railway Co.*,[8] especially in the speech of Lord Blackburn. But the position, I think, was stated most clearly in *Phipps* v. *London & North Western Railway Co.*,[9] in the judgments of Lord Herschell[10] and Lindley L.J.[11] Whether a preference is given for a bad reason raises a question of law; if mere excess is in issue that is a question of fact; and an allegation of undue preference, in my opinion, may be raised on either ground.

A further point taken by the defenders was that the question of preference or discrimination could only arise as between persons or classes of persons charged on the same basis or system of supply. Here, it was said, there were two systems of supply, a supply to high voltage users and a supply to low voltage users, with separate tariffs applicable to each, and a question of preference or discrimination could only arise as between users within the respective types of supply. Reliance was placed upon the decision of the Judicial Committee in the case of *Attorney-General for Victoria* v. *Melbourne Corporation*.[12] In my opinion, for the reasons given by the judges of the Second Division, that decision has no application to the case in hand. I see no reason why, under subsection (8), a case of undue preference or undue discrimination may not exist as between the classes of high voltage users and low voltage users.

It was argued, however, for the defenders, though in a somewhat negative way, that this was not a case in which it could be said that there was undue preference, or undue discrimination, or, indeed, any preference or discrimination at all against the pursuers. The pursuers, it was said, already had a preference over the low voltage users, in being charged a lower price for their supply of electricity. Counsel for the defenders said he knew of no precedent for a consumer in such a case being allowed

[5] [1914] 2 Ch. 251, 263.
[6] [1901] 2 Ch. 799, 811; 17 T.L.R. 435.
[7] [1914] 2 Ch. 251, 263.
[8] (1885) 11 App.Cas. 97; 2 T.L.R. 199.
[9] [1892] 2 Q.B. 229.
[10] Ibid. 237, 245.
[11] Ibid. 251–252.
[12] [1907] A.C. 469; 23 T.L.R. 753.

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to say that he was suffering from undue discrimination exercised against him, or that he was entitled to a greater preference. There is no trace of this point in the pleadings of the defenders, though it may be said that it is covered by the defenders' plea to relevancy. But what is more important is that before the Lord Ordinary and before the Second Division it must have been common ground that the pursuers' pleadings were sufficient to support a case of preference or discrimination. Only on this footing was there any point in the defenders maintaining the two arguments already referred to which were considered and disposed of by the Second Division. Mere arithmetical disparity in tariffs as between two consumers on a different system of supply would be a very unsafe guide on which to decide, without the assistance of evidence technical or otherwise, the question of preference or discrimination. Other considerations may neutralize or extinguish what seems to be an apparent preference. Looking to the attack made on the defenders' tariffs the pursuers are, I think, entitled to establish by evidence (within the limits of their record) that in fact the tariffs work out to their prejudice. The matter does not appear to me to involve an inquiry into the whole question of the costs of supplying electricity. The field of objection is much more limited. But that would be a matter for the Lord Ordinary to consider when evidence is tendered at the proof, on a consideration of the averments on record. In the matter of precedents, also, I think more attention will have to be given to the case of *Phipps* v. *London & North Western Railway Co.*,[13] already cited. Investigation, also, of other cases decided by the Railway Commissioners or the Railway and Canal Commission may disclose other relevant authority.

The question may be put thus: whether discrimination may not be exercised against one consumer and a preference given to another where both are charged the same rate in circumstances which justify a differential rate between them. If the answer is "Yes," it would equally follow that where the differential was too small a like complaint could be made. For the reasons given I am not prepared to decide this matter in this case as a question of relevancy, the more so as I consider that only in very exceptional circumstances would it be proper for this House to reverse an interlocutor of the Court of Session, allowing a proof before answer which can only be appealed to this House with the leave of the Court of Session, on a point which was never taken in the courts below, and on which your Lordships have not had the benefit of the opinions of the judges whose judgment is under appeal.

I should, before parting with this case, refer to certain other matters which were mentioned for the first time, but only slightly discussed, in the course of the appeal. The precise extent of the court's jurisdiction to interfere with tariffs fixed by an area board is not easy to determine. But it may be questioned whether

[13] [1892] 2 Q.B. 229.

section 37 is an enactment that has the effect of nullifying tariffs containing an element of undue preference, or undue discrimination. Similar clauses have existed over the past hundred years in the Railway and Canal Traffic Acts and the Electricity (Supply) Acts and no case was cited to us where the effect of such a clause was held to render the tariff complained of null and void. It is the preference that is illegal, not the whole tariff. In most cases under earlier statutes the complaint was that somebody else's tariff was too low and no advantage would result to the complainer from wiping out the tariff altogether. The statute imposes a prohibition of undue preference or discrimination and the normal method of enforcing such a prohibition would be interdict, or injunction, against the continuance of the undue preference, as illustrated, for instance, by cases under the Electricity (Supply) Acts. Further, the statutory procedure for fixing and revising tariffs raises a question whether the courts can in any sense function as a tariff-fixing body and whether for this and other reasons a conclusion for repayment of overcharges can ever be an appropriate remedy. This is not a case under an equality clause in which a claim for overcharges raises no serious difficulty. On these matters I express no concluded opinion. I mention them because the course which this whole case has taken has been of a very unusual character and the fact that these points were raised for the first time during the hearing of this appeal suggests that they have had little, if any, proper consideration in the earlier stages of the case. There seems to me to be a serious question whether the whole form of action here is not misconceived.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Gouldens for Scott & Glover W. S., Edinburgh, and Burns, Reid & Tilston, Glasgow; Solicitor to the Ministry of Labour and National Service for Macpherson & Mackay W. S., Edinburgh.*

F. C.

[QUEEN'S BENCH DIVISION.]

* FALLAIZE *v.* TROUGHTON & YOUNG LTD.

1956
July 16.

Lord Goddard C.J., Ormerod and Donovan JJ.

Building — Safety regulations — Eyes — Protection — Workman drilling holes in concrete by means of chisel with cutting edges fixed to hammer driven by electric motor — Whether process of "cutting" concrete — Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 84, *Sch. II, para.* (2).

An employee of the defendants, who were engaged in installing electric cables in a partially constructed power station, was drilling holes, approximately $\frac{3}{8}$ of an inch in diameter which were to contain rawlplugs, in a reinforced concrete ceiling. For that

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purpose the employee was using a Kango hammer, a portable tool driven by an electric motor, to which was fixed a chisel or bit which consisted of a long piece of metal pointed at the end with four cutting edges. The defendants were charged with a contravention of regulation 84 of the Building (Safety, Health and Welfare) Regulations, 1948, in that they failed to provide goggles or effective screens to protect their workmen's eyes while engaged in a process specified in the Second Schedule to the regulations, namely "Cutting . . . concrete . . . by means of a portable tool driven "by mechanical power." The justices dismissed the information. On appeal:—

Held, that the operation in question was "cutting" concrete within the meaning of the Second Schedule to the regulations, and, accordingly, the defendants were in breach of regulation 84.

CASE STATED by Warwick justices sitting at Coleshill.

The defendants, Troughton & Young Ltd., were charged on an information preferred by John Sidley Fallaize, one of Her Majesty's Inspectors of Factories, that they on September 16, 1955, were contractors and employers of workmen undertaking operations to which section 107 of the Factories Act, 1937, and the Building (Safety, Health and Welfare) Regulations, 1948, applied at Central Electricity Authority, Hams Hall "C" Power Station, and that on that date there was a contravention of regulation 84 in that suitable goggles or effective screens were not provided to protect the eyes of persons employed in the process of cutting reinforced concrete by means of a portable tool driven by mechanical power, a process specified in the Second Schedule to the regulations, and that in consequence of such contravention, Arthur Beck suffered bodily injury whereby the defendants were guilty of an offence and liable without prejudice to any other penalty to a fine not exceeding £100 in accordance with section 133 of the Factories Act, 1937.

The justices found the following facts: On September 16, 1955, the defendants who were electrical contractors and employers of workmen engaged in installing electric cables in a partially constructed power station at Hams Hall "C" Power Station. Arthur Beck, in the course of his employment with the defendants, was drilling holes in a reinforced concrete ceiling. The holes were approximately three-eighths of an inch in diameter and were to contain rawlplugs into which brackets for supporting the electric cables were to be bolted. Arthur Beck was drilling the holes with an instrument known as a Kango hammer, which was a portable tool driven by an electric motor. To perform the operation of drilling with a Kango hammer a chisel or bit was fixed in the hammer. The chisel or bit consisted of a long piece of metal pointed at the end where it pierced the concrete. It was fluted and had four cutting edges starting from the pointed end and running down the sides of the chisel or bit. The chisel or bit was fitted with an arm which was used to turn it round while the hole was being drilled. The effect of turning it round in that way was that the cutting edge of the chisel or bit made the hole

circular and waste material was cleared away. The tool, when in action, moved the chisel or bit into the material with a series of quick hammer-like blows. Arthur Beck held the tool with the point of the chisel or bit directed upwards against the place where the hole was to be drilled, and while he did so an assistant slowly moved the arm of the chisel or bit so as to turn the same in the hole. The chisel or bit was moved forwards and backwards through an angle of approximately 180 degrees. No suitable goggles or effective screens were provided to protect Arthur Beck's eyes. In consequence of Arthur Beck operating the Kango hammer, a piece of steel and concrete from the ceiling hit him in the eye and injured him. The work on which Arthur Beck was engaged was drilling or boring holes in concrete, and was so described by him.

It was contended by the prosecutor that the work of installing electric cables in a partially constructed power station was an operation to which the provisions of the Building Regulations, 1948, applied; that a Kango hammer was a portable tool driven by mechanical power; that the material in which the holes were made was concrete; that goggles or screens were not provided; and that the operation involved the "cutting" of concrete within the meaning of the provisions of paragraph (2) of the Second Schedule to the Building Regulations, 1948.[1]

It was contended by the defendants that the provisions of the Building Regulations, 1948, did not apply to the operations on which they were engaged; that regulation 84 was a penal regulation and should be strictly construed; that the work on which Arthur Beck was engaged was not the "cutting" of concrete within the meaning of the provisions of paragraph (2) of the Second Schedule to the regulations; that the word "cutting" in paragraph (2) connoted an alteration in the linear dimensions of the substance therein enumerated and that the word "cutting" was to be construed ejusdem generis with the words "dressing" and "carving."

The justices were of the opinion that the defendants were engaged in operations to which the provisions of the Building Regulations, 1948, applied, and that the process of drilling or boring holes in concrete in the manner described was not the "cutting" of concrete within the meaning of paragraph (2) of the Second Schedule to the regulations.

The justices therefore dismissed the information.

The prosecutor appealed. The defendants did not take the point, on the appeal, that the Building Regulations, 1948, did

[1] Building (Safety, Health & Welfare) Regulations, 1948, reg. 84: "Where there is carried on any "process specified in the Second "Schedule to these regulations "suitable goggles or effective screens "shall be provided to protect the "eyes of persons employed in the "process."

Sch. 2, para. (2): "Cutting, "dressing or carving of stone, con- "crete or similar materials by means "of a portable tool driven by "mechanical power."

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not apply to the operation in question, but submitted only that their employee, Arthur Beck, was not "cutting" concrete.

S. B. R. Cooke for the prosecutor.

John Thompson Q.C. and *E. G. H. Beresford* for the defendants.

The following cases were cited in argument: *Unwin* v. *Hanson*[2]; *Burns* v. *Joseph Terry & Sons Ltd.*[3]; and *Doncaster* v. *R. Sadlow.*[4]

LORD GODDARD C.J. The short point raised by this case is whether drilling a hole in concrete by means of a mechanical tool, that is, a tool driven by mechanical power which consists of cutting edges, is cutting within the meaning of the Building (Safety, Health and Welfare) Regulations, 1948. The Second Schedule to the regulations, which contains processes to which regulation 84 applies, provides: "Cutting, dressing or carving of "stone, concrete or similar materials by means of a portable tool "driven by mechanical power."

In this case holes were being drilled into concrete by means of this tool, which is a straight tool having cutting edges, revolving no doubt at great speed. The justices thought that that process did not involve cutting. This court does not take that view. This court takes the view that it involves cutting. One cannot make a hole without cutting out the stone. Mr. Thompson concedes that one cuts a hole but, with all respect, that is not accurate; you cut the surface and thereby make a hole, but the hole is a void. I think obviously drilling holes in a concrete wall involves cutting because one cuts the stone or concrete out in order to put something else in.

For these reasons, I think the justices were wrong, and the case must go back with a direction to convict.

ORMEROD J. I agree. The point is simply whether the process involves the cutting of concrete as provided by the Second Schedule to the Building Regulations, 1948. Having seen the tool, and the matter having been quite clearly described and set out in the case stated, I find it difficult to see how this process can fail to come within the description "cutting." The tool in question has four sharp edges which are described as cutting edges. The tool is revolved in the concrete as it is hammered in, and it is obviously there for the purpose of the disintegration of the surface of the concrete so that a hole can be produced. I have not the slightest doubt that this process comes within the terms of the schedule.

[2] [1891] 2 Q.B. 115; 7 T.L.R. 488.

[3] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987.

[4] 22 Butterworth's Workmen's Compensation Reports 564.

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DONOVAN J. I also agree. Mr. Thompson says that the defendants should not be put in peril on an ambiguity, and with that I agree. But, like my brothers, I find no ambiguity in the word "cutting." On the other hand, it is equally important that workmen's eyes should not be put in peril by a narrow and technical meaning of the word such as the defendants seek to give it.

Appeal allowed.

Solicitors: *The Solicitor, Ministry of Labour and National Service; Buller, Jeffries & Kenshole.*

C. J. E.

[COURT OF APPEAL.]

* PETER LONG & PARTNERS *v.* BURNS.

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1956
July 13, 16.

Singleton, Morris and Romer L.JJ.

[1955 L. No. 573.]

Agency — Estate agent — Commission — Payable upon introduction of person "ready, willing and able to enter into a binding contract "to purchase my business" — Contract to purchase signed by purchaser—Rescinded before completion owing to innocent misrepresentation by agents' representative—Meaning of "binding "contract"—Whether agents' commission payable — Damages for breach of contract.

By a contract in writing contained in a commission note and entered into between the defendant, the owner of a garage, and the plaintiffs, who were estate agents, it was agreed that the plaintiffs' commission should be payable upon their "introducing "a person ready, willing and able to enter into a binding contract "to purchase" the property. A purchaser signed a contract to purchase the property and paid a deposit after being informed by a representative of the plaintiffs that a town planning scheme then in force would affect the property only to a very limited extent. The representative did not explain to the purchaser that his statement was based only on information given to him by the vendor. The purchaser, who subsequently discovered that the scheme would affect the property substantially and would in fact result in the buildings on the site being demolished, resiled from the contract before completion, and the contract was eventually cancelled by agreement between the parties on payment of a certain sum by the purchaser to the vendor. The plaintiffs claimed their commission, but the defendant refused to pay.

In an action by the plaintiffs for their commission by way of damages for breach of contract, it was not contested that the purchaser had been induced to sign a contract by, inter alia, the statement made by the plaintiffs' representative.

Lord Goddard C.J. dismissed the action. On appeal:—

Held, that a "binding contract" in this context meant one which was legally enforceable by the vendor against the purchaser; and that, as by reason of the innocent misrepresentation of the

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plaintiffs' representative, the contract had been rendered unenforceable by the vendor, no commission was payable.

Judgment of Lord Goddard C.J. [1956] 1 W.L.R. 413; [1956] 2 All E.R. 25 affirmed.

APPEAL from Lord Goddard C.J.[1]

In 1954 the defendant, Mrs. Beatrice A. Burns, the owner of a garage at Three Mile Cross, near Reading, put the property in the hands of the plaintiffs, Peter Long and Partners, estate and business agents, and on August 8, 1954, she signed the following commission note: "I hereby appoint you my sole "agent for the sale of my business and property, the details of "which are truly stated above and overleaf, at the price of "£9,750 and trade stocks at valuation. In consideration of your "services I undertake not to revoke this agreement and agree "to pay your commission in accordance with the terms stated "herein on the total purchase price (including stock) upon your "introducing a person ready, willing and able to enter into a "binding contract to purchase my business referred to above. "In further consideration of your services I agree to leave the "disposal of my business and property with you as my sole "agent for a period of three months from the date hereof, nor "will I consent to my business being sold except to a person "introduced by you." The following day, August 9, 1954, the plaintiffs wrote to the defendant stating that they accepted "the appointment to act as your sole agents in the disposal of the "above business for a period of three months from the 8th "instant, and confirm your valued instructions to introduce a "person able, ready and willing to purchase your concern at the "price of £9,750, or any other such price as you may hereafter "accept."

On September 12, 1954, a prospective purchaser, a Mrs. Pritchard, who had first heard that the garage was for sale through her husband's employers, and who had had no previous dealings with the plaintiffs, met the defendant at the garage premises, a representative of the plaintiffs, one Wade, being present at the meeting at the suggestion of the defendant. A statement subsequently made by Wade, which was accepted by the defendant as a true account of the events which took place at the meeting, stated that Mr. Pritchard, who was also present at the meeting, asked him, Wade, if he knew of any town planning schemes, and Wade informed him that two or three feet would be taken from the forecourt of the garage. Wade did not explain that this representation was based only on information which had been given to him by Mrs. Burns. Mrs. Pritchard agreed to buy the property for £7,750, and signed the contract, paying to Wade a deposit of £300. On November 4, 1954, Mrs. Pritchard, having discovered that a road widening scheme was in existence which, when put into force, would involve the acquisition

[1] [1956] 1 W.L.R. 413; [1956] 2 All E.R. 25.

by the county council of almost the entire site of the garage property and the demolition of the buildings upon it, informed the defendant through her solicitor that she could not continue with the purchase. Eventually, agreement was reached between the defendant and the purchaser to cancel the contract on payment by the purchaser to the defendant of £150. On January 12, 1955, the plaintiffs, at the request of the defendant, returned the £300 deposit to the purchaser, but requested the payment of the commission which they alleged to be due to them. This the defendant refused to pay.

In the present action, the plaintiffs, relying on the agreement contained in the commission note of August 8, 1954, claimed that they had negotiated on the defendant's behalf the sale of the property to Mrs. Pritchard, who had entered into a binding contract to purchase the property for £7,750; that their commission amounting to £387 10s. thereupon became due; that the defendant had refused, in breach of contract, to pay that sum; and they were entitled to damages.

The defendant admitted that Mrs. Pritchard had entered into a contract to purchase the property, but denied that in the events which had happened it was a binding contract. She contended that by reason of the innocent representation made by Wade, the plaintiffs' representative, acting for and on behalf of the defendant, Mrs. Pritchard had rescinded the contract before completion as she was entitled to do, and denied that the plaintiffs were entitled to the commission claimed or that they had suffered damage.

By their reply the plaintiffs contended, inter alia, that at all material times the contract was binding on Mrs. Pritchard; alternatively, that it was binding upon her until she rescinded it, which they did not admit she had a right to do.

Peter Dow and *Quentin Dunnett* for the plaintiffs.
Conolly Gage for the defendant.

The following cases were cited in argument: *Midgley Estates Ltd.* v. *Hand*[2]; *Dennis Reed Ltd.* v. *Goody*[3]; *Dawes* v. *Harness*[4]; *Clough* v. *L. & N. W. Railway Co.*[5]

SINGLETON L.J. The plaintiffs are estate and business transfer agents at Richmond. They claim commission or damages from the defendant, Mrs. Burns, who has a garage some three miles out of Reading. A representative of the plaintiffs, one Wade, heard that the defendant was anxious to dispose of her garage. He called upon her and obtained her signature to a document headed "Peter Long & Partners, Lion House, Richmond,

[2] [1952] 2 Q.B. 432; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394.
[3] [1950] 2 K.B. 277; 66 T.L.R. (Pt. 1) 918; [1950] 1 All E.R. 919.
[4] (1875) L.R. 10 C.P. 166.
[5] (1871) L.R. 7 Exch. 26.

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"Surrey," and at the head of it there are spaces for the type of business and the address and position. The address is "Hawthorne Garage, Three Mile Cross, near Reading, Berkshire," on the main road from Reading to Basingstoke. The type of business is set out, the premises are stated to be freehold, and the turnover is given as approxmiately £10,000 a year. At the foot there appears in print: "To Messrs. Peter Long & Partners, estate and business agents, Lion House, Richmond, Surrey. I hereby appoint you my sole agent for the sale of my business and property the details of which are truly stated above and overleaf, at the price £9,750 and trade stocks at valuation. In consideration of your services I undertake not to revoke this agreement and agree to pay your commission in accordance with the terms stated herein on the total purchase price (including stock) upon your introducing a person ready, willing and able to enter into a binding contract to purchase my business referred to above. In further consideration of your services I agree to leave the disposal of my business and property with you as my sole agent for a period of three months from the date hereof, nor will I consent to my business being sold except to a person introduced by you. Commission rates: business premises, lease, goodwill, trade fixtures and fittings and trade stocks, 5 per cent.; freehold property, 5 per cent." The document was signed by the defendant on August 8, 1954.

No doubt the plaintiffs made some effort to find a buyer for the garage. It happened that a Mr. and Mrs. Pritchard were anxious to acquire the property and the business. They knew something of it, and they got into communication with the defendant. When the plaintiffs' representative, Wade, called to see the defendant again, she told him that the Pritchards were anxious to buy. Wade said it would be a good thing to get them over, and that was arranged by telephone.

Wade's account of what took place is contained in a document agreed between the parties and supplied to the court: "Re Hawthorne Garage, Three Mile Cross, near Reading. I called at Hawthorne Garage on September 12 last at approximately 12.30 p.m. to meet a prospective purchaser and was informed at about 1.0 p.m. by Mrs. Burns that Mr. and Mrs. Pritchard, who had known the aforementioned garage for some time past, were very keen to buy. I suggested that this might well be an opportune moment for them to meet me and proceed with the purchase. Mrs. Burns telephoned Mr. Pritchard, who arrived with Mrs. Pritchard within 45 minutes. They informed me that they had known the garage for some considerable time, and were very keen to purchase, also that they would not require any petroleum company finance. They were apparently quite satisfied with regard to the annual gallonage. I understood Mr. Pritchard to be a member of the Regent Petroleum Company, and in consequence he had checked the figures. I was then given Mrs. Pritchard's full name and address which

" was entered into the contract, the purchase price was agreed " at £7,750 freehold, stock at valuation. Mr. Pritchard asked " me if I knew of any town planning schemes. I informed him " that, to the best of my knowledge, and upon information from " Mrs. Burns, 2 or 3 ft. would be taken from the forecourt of " the garage; he did not regard this with any concern. Mrs. " Pritchard then handed me a cheque payable to the favour " of Messrs. Peter Long & Partners to the amount of £300, part " of the normal 10 per cent., agreeing to forward us the " remaining £475 as soon as she had made arrangements with " her bank, and duly signed the contract witnessed by myself." Some work was being done further down the road, and the defendant, probably in reply to a question, had at some time told Wade that some two or three feet might be taken from the front of the garage. Whether she knew anything about town and country planning, I do not know; nor do I know whether Wade did.

The contract which was signed was for the sale of the freehold, goodwill, fixtures, etc., for a total sum of £7,750, and by its terms the National Conditions of Sale were introduced. The total purchase price is divided up. Clause 8 provides: " The " vendor will upon completion for the further consideration of " £3,250 convey (or procure the conveyance of) the said freehold " property known as Hawthorne Garage, Three Mile Cross, to " the purchaser and shall offer a statutory root of title." Clause 9 provides: " The National Conditions of Sale (16th " Edition) shall be deemed to be incorporated herein so far as the " same are applicable to a sale by private treaty and are not " varied by or inconsistent with the express terms of this agree- " ment." Condition 15 (3) of the National Conditions of Sale reads: " Save as mentioned in the Special Conditions, the " property is not to the knowledge of the vendor subject to any " charge, notice, order, restriction, agreement or other matter " arising under the Town and Country Planning Act, 1947, but " (without prejudice to any right of the purchaser to rescind the " contract under paragraph (2) of this condition) the property is " sold subject to any such charges, notices, orders, restrictions, " agreements and matters affecting the same."

It seems to me to be highly undesirable that parties should be asked to enter into a contract of this kind without any advice. The impression given is that the sole desire of the agents' representative was to obtain a signature to the document in order to found a claim for commission. When the matter came into the hands of the solicitors, it was ascertained that the true position was that the Berkshire County Council, in their development plan, had " a road-widening scheme which, when work " commences on it, will necessitate the compulsory purchase of " the bulk of the said property and will render it impossible to " continue the said business on what remains thereof. The said " work is scheduled for completion by 1972." That is taken from

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a portion of the particulars under paragraph 6 of the defence in this case. I asked counsel during the argument if that was the correct position, and it was agreed that it was.

There was considerable correspondence. The Pritchards refused to complete, and the proposed purchase fell through on Mrs. Pritchard, who alone had signed the contract as purchaser, making a small payment to the defendant. It is conceded for the purposes of this appeal that an action by the defendant for specific performance of the contract would not have succeeded. The agents commenced this action against the defendant claiming £387 10s., being 5 per cent. on the purchase price. The statement of claim is framed as though it is a claim for commission, but it ends as a claim for damages. The action was heard by Lord Goddard C.J., and on March 21, 1956, he gave judgment for the defendant, holding that the agents had not produced someone who was "ready, willing and able to enter into a binding "contract" to purchase the business. The plaintiffs appeal against that judgment.

On their behalf it was submitted by Mr. Dow that the contract was a binding contract until it was repudiated, and that the right to commission was established when the contract was signed. I agree with the Lord Chief Justice that the words "binding contract" in the document on which the plaintiffs rely mean a contract which is enforceable in law. The contract could not be enforced by reason of the misrepresentation by the agents' representative as to the position under the Town and Country Planning Act, 1947. That is admitted. Hence the claim must fail. If the contract could not be enforced as against the purchaser, it was not a binding contract within the meaning of those words in the document on which the plaintiffs rely.

I do not think it necessary to go into the authorities. They were considered by the Lord Chief Justice, who said in the course of his judgment[1]: "It is said that this was not a binding "contract. I have to consider whether it was a binding contract. "As the parties have agreed that the purchaser was induced to "sign the contract, among other things, by the statement made "by the plaintiffs' representative, as to the effect of the town "planning scheme, I am bound to hold that it was a contract "induced by an innocent misrepresentation, and I cannot say "that the representation was not made with reference to a "substantial matter, and, although it was an innocent mis-"representation, it was a representation of which the purchaser "was entitled to take advantage while the contract was still "executory and say that she would not carry out her bargain "because she had been induced to enter into it by the repre-"sentation." On that ground the Lord Chief Justice was satisfied that the contract could not be enforced against Mrs. Pritchard and that, therefore, it was not a binding contract.

[1] [1956] 1 W.L.R. 413, 418; [1956] 2 All E.R. 25.

It was submitted that the defendant could not take advantage of the misrepresentation of the agents' representative as she herself had given the information to him. She had told the agent the position so far as she knew it. That did not entitle the agent to make a representation such as he did without ascertaining what the true position was. He could have inquired at the offices of the county council whether there was a scheme and, if so, how far it was advanced, and what its effect on this particular property would be; or he could have told the Pritchards that he did not know and that they must make their own inquiries. Mr. Dow relied on something in the nature of an estoppel and said that, as the information came from the defendant, she ought not now to be allowed to say that the agents' representation affected the position as against her; and Mr. Dow submitted that the agents' representative was not under any duty to the Pritchards. I would point out that at least he was under a duty to the defendant, and the making of a representation such as he made might well lead to trouble for her. Indeed, the representation made with such knowledge, or lack of knowledge, as he had might well be said to have been made recklessly. He was too anxious to obtain signatures to the contract. It is a matter for regret that the case was heard without witnesses, and that we have no proof of the precise words used. I am satisfied that there is no substance in this point raised by Mr. Dow.

The plaintiffs rely upon the strict terms of the document which was signed by the defendant on August 8, 1954. Mr. Gage, on behalf of the defendant, pointed out that the defendant can claim to do the same and to say that, on a strict reading of the document, they, the plaintiffs, did not introduce Mrs. Pritchard as a purchaser. Mrs. Pritchard came along and saw the defendant herself. The Pritchards knew the garage and knew that the defendant was anxious to dispose of it. It was the defendant who introduced Mrs. Pritchard to the agents' representative; it was not the agents or their representative who introduced Mrs. Pritchard to the defendant. It may be a sound point, though the defendant was prepared to treat the agents as having introduced the Pritchards. She caused the agents to meet them, and the agents' representative produced the contract, which was signed by both parties. It is not necessary to say anything further upon this part of the case.

The case shows how undesirable it is for persons who have something to sell to sign a form put before them by agents without understanding it, and it emphasizes the necessity for taking legal advice before a contract for the sale of property is signed.

I have said nothing upon the general duties of agents as to town and country planning matters. I would, however, point out that the claim of the agents in the present case is for no less a sum than £387 10s., and I cannot see how they can be justified in placing on the defendant any responsibility for that which she said about what might happen to the frontage. She at least gave

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them some information which might have led to their making inquiries if they thought it right to do so. If they had been local agents, they might well have known something of the scheme. The representative apparently came upon this place many miles away from where the agents carried on their business and very quickly obtained the signature of the defendant to the document on which they claim their commission.

In my opinion the judgment of the Lord Chief Justice was right, and the appeal should be dismissed.

MORRIS L.J. I have reached the same conclusions. In these agency cases, it seems to me that the first matter always is to find out exactly what was the contract between the parties. In his speech in *Luxor (Eastbourne) Ltd.* v. *Cooper*[2] Lord Russell of Killowen said[3]: "A few preliminary observations occur to "me. (1) Commission contracts are subject to no peculiar rules "or principles of their own; the law which governs them is the "law which governs all contracts and all questions of agency. "(2) No general rule can be laid down by which the rights of "the agent or the liability of the principal under commission "contracts are to be determined. In each case these must "depend upon the exact terms of the contract in question, and "upon the true construction of those terms."

My Lord has recited the words of the agreement. By the last words, the defendant agreed to this: "nor will I consent to "my business being sold except to a person introduced by you." If those words were taken very literally in this case, they would have meant that it was impossible for the defendant to sell to Mr. or Mrs. Pritchard at all, for it was the defendant who had found the Pritchards and not the plaintiffs. According to those strict words, she could not sell to anyone other than a person introduced by the plaintiffs, and it is common ground in this case that the Pritchards were never introduced by the plaintiffs. But it may be that the effect of what was done was that the parties agreed to treat the Pritchards as having been introduced. Without saying more on that matter, I propose to deal with the other points on the assumption that the parties proceeded on that basis.

If that assumption be made, then the question arises whether there was in this case a binding contract. Mr. Dow referred us to certain authorities which lay down what is the true position where there is a voidable contract. I cite one passage to which he referred us from *Clough* v. *London and North Western Railway Co.*[4]: "The fact that the contract was induced by fraud did not "render the contract void, or prevent the property from passing, "but merely gave the party defrauded a right, on discovering "the fraud, to elect whether he would continue to treat the "contract as binding, or would disaffirm the contract and resume

[2] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33.
[3] [1941] A.C. 108, 124.
[4] (1871) L.R. 7 Exch. 26, 34.

" his property." So Mr. Dow argues that, on the signing of the contract in this case, there was at that moment a binding contract even though it was a contract that was voidable. But it seems to me that in the present context the words " binding contract " mean a contract which can be enforced by the vendor against the purchaser. It is much too narrow a construction to say that the reference is to some contract which might temporarily have been regarded as a contract or a binding contract. The reference is to a contract that remains binding. I respectfully agree with the judgment of the Lord Chief Justice on this point.

I agree further with the Lord Chief Justice that commission is payable in a case of this kind when the contract is shown to be a binding contract in this sense. The result is that commission is not necessarily payable as soon as a contract is signed but only when it is shown to be a binding contract, and it may in many cases not be possible to prove that a contract is a binding contract until completion has taken place. Mention was made of the case in this court decided in 1952 of *Midgley Estates Ltd.* v. *Hand*.[5] In that case a contract was entered into by the plaintiffs, estate agents, and the defendant vendor under which it was agreed that the agents' commission should be paid as soon as the purchaser introduced by them " shall have signed a legally " binding contract, effected within a period of three months from " this date." The person introduced signed a legally binding contract within the three months, paid a deposit, and was permitted by the vendor to enter into occupation of the premises, but he was unable financially to complete the purchase and his deposit was forfeited. The agents claimed their commission, but the county court judge held that as the person they had introduced was not able to complete the purchase they had not earned their commission. On appeal to this court it was held: " that " although, generally speaking, when a vendor puts his property " into the hands of an agent for sale he contemplates that if a " completed sale resulted, and not otherwise, he will be liable " to pay the agent's commission out of the purchase price, the " question depends on the construction of each particular " contract. If its terms are clear, and not ambiguous, the court " will give effect to them. The plaintiff agents having introduced, " within the stipulated period of time, a person who had bound " himself to purchase the property by a legally binding contract " they had earned their commission, and the subsequent fate of " the contract of sale did not affect their right to it." But in that case no suggestion was made that the contract was not binding, and as the Lord Chief Justice pointed out the difference between that case and the present is that in that case no one suggested that it was a contract that could be rescinded. It seems to me, therefore, that here, since there was an innocent misrepresentation as to an important matter, Mrs. Pritchard was entitled to resile, and so there was no binding contract.

[5] [1952] 2 Q.B. 432; [1952] 1 All E.R. 1394; [1952] 1 T.L.R. 1452.

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I would just add a word or two on the other part of the case. The plaintiffs say, in effect: "Oh, but the whole of this was "Mrs. Burns' fault." Mr. Dow put his argument in the following way. This was an argument alternative to his main argument, and was on the footing that there was no binding contract. He said: "Then it was Mrs. Burns' fault. (a) Mrs. Burns cannot "rely upon non-completion in order to avoid payment of com- "mission when it was due to her fault"; that is to say, owing to the representation that she admits by her pleading she made to Wade; and further: "(b) Alternatively, it was an implied "term in the contract between Mrs. Burns and the plaintiffs "that she would not, by any wrongful act, deprive the agents "of any opportunity to earn commission, and she broke that "term by making the misrepresentation which enabled the "purchaser, who would otherwise be bound, to escape from it."

The speeches in *Luxor (Eastbourne) Ltd.* v. *Cooper* [6] convey a warning against too readily implying terms in a case of this kind. Lord Russell of Killowen said [6]: "As to the claim for "damages, this rests upon the implication of some provision in "the commission contract, the exact terms of which were "variously stated in the course of the argument, the object "always being to bind the principal not to refuse to complete "the sale to the client whom the agent has introduced. I can "find no safe ground on which to base the introduction of any "such implied term. Implied terms, as we all know, can only "be justified under the compulsion of some necessity."

Lord Wright, in his speech in that case, said [7]: "For instance, "if the negotiations between the vendor and the purchaser have "been duly concluded and a binding executory agreement has "been achieved, different considerations may arise. The vendor "is then no longer free to dispose of his property. Though the "sale is not completed the property in equity has passed from "him to the purchaser. If he refuses to complete he would be "guilty of a breach of agreement vis-à-vis the purchaser. I "think, as at present advised, that it ought then to be held "that he is also in breach of his contract with the commission "agent, that is, of some term which can properly be implied. "But that question and possibly some other questions do not "arise in this case and may be reserved."

In *Fowler* v. *Bratt*, in this court in 1950, Denning L.J. expressed this principle [8]: "But in point of law if an agent "succeeds in finding a person who actually enters into a binding "and enforceable contract to purchase, and if that contract "afterwards goes off by the vendor's default, the vendor is liable "to pay commission." I think that Mr. Dow, in submitting his argument, had in mind some of the passages to which I have referred. But it is important to observe that in this case nothing

[6] [1941] A.C. 108, 125.
[7] Ibid. 142.
[8] [1950] 2 K.B. 96, 105; 66 T.L.R. (Pt. 1) 880; [1950] 1 All E.R. 662.

was done by Mrs. Burns after September 12 to deprive the plaintiffs of any commission.

The plaintiffs further submit that there was an estoppel. They plead as follows in paragraph 3 of the reply: "If it is found that "the said contract was not binding on Mrs. Pritchard the "plaintiffs will further say that the defendant having innocently "misled the said Wade who upon the defendant's said instruc- "tions innocently misled Mrs. Pritchard, the defendant is "estopped from setting up her own misrepresentation, resulting "in the recission of her contract with Mrs. Pritchard, to defeat "the plaintiffs' claim for commission." But, in my judgment, this is not a case where the doctrine of estoppel can be relied upon. There was nothing to prevent Mrs. Pritchard from proving that there had been an innocent misrepresentation and so from resiling from the contract. Upon proof that Mrs. Pritchard did disaffirm the contract it was shown that there had been no binding contract and so that commission had not been earned. There is no evidence, for no oral evidence was called, that had Mrs. Pritchard known the true facts as to the road widening she might have purchased at a lower figure and so enabled the plaintiffs to earn some commission. There was no evidence to that effect.

What, then, is the legal basis of the plaintiffs' complaint? The plaintiffs may say that they wasted some time because they had some dealing with Mrs. Pritchard which led to an abortive contract. But there is no claim against the defendant on that basis; nor do I see that there could be. The defendant made no fraudulent misrepresentation to the plaintiffs, and no sort of suggestion of that kind is or could be made. The plaintiffs do not suggest that the defendant gave any warranty to them of the truth of the representation which she made.

If the question is being considered as to where the fault lay in its broadest sense, then the agents have, I think, only themselves to blame for what happened. When Mr. Pritchard, at the interview of September 12, asked a question about the town planning scheme, Wade made answer. All he had known was what he had been orally told by the defendant. I express no opinion as to whether or not as agents the plaintiffs should have made their own inquiries of the county council or should have searched. In fact they had not inquired or searched. Wade, however, proceeded to give a positive answer. He did not even leave it to Mrs. Burns to answer. He did not even say that he only knew what Mrs. Burns had told him. Once that question was asked, it seems to me that Wade must have known that no contract would go through if the answer given was incorrect. He ought at least to have warned Mrs. Pritchard that the answer to the question ought to be accurately ascertained. If an answer was being given, then it ought to have been verified before a contract was signed and, if necessary, the advice of solicitors sought. But a contract was there and then signed. If commission was to be earned when a binding contract was made,

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then I should have thought that solicitors would have been introduced to give their skilled assistance as to the terms and form of any proposed contract. This case perhaps illustrates how troubles and difficulties may arise if estate agents do work which is more appropriately done by solicitors; that is to say, the work of arranging binding contracts.

I therefore agree that in this case the plaintiffs did not earn their commission and that no reason is shown why the defendant is precluded from proving that they did not.

ROMER L.J. I agree, and I have very little to add. Under the terms of the commission contract which the defendant, Mrs. Burns, signed on August 8, 1954, the plaintiffs would only be entitled to claim commission if they introduced a person ready, willing and able to enter into a binding contract to purchase the defendant's business, which I suppose also implies a further term that such a person would in fact enter into such a contract. It is clear that Mrs. Pritchard, who did sign the contract upon which this action has been brought, was not introduced by the plaintiffs, who had neither seen nor even heard of her by the time the interview took place on September 11, 1954.

It is clear, I think, from the correspondence and from the agreed statement of facts, that when Wade was told about Mrs. Pritchard he made himself very active in this matter and played as busy a part as he could in the discussions which took place with an eye, I have no doubt, to the claim his principals would found upon this contract to commission. But the parties appear to have to some extent treated the plaintiffs, as a result of those activities, as coming within the requirements of the commission note notwithstanding that the plaintiffs had not, as I have said, even met Mrs. Pritchard before. Consequently, it is not necessary to come to a definite decision as to whether Wade's activities do justify them in saying that they had in fact introduced Mrs. Pritchard.

I confess that, for myself, I have the gravest doubt as to whether the part which Wade played at this meeting, and the things which he did, much of which would have been much better left undone, did entitle them to this large sum of £387 odd which they are claiming as commission. It is quite true, no doubt, that the plaintiffs had done quite a considerable amount of work in an endeavour to find other purchasers, but, so far as Mrs. Pritchard is concerned, they could hardly have done less than what they did do; and, as I have said, much of what they did do would have been much better left undone.

However, passing from that, I have no doubt that the contract which Mrs. Pritchard did sign was not a binding contract within the terms of the commission note. I agree, with respect, with the Lord Chief Justice that "a binding contract" in this context is the same as a legally binding contract, and that means a contract binding on the purchaser and legally enforceable against

the purchaser by the vendor. The contract which Mrs. Pritchard signed was never legally enforceable against her by the defendant, Mrs. Burn, because of the innocent misrepresentation which was made to her by Wade. Moreover, the contract was voidable by Mrs. Pritchard, who could rescind it the moment that she discovered what the true facts were. Accordingly, it appears to me impossible to say that it was a binding contract within the meaning of that phrase as used in the commission note.

A voidable contract, when rescinded, is avoided ab initio. Indeed, on the way Mr. Dow framed his argument on this point, which he did with great ability, it would follow, I think, that estate agents would be entitled under this form of commission contract to claim their commission even on a contract for sale which had been induced by a fraudulent misrepresentation made by the vendor or by some agent on her behalf, and I cannot think that that is right.

Then, finally, there is this question of an implied term on which Mr. Dow relied, which has been formulated by Morris L.J. in the course of his judgment and which I will not formulate again. As to that, I very much doubt in the first place whether the point is open to the plaintiffs having regard to the terms of their pleadings; but, in any event, any claim founded upon it would be a claim for damages for breach of an implied term, and not for commission. One thing that would be quite plain is that the damages which the plaintiffs would recover would not be the full amount of £387 10s., because, had Mrs. Pritchard been told the truth in regard to the development which the local authority intended to put in hand, and the effect that that development would have on the property, she would never have agreed to buy this property for this sum at all. Therefore, assuming that the plaintiffs would get some damages measured by commission, they could not possibly be measured by the commission which would have been payable on the contract price.

But I am far from satisfied as to what representation, if any, the defendant did make to Wade. As my Lord said, it is a great pity in many respects that this action was not fought on oral evidence, but there is no evidence at all here—there is nothing in the agreed statement of facts, and there is little enough in the correspondence—from which one can arrive at any definite conclusion that the defendant made any definite representation of the kind alleged to Wade at all. It may be that he asked her informally some question about it and she gave an informal answer, not really applying her mind to it, saying what she believed to be the position; and, if she did, Wade made use of that for the purpose of making a deliberate answer to a specific inquiry on that very subject made by Pritchard, on a matter to which obviously Pritchard attached a great deal of importance in deciding whether he and his wife should buy this property.

What makes it a great deal worse, to my mind, is that the plaintiffs themselves, in a letter dated November 12, 1954, said,

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with reference to this interview of September 17, "We knew "nothing of a road widening scheme in connexion with the "premises." If they knew nothing, what business Wade had to give a definite and unequivocal answer in reply to Pritchard's query I am at a loss to understand, and it appears to me that he was a great deal more at fault in doing that without making the slightest attempt to check up on what the answer was. Not knowing what the position was, as appears from that letter, and knowing nothing about it all, he should have said to Pritchard: "I honestly do not know. You had better find out. You had "better make the usual search." I do not think there is any ground for founding a cause of action by the plaintiffs against the defendant on those kinds of lines.

In conclusion, I would like to say for myself, in agreement with my brethren, that I think it is highly undesirable that estate agents should hurry people into signing contracts without legal advice, and especially when they attach to those contracts conditions of sale which neither the parties nor the agents themselves in the least understand. The agents' function is to find purchasers for property and not to produce contracts and persuade the parties into signing them. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *J. J. Dunnett; Torr & Co.*

A. W. G.

[CHANCERY DIVISION.]

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July 3, 4, 5.
Upjohn J.

* *In re* COOPER'S CONVEYANCE TRUSTS. CREWDSON AND OTHERS *v.* BAGOT AND OTHERS.

[1955 C. 4888.]

Charity—Cy-près doctrine—Limited period, gift for—Gift over void for remoteness—Applicability of cy-près doctrine—Necessity for finding general charitable intention.

Where in terms an absolute and perpetual gift to charity is made with a gift over on cesser which fails for remoteness or for some other reason, the original perpetual gift to charity remains; but where there is a gift to charity for a limited period then the undisposed of interest reverts to the grantor.

By a conveyance dated April 13, 1864, certain land and property was conveyed to trustees "their heirs and assigns for ever" in trust for the purposes of an orphan girls' home and upon failure of that trust the land and property in question were to be held in trust for the persons then entitled to certain real estate therein specified and the aforementioned "messuage . . . hereditaments "and premises" were to be conveyed accordingly "and upon or "for no other trust or purpose whatsoever."

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The home, which was the gift of one H., was forced to close in 1954 owing to lack of support:—

Held, (1) that the gift over on failure of the primary trust was void for remoteness; (2) that the donor intended a gift to charity only for a limited time and for a limited purpose; and that period having come to an end there was an interest in the donor remaining undisposed of which was held upon resulting trust for her estate.

In re Talbot [1933] Ch. 895; 49 T.L.R. 462; *Gibson* v. *South American Stores (Gath & Chaves) Ltd.* [1950] Ch. 177; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985 applied.

Per Upjohn J.: Where there is found an initial out and out or perpetual gift to charity, albeit to a particular charity or to a particular charitable purpose, and that charity or charitable purpose fails after the gift has vested in interest, it is in a sense irrelevant to consider whether there is a general charitable intention, because the donor has made initially an out and out gift to charity, although to a particular charity or charitable purpose, and has reserved no interest in himself. Where, however, the donor uses language showing an intention that in some circumstances he contemplates a failure of the purpose or indicates that his gift is only to be for a limited time or purpose, then it becomes a question of construction, whether he has made an out and out or perpetual gift to charity or not, and that is not inaptly expressed by asking whether he has evinced a general charitable intention. Whatever language is used, however, the whole question is what are the donor's intentions, to be ascertained upon a true construction of the relevant documents in the light of the relevant surrounding circumstances. Thus, even where the gift is in the first place unlimited in time but is followed by clauses of defeasance or powers of revocation, it is a question of construction whether a donor intended to devote his gift to charity out and out or in perpetuity or only for a limited purpose and period.

ADJOURNED SUMMONS.

By a conveyance dated April 13, 1864, after reciting (amongst other things) that by a deed dated October 23, 1863, therein mentioned the property thereinafter described and conveyed had been conveyed to the parties thereto of the first part in consideration of their payment of a sum of £126 16s. 8d. and that the said purchase price of £126 16s. 8d. had in fact been paid by the Honourable Mary Howard of Levens Hall in the county of Westmorland out of her own moneys as part of her contribution to the funds of a charity intended to be constituted and established under the name of "The Orphan Girls' Home at Kendal" in accordance with the rules and regulations in the schedule thereto, and that the said land was so conveyed to the intent that it might be conveyed unto the persons selected to be the first or original trustees of the charity, and to the intent that there might be erected and built on the said land a messuage and other buildings suitable for the objects and design of the said charity and that the parties thereto of the second part had been selected as the first or original trustees of the charity and such messuage and other buildings as aforesaid had already been erected or were then in course of erection on the said land at the sole cost of the Honourable Mary Howard, it was witnessed that certain land in

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the township of Helsington in the parish of Kendal in the county of Westmorland together with the messuage or home and other buildings erected or erecting thereon was thereby conveyed to the said persons parties thereto of the second part "their heirs and "assigns for ever in trust nevertheless for the purposes of the "Orphan Girls' Home at Kendal (that is to say) the charity of "which the object and constitution and the governing rules and "regulations are defined set forth and contained in the schedule "hereunder written in which schedule the same charity is termed "the Institution and to hold apply and dispose of the same "accordingly pursuant to the said rules and regulations for the "time being in force and on failure of the said trust evidenced "by a resolution of the Committee of Management of the said "Institution confirmed by a general meeting of the subscribers "to the same then the said several messuages and hereditaments "and premises hereinbefore expressed to be hereby granted or "so many and such parts thereof and such estates and interest "therein as shall not have been disposed of under the foregoing "trust shall subject to the said foregoing trust and to all acts "and things done by virtue thereof be held upon such trusts and "for such intents and purposes as shall correspond (as far as "circumstances will permit and the rules of law and equity shall "allow) with the uses and limitations (other than uses or limita-"tions by way of mortgage or charge) to which the aforesaid "Mansion House called Levens Hall or the land on which the "same and the outbuildings and offices thereof now stand shall "then be subject and to the intent that the person or persons "who on the failure of the aforesaid charitable objects shall "under the said uses and limitations be entitled or who (but for "prior incumbrances) would be entitled to the said Mansion "House land and premises for any estate or successive estates "for life or lives or for any greater estate or estates at law and "in equity or in equity only shall have been entitled to the same "or the like estate or estates (as nearly as may be) in the said "messuage or home and buildings hereditaments and premises "with the appurtenances hereinbefore expressed to be hereby "granted or in such undisposed part thereof or interest therein "as aforesaid. And to convey and assure the same messuage "and premises accordingly And upon or for no other trust or "purpose whatsoever.

"The schedule referred to by the foregoing indenture.

"Rules and regulations of the Orphan Girls' Home at Kendal "in the county of Westmorland.

". . . IV. The committee of management.

"11. The conduct and management of the Institution in "accordance with the rules and by-laws of the Institution for the "time being in force shall be vested in the committee of manage-"ment consisting of seven subscribers.

". . . VI. Winding up.

" 39 and lastly. If at any time the committee of management shall come to the unanimous resolution that it is impossible to prosecute the objects or design of the Institution as hereinbefore set forth with advantage it shall be lawful for such committee by resolution confirmed by a general meeting of the subscribers to declare that the objects of the Institution have failed and that the same ought to be discontinued and wound up and thereupon the committee shall wind up the affairs of the Institution accordingly and the messuages and premises vested in the trustees of the Institution for the purpose of being used as the Home of the Institution shall be held by them upon the trusts and for the purposes to and for which the same are above declared to be subject in the event of the failure of the trusts above declared for the benefit of the Institution and the committee shall cause to be converted into money the other real and personal property and effects of the Institution in such manner as the committee of management shall deem expedient and shall apply the net proceeds of such conversion to such objects or purposes of charity within the said county of Westmorland as the committee of management shall unanimously resolve upon and a general meeting of the subscribers specially convened for the purpose shall sanction and confirm."

From a time shortly after the execution of the conveyance until the month of June, 1954, an orphan home for girls accommodating about 32 girls at a time was carried on at the home built on the property, the subject of the conveyance, and pursuant to the charitable trusts therein declared and under a management committee constituted under the rules contained in the schedule thereto.

For many years past the home had been called " The Howard " Orphan Home " or " The Howard Orphan Home for Girls " and during the later years of its existence the girls in the home were all sent there by Westmorland County Council and other local authorities in the north of England, and the home was largely maintained and carried on by the moneys received from these authorities and grants from the Ministry of Education. In 1953 and the beginning of 1954, however, these authorities ceased to send a sufficient number of children to the home as the result of a change of policy which resulted in their preferring to send the orphan children in their care into small homes, and a meeting was held on December 5, 1953, at which representatives of the Home Office were present when the future of the home was discussed with them and it appeared that there was no likelihood of being able to maintain the home as it then was. At a meeting of the committee of management held on March 9, 1954, after considering the financial position of the home, the following resolution was passed: " That the committee deeply regret that " they cannot carry on the home and propose it must be closed " in three months."

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There were and had for some years previously been no subscribers to the home and therefore no meeting of subscribers could be held as mentioned in rule 39 of the schedule to the conveyance.

Pursuant to the above resolution the home was finally closed as an orphan home on June 10, 1954, and since that date it had been standing empty.

The plaintiffs, the present trustees of the conveyance, had standing in their names certain instruments and moneys constituting personal property of the institution. In the circumstances it was desired that a scheme might be directed by the court for the application of these funds.

The plaintiffs issued the present summons for determination of the questions (1) whether the trust contained in the conveyance arising on the failure or termination of the trust for the Howard Orphan Home that the hereditaments thereof conveyed should be held in the manner therein specified (a) was void for remoteness as offending the rule against perpetuities, or (b) was a valid or effective trust; (2) if the said trust failed then whether on the true construction of the conveyance and in the events which had happened the hereditaments comprised in and conveyed by the conveyance ought to be held and applied upon such charitable trusts as the court might direct by way of scheme or whether the said hereditaments were now held upon a resulting trust for the persons now entitled to the residuary real estate of the Honourable Mary Howard; (3) that if necessary a scheme for the cy-près application of the said hereditaments might be directed by the court; (4) that a scheme for the cy-près application of the trust funds (other than the said hereditaments) now held by the plaintiffs as trustees of the conveyance or of the charity known as the Howard Orphan Home might be directed by the court.

W. T. Elverston for the plaintiffs.

Nigel Warren for those persons interested in the residuary real estate of the donor.

Denys Buckley for the Attorney-General.

Case cited in argument which was not referred to in the judgment: *In re Wokingham Fire Brigade Trusts.*[1]

UPJOHN J. The Howard Orphan Home near Kendal, in the County of Westmorland, was founded by the generosity of the Honourable Mary Howard in the year 1864, but due to a change of circumstances it was forced to close in the year 1954 after 90 years of useful life. The question which I have to determine is whether the lands and buildings upon which the charity was conducted, and the proceeds of sale of a small part which has been sold, are now held on valid charitable trusts and a scheme

[1] [1951] Ch. 373; [1951] 1 T.L.R. 446; [1951] 1 All E.R. 454.

ought to be directed for their application cy-près, or whether there is a resulting trust in the estate of the grantor, who has long since died.

The orphanage was constituted by a deed dated April 13, 1864. By it, certain land and property were conveyed to a body of trustees, and I can turn straight to the operative part. [His Lordship read it and continued:] I can turn straight to the rules contained in the schedule, and I need, I think, refer in detail only to two of them. Part IV of the rules constituted the committee of management of the orphanage, and rule 11 was in these terms: "The conduct and management of the institution in "accordance with the rules and by-laws of the institution for the "time being in force shall be vested in the committee of manage-"ment consisting of seven subscribers." Part V, rules 36 to 38, provided for general meetings of subscribers.

Part VI dealt with the winding up in rule 39 in these terms: [His Lordship read it and continued:] Certain funds are held upon the trusts of the charity, and it is common ground that, having regard to the rules that I have just read, those funds are held upon valid charitable trusts and a scheme must be directed for their administration cy-près.

For many years the orphanage was supported by voluntary contributions, but no one has subscribed for ten years at least, and in its latter years the orphanage was in fact supported by grants from various local authorities and from the Ministry of Education. These bodies were placing girls there for their education. Through changes of policy, in 1953 these authorities ceased to send girls to the orphanage or to support the home. A meeting was held in December, 1953, at which representatives of the Home Office were present, and, as a result, it was plain that there was no prospect of continuing the orphanage, which finally closed in June of 1954.

Pursuant to rule 39, the committee of management purported to pass a resolution closing the home. I do not read their resolution, for it is clear that the committee, though de facto managing the orphanage, had for many years not been constituted according to the rules, for none was a subscriber; and for a like reason it was impossible to convene a meeting of subscribers to confirm the resolution of the committee of management.

One thing is clear upon the construction of the deed or grant, and that is that the gift over upon failure of the trust to the person or persons who shall be entitled to the mansion house called Levens Hall is void as infringing the rule against perpetuities, and I have already formally made a declaration to that effect.

The question whether the property—that is, the lands and buildings—ought now to be applied upon the charitable trusts cy-près or results to the trust of the donor depends upon the true construction of the deed. A number of authorities have been cited to me. They establish clearly the following propositions:

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Where in terms an absolute and perpetual gift to charity is made with a gift over on cesser which fails for remoteness or for some other reason, the original perpetual gift to charity remains; but, on the other hand, where there is a gift to charity for a limited period then the undisposed of interest reverts to the grantor.

The question to be answered was succinctly put by Stirling J. in *In re Bowen.*[1] He said: "The question which I have to "decide, therefore, appears to me to reduce itself to one of the "construction of the testator's will—i.e., whether the testator "has given the property to charity, in perpetuity, subject to an "executory gift in favour of the residuary legatee, or whether "he has given it for a limited period, leaving the undisposed of "interest to fall into residue." In that case, and in the case in which Sargant J. followed it, *In re Peel's Release,*[2] the original beneficial gift was in express terms made perpetual. On the other hand, *In re Randell*[3] and *In re Blunt's Trusts*[4] were cases on the other side of the line, for the gift in each of those cases was expressed to be limited in duration.

Maugham J. considered those cases in *In re Talbot.*[5] The decision there turned ultimately on the Methodist Church Union Act, 1929, but the earlier authorities were discussed. As in the case before me, there was in that case a gift neither expressed to be in perpetuity nor, on the other hand, limited in duration. Maugham J.'s judgment is not entirely easy to follow, but I respectfully agree with Evershed M.R. in *Gibson* v. *South American Stores (Gath & Chaves) Ltd.*[6] that had the matter arisen for decision Maugham J. would have held that the gift in that case fell into the second branch of the problem stated by Stirling J.

Mr. Buckley, on behalf of the Attorney-General, referred to a number of authorities to establish the proposition that when once the charitable gift has taken effect, as distinct from an initial failure through impracticability or lapse during the testator's lifetime, the question of general charitable intention is irrelevant, although he concedes that one must in the first place find a perpetual or out and out gift to charity. I think the matter is really one of language. The general principle is stated in the fifth edition of Tudor on Charities at p. 141. After referring to the well-known passage of Parker J. in *In re Wilson,*[7] the editor continues: "The importance of the distinction lies in "the fact that the cy-près principle is confined to property given "with a general intention of charity. There is an exception to "this rule concerning property given absolutely and perpetually "to charity, and which has vested in the charity: in such circum-"stances a rule of convenience has grown up that on the

[1] [1893] 2 Ch. 491, 495; 9 T.L.R. 380.
[2] [1921] 2 Ch. 218.
[3] (1888) 38 Ch.D. 213.
[4] [1904] 2 Ch. 767; 20 T.L.R. 754.
[5] [1933] Ch. 895; 49 T.L.R. 462.
[6] [1950] Ch. 177, 202; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985.
[7] [1913] 1 Ch. 314, 320.

" subsequent failure of the trusts, the fund can be applied cy-près " irrespective of the donor's intention." I draw attention to the words " property given absolutely and perpetually to charity."

I was also referred to *In re Slevin*,[8] and the recent case of *In re Wright*.[9] Those cases appear to me to establish this, that if one finds an initial out and out or perpetual gift to charity, albeit to a particular charity or to a particular charitable purpose, and that charity or charitable purpose fails after the gift has vested in interest, it is in a sense irrelevant to consider whether there is a general charitable intention. This is because the donor has made initially an out and out gift to charity, although to a particular charity or charitable purpose, and has reserved no interest in himself. Thus, in the present case, if there had been no gift over on the failure of the orphanage, it would hardly have been suggested that upon the subsequent failure of it there would have been a resulting trust. Where, however, the donor uses language showing an intention that in some circumstances he contemplates a failure of the purpose or indicates that his gift is only to be for a limited time or purpose, then it becomes a question of construction, whether he has made an out and out or perpetual gift to charity or not, and that is not inaptly expressed by asking whether he has evinced a general charitable intention.

Whatever language is used, however, the whole question is what are the donor's intentions, to be ascertained on a true construction of the relevant documents in the light of the relevant surrounding circumstances. Thus, even where the gift is in the first place unlimited in time but is followed by clauses of defeasance or powers of revocation, it is a question of construction whether a donor intended to devote his gift to charity out and out or in perpetuity or only for a limited purpose and period: see *In re Talbot* [10] and *Gibson* v. *South American Stores (Gath & Chaves) Ltd.*,[11] which I have already mentioned. In considering the construction of the deed, those two cases also make it clear that the court may rely on a clause of defeasance though that clause is open to objection on the ground of perpetuity.

I turn to a consideration of this deed. Mr. Buckley, for the Attorney-General, submitted that the clause of defeasance, like all conditions subsequent, must be construed strictly; and as there was no de jure committee of management and no general meeting of subscribers could be summoned, the gift to charity has not yet come to an end for the gift over has not yet operated, and, as there are no subscribers, never can operate. I do not agree with that. The deed has been most carefully drawn, and the donor is dealing with the case where there has been a failure, and that failure is to be evidenced by a resolution of the committee and of the subscribers. It was only a question of evidence,

[8] [1891] 2 Ch. 236; 7 T.L.R. 394.

[9] [1954] Ch. 347; [1954] 2 W.L.R. 972; [1954] 2 All E.R. 98.

[10] [1933] Ch. 895.

[11] [1950] Ch. 177.

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and, in my judgment, that was put in by this careful draftsman purely as a piece of machinery to protect the trustees in whom the land was vested so that the trustees could safely act upon those resolutions. The fact that there can be no resolutions now, in my judgment, may be rejected as irrelevant. The fact remains that the charity has failed.

It is clear that the grant of the legal estate was expressed to be in perpetuity, for it was to the trustees, "their heirs and "assigns for ever," but the trusts incurred were not expressed to be either limited in time or in perpetuity, and in that respect the case, as I have pointed out, is somewhat similar to *In re Talbot.*[12] What, however, seems to me clear is that the donor desired the charity to continue only while it could be carried on as an orphan girls' home by the committee of management and subject to the general supervision of general meetings of subscribers as detailed in the schedule. When that particular charity came to an end, in my judgment, she evinced the clearest possible intention that the property was to go over to the non-charitable purpose mentioned in her will. She has said quite clearly that, on failure of the trusts, to be evidenced by these resolutions, then, "subject to the foregoing trust and to all acts "and things done by virtue thereof," it is to be held upon the new trust, and she ends up her direction upon this matter by saying that the property is to be conveyed "accordingly and upon "or for no other trust or purpose whatsoever." True, those concluding words have no dispositive effect, and in that sense are otiose, but they do confirm the view which independently thereof I should have formed, that the donor in this case is concerned and concerned only with an orphanage carried on upon the particular property by the particular bodies she has appointed in the schedule to carry it on. The moment that particular purpose comes to an end, the gift is to go over, and the donor has again made that intention as to the land and buildings abundantly clear by the language she has employed in rule 39.

Accordingly, in my judgment, this is a case where the donor intended a gift to charity only for a limited time and for a limited purpose; that is to say, the time limited by the time for which the orphanage could be carried on. That period having come to an end, in my judgment, there is an interest in the donor remaining undisposed of; that is held upon trust for her estate by way of resulting trust, and I must declare accordingly.

Declaration accordingly.

Solicitors: *Kingsford, Dorman & Co. for Milne, Moser & Sons, Kendal; Peacock & Goddard; Hunters; Hillcarys; Farrer & Co.; Evans, Barraclough & Co.; Leman, Harrison & Flegg; Treasury Solicitor.*

J. A. G.

[12] [1933] Ch. 895.

[CHANCERY DIVISION.]

*HART (INSPECTOR OF TAXES) *v.* SANGSTER.

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June 26, 27;
July 3.

Vaisey J.

Revenue — Income tax — New source of income — "Source" — Deposit account at bank — Interest payable on sums deposited — Whether new contract between customer and bank arises every time a fresh sum deposited — "New source, or addition to source of income" — Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, Case III — Finance Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 43), *s.* 21.

The taxpayer had for several years before 1951 kept a deposit account with his bank. In the first quarter of 1951, down to March 16, 1951, the amount standing to his credit on such account was £20,496. On March 17, 1951, he paid a further sum of £2,000,000 by cheque into the account, and on March 30, 1951, he withdrew from the account £250,000. The arrangement as regards interest was that it was credited on half-yearly rest dates, June 20 and December 20 in each year, and it was calculated in the ordinary way on a day-to-day basis. The interest, when credited, became principal, and then, but not before, began itself to earn interest. It was not the practice to allow accruing interest to be withdrawn between the rest dates, but if an account was closed interest was calculated to the date of closure, credited as principal, and withdrawn. The rate of interest varied from time to time. Fourteen days' notice of withdrawals from the deposit account was required, and withdrawal without notice involved the customer in a loss of fourteen days' interest.

The assessments to income tax under Schedule D made on the taxpayer for the years 1951–1952 and 1952–1953 amounted to £7,037 and £29,371 respectively. The main ingredient in the amounts assessed was the interest on the deposit account. These sums were reduced to £53 and £7,032 respectively by the special commissioners, who held, on an appeal by the taxpayer, that the taxpayer had not acquired a new source, or an addition to a source, of income when he made the deposit on March 17, 1951, and that neither section 21 of the Finance Act, 1951, nor section 30 of the Finance Act, 1926, had any application to the income the subject of the appeal.

On appeal by the Crown:—

Held, (1) that the word "source" in relation to income was indistinguishable from the word "origin."

(2) That the source or origin of the interest on the £2,000,000 was to be found in a contract between the taxpayer and the bank; that it was not to be found in an existing contract but that a new contractual relationship resulted from and was brought into existence by the tender of that sum by the taxpayer and its acceptance by the bank on the date in question.

(3) That, accordingly, the taxpayer acquired a new source, or an addition to a source, of income chargeable under Case III of Schedule D on March 17, 1951; that income first arose therefrom after April 6, 1951, namely, on June 20, 1951, when the income was placed at the credit and disposal of the taxpayer; and that income for the years to which the appeal related was properly computed by reference to the provisions of section 21 of the Finance Act, 1951.[1]

[1] Finance Act, 1951, s. 21: "(1) If at any time any person acquires—(*a*) a new source of any profits or income in respect of which he is chargeable either under Rule 1 of the Rules applicable to Case III of Schedule D or under Case IV of Schedule D or under

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APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated, so far as relevant, was as follows:

"1. At a meeting of the Commissioners for the Special "Purposes of the Income Tax Acts held on January 28, 1955, "Mr. John Young Sangster (hereinafter called 'Mr. Sangster') "appealed against assessments made upon him to income tax, "Schedule D, for the years and in the amounts following:— "1951–1952: £7,037; 1952–1953: £29,371.

"2. The main ingredient in the amount assessed for each "Case V of Schedule D; or (*b*) an "addition to any source of any such "profits or income, then, for the year "of assessment in which income first "arises from the source or addition "and the two following years of "assessment—(i) income tax in "respect of the profits or income from "the source or addition shall be "computed separately; and (ii) in the "case of profits or income chargeable "under Rule 1 of the Rules applic- "able to Case III, the provisions of "paragraph (1) of Rule 2 of those "Rules shall apply, and, in the case "of profits or income chargeable "under Case IV or Case V, the pro- "visions of proviso (*b*) of subsection "(1) of section twenty-nine of the "Finance Act, 1926, shall apply.

"(2) Subsection (1) of this section "shall have effect in lieu of para- "graph (ii) of the proviso to section "thirty of the Finance Act, 1926, and "the references to that paragraph "contained in paragraph (iv) of that "proviso shall be construed as refer- "ences to the said subsection (1).

"(3) The preceding provisions of "this section shall apply in relation "to sources or additions to sources "acquired on or after the sixth day "of April, nineteen hundred and "fifty-one and to sources or additions "to sources acquired before that date "where the income or profits first "arose therefrom on or after that "date, but shall not apply in any "other case. . . .

"(5) In this section, references to "profits or income chargeable under "Rule 1 of the Rules applicable to "Case III of Schedule D shall be "construed as including references to "profits or income chargeable under "that Case as if they were mentioned "in the said Rule 1 . . ."

Income Tax Act, 1918, Sched. D: "*Rules applicable to Case III.* "1. The tax shall extend to—(*a*) any "interest of money, whether yearly "or otherwise, or any annuity, or "other annual payment, whether such "payment is payable within or out "of the United Kingdom either as a "charge on any property of the per- "son paying the same by virtue of "any deed or will or otherwise, or "as a reservation thereout, or as a "personal debt or obligation by "virtue of any contract, or whether "the same is received and payable "half-yearly or at any shorter or more "distant periods; . . .

"2. [New rule substituted by s. 17 "of the Finance Act, 1922.]—(1) The "tax shall, subject as hereinafter "provided, be computed—(*a*) as "respects the year of assessment in "which the profits or income first "arise, on the full amount of the "profits or income arising within that "year; and (*b*) as respects subse- "quent years of assessment, on the "full amount of the profits or income "arising within the year preceding "the year of assessment: Provided "that—(i) where the profits or income "first arose on some day in the year "preceding the year of assessment "other than the sixth day of April, "the computation shall be made on "the profits or income of the year of "assessment; and (ii) where the "profits or income first arose on the "sixth day of April in the year pre- "ceding the year of assessment, or "on some day in the year next before "the year preceding the year of "assessment other than the sixth "day of April, the person charged "shall be entitled, on giving notice "in writing to the surveyor of taxes "at any time within twelve months "after the end of the year of assess- "ment, to be charged on the amount "of the profits or income of that year, "and if the tax charged has been "paid, any amount overpaid shall be "repaid.

"(2) Tax shall be paid on the actual "amount computed as aforesaid with- "out any deduction."

" year was interest upon Mr. Sangster's deposit account with " the Colmore Row, Birmingham, branch of Barclays Bank, and " the question for our determination was the correct method of " computing the income tax in respect of such interest.

" 3. (1) The assessment for 1952–1953 was made under the " provisions of the Income Tax Act, 1952. The assessment for " 1951–1952 was made under the provisions of the Income Tax " Acts in force prior to the coming into operation of the Income " Tax Act, 1952. The appeal was argued before us by reference " to the latter provisions (i.e., the earlier enactments), it being " common ground between the parties that there was no material " difference between such provisions and those contained in the " Income Tax Act, 1952. In stating this case we are following " the same course and making references to the earlier enact- " ments as if they applied to the 1952–1953 assessment in the " same manner as they apply to the 1951–1952 assessment.

" (2) The assessments under appeal were made upon the basis " that the income in question had to be computed in accordance " with the Finance Act, 1951, section 21, which deals with cases " where a person acquires a new source or an addition to any " source of income chargeable under Case III of Schedule D. " The provisions apply in relation to new sources or additions to " sources of income acquired before April 6, 1951, only where " income first arose therefrom on or after that date.

" (3) Cases where a person has acquired a new source or an " addition to any source of such income and income first arose " therefrom before that date are governed by the Finance Act, " 1926, section 30.

" (4) If the matter before us were governed by the Finance " Act, 1951, section 21, then subparagraph (*a*) of and the proviso " to paragraph 2 (1) of the Rules applicable to Case III of " Schedule D to the Income Tax Act, 1918, would apply to " interest upon the deposit of £2,000,000 made on March 17, " 1951 (as set out in paragraph 4 hereof), in relation to the years " of assessment 1951–1952, 1952–1953 and 1953–1954.

" (5) If the matter were governed by the Finance Act, 1926, " section 30, then subparagraph (*a*) of and the proviso to the said " paragraph 2 (1) would apply to the said interest in relation to " the years of assessment 1950–1951, 1951–1952 and 1952–1953.

" (6) If the matter were not within either of the said sections " of the Finance Acts, 1951 or 1926, then subparagraph (*b*) of the " said paragraph 2 (1) would apply in relation to all material " years of assessment.

" 4. . . . Mr. Sangster had the [deposit] account for many " years prior to 1951, and in the early part of 1951 it stood at " £20,496. On March 17, 1951, he paid in £2,000,000. On " March 30, 1951, he withdrew £250,000. Interest on the account " was credited on June 20 and December 20 in each year.

" 5. . . . We found the following facts:

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"No special agreement was concluded between Mr. Sangster "and the bank.

"Interest on deposit accounts was calculated on the principal "on a day to day basis and was credited on half-yearly rest "dates, June 20 and December 20 in each year. When it was "so credited, the interest became principal and then (and not "before) began itself to earn interest. It was not the practice "to allow accruing interest to be withdrawn between the half-"yearly rest dates, save that if an account was closed at any "time, interest was calculated up to the date of closure, credited "and withdrawn as principal. The rate of interest varied from "time to time.

"In 1951 the bank required fourteen days' notice of with-"drawals from deposit account; a depositor who wished to make "a withdrawal without this notice could do so, but would lose "fourteen days' interest on the sum withdrawn. Mr. Sangster "withdrew £250,000 on March 30, 1951, without giving the "fourteen days' notice, and fourteen days' interest on this sum "was deducted in calculating the interest credited on the follow-"ing June 20.

"The sum of £2,215 3s. 1d. was credited for interest on "June 20, 1951. . . .

"6. It was contended on behalf of Mr. Sangster:—

"(1) That when Mr. Sangster paid in £2,000,000 to the "credit of his deposit account on March 17, 1951, he did not "acquire a new source, or an addition to a source of income "within section 21 of the Finance Act, 1951, or section 30 of "the Finance Act, 1926.

"(2) That income tax upon the interest on Mr. Sangster's "deposit account should be computed for 1951–1952 and 1952–"1953 on the preceding year basis in accordance with paragraph "2 (1) (*b*) of the Rules applicable to Case III of Schedule D to "the Income Tax Act, 1918.

"(3) Alternatively, that if Mr. Sangster did acquire a new "source, or an addition to a source, of income when he paid in "the said sum of £2,000,000, income first arose therefrom prior "to April 6, 1951; that section 21 of the Finance Act, 1951, was "accordingly not applicable to such income, and that income "tax for the years to which the appeal related should be com-"puted in accordance with section 30 of the Finance Act, 1926.

"7. It was contended on behalf of the Crown:—

"(1) That Mr. Sangster acquired a new source, or an addition "to a source, of income chargeable under Case III of Schedule D "on March 17, 1951.

"(2) That income first arose therefrom after April 6, 1951; "that is to say, on June 20, 1951, when the interest was placed "at the credit and disposal of Mr. Sangster.

"(3) That income tax for the years to which the appeal "related was properly computed by reference to the provisions "of section 21 of the Finance Act, 1951.

"We were referred, inter alia, to the following authorities: "*Cull* v. *Cowcher*[2]; *Simpson* v. *The Executors of Bonner* "*Maurice*[3]; *St. Lucia Usines and Estates Co.* v. *St. Lucia* "*(Colonial Treasurer)*[4]; *Dewar* v. *Commissioners of Inland* "*Revenue*[5]; Apportionment Act, 1870.

"8. We, the commissioners who heard the appeal, held that "the source, and the only source, of the income in question was "the contractual relationship between Mr. Sangster and the "bank which came into being when Mr. Sangster first opened "his deposit account; in our opinion the authorities to which "our attention was drawn, and in particular the decision of "Finlay J., in *Cull* v. *Cowcher*[6] (which had been relied on by "both parties to the appeal), pointed to that conclusion.

"We held that Mr. Sangster did not acquire a new source of "income when he made the deposit on March 17, 1951, and "that neither section 21 of the Finance Act, 1951, nor section 30 "of the Finance Act, 1926, had any application to the income "which was the subject of the appeal. It was accordingly not "necessary for us to make any decision upon Mr. Sangster's "alternative contention, but we indicated the opinion we had "formed that if a new source, or an addition to a source, of "income was acquired on March 17, 1951, income first arose "therefrom on June 20, 1951.

"On April 26, 1955, we determined the appeal by adjusting "the assessments to the following figures, which had been agreed "between the parties to be correct upon the basis of our decision "in principle: the 1951–1952 assessment we reduced to £53; "the 1952–1953 assessment we reduced to £7,032.

"9. The inspector of taxes immediately after our determina- "tion of the appeal declared to us his dissatisfaction therewith "as being erroneous in point of law, and in due course required "us to state a case for the opinion of the High Court pursuant to "the Income Tax Act, 1952, s. 64, which case we have stated. . .

"The points of law for the opinion of the court are whether "income tax for the years 1951–1952 and 1952–1953 should be "computed by reference to the Finance Act, 1951, s. 21, or by "reference to the Finance Act, 1926. s. 30, or by reference to "paragraph 2 (1) (*b*) of the Rules applicable to Case III of "Schedule D to the Income Tax Act, 1918."

Sir James Tucker Q.C. and *Sir Reginald Hills* for the Crown.
F. Heyworth Talbot Q.C. and *G. A. Grove* for the taxpayer.

Cases cited in argument but not referred to in the judgment: *Henry* v. *Galloway*[7]; *Oliver* v. *Chuter*.[8]

Cur. adv. vult.

[2] (1934) 18 T.C. 449.
[3] (1929) 45 T.L.R. 581; 14 T.C. 580.
[4] [1924] A.C. 508.
[5] [1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 561.
[6] 18 T.C. 449.
[7] (1933) 49 T.L.R. 191; 17 T.C. 470.
[8] (1934) 18 T.C. 570.

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July 3. VAISEY J. read the following judgment: The facts in this case are quite simple, and it may be thought that the only strange feature of it is the conclusion to which I find myself driven at the end of it.

The respondent, Mr. John Young Sangster, had for several years prior to 1951 kept a deposit account with the Colmore Row branch of Barclays Bank at Birmingham. In the first quarter of 1951, down to March 16, the amount standing to his credit on such account was £20,496. On March 17, he paid a further sum of £2,000,000 by cheque into the account, and on March 30 he withdrew from the account £250,000.

The arrangement as regards interest was that it was credited on half-yearly rest dates, June 20, and December 20, in each year, and it was calculated in the ordinary way on a day-to-day basis.

The other arrangements between Mr. Sangster and the bank, so far as they seem to me to be material, were as follows: the interest, when credited, became principal, and then, but not before, began itself to earn interest. It was not the practice to allow accruing interest to be withdrawn between the rest dates, but if an account was closed interest was calculated to the date of closure, credited as principal, and withdrawn.

The rate of interest varied from time to time. Fourteen days' notice of withdrawals from the deposit account was required, and withdrawal without notice involved the customer in a loss of 14 days' interest. In fact, the £250,000 was withdrawn without notice, and 14 days' interest on that sum was duly deducted in calculating the interest credited on the following June 20.

There is a statement in the case that there was no "special "agreement" between Mr. Sangster and the bank, which I understand as meaning that the arrangements which I have mentioned are to be regarded as usual and ordinary arrangements, such as obtain generally between English banks and their customers. It cannot mean that there was no particular agreement between Mr. Sangster and the bank in the present case, because the relationship of customer and banker with regard to a deposit account, or indeed any other account, is essentially and necessarily contractual—see Paget's Law of Banking, 5th ed., Chap. 6, s. 1; and Halsbury's Laws of England, 3rd ed., Vol. II. p. 174.

The assessments to income tax under Schedule D made on Mr. Sangster for the years 1951–1952 and 1952–1953 amount to £7,037 and £29,371 respectively. These sums were reduced by the special commissioners, from whom this appeal is brought, to £53 and £7,032 respectively. The Crown asks that the assessments be restored. The main ingredient in the amounts assessed was the interest on the deposit account, and the correct method of computing the tax on such interest is what now falls to me to decide.

The basis of the assessment is as follows: taking the position on June 20, 1951, the sum of £2,215 3s. 1d. was credited for interest on that day, made up of (i) 87 days' interest on £20,496 the amount of the deposit down to March 17; (ii) 13 days' interest on £2,020,496, the amount of the deposit from March 17 to March 29, less four days' interest on £2,000,000 being the four days while Mr. Sangster's cheque was being cleared, and (iii) 82 days' interest on £1,770,496, the amount of the deposit from March 30 to June 20, from which there is deducted 14 days' interest on £250,000 withdrawn without the requisite notice.

Now it seems to me, and I understand the parties to be agreed, that the question depends on whether Mr. Sangster did, or did not, acquire a new source of income or an addition to a source of income within the meaning of section 30 of the Finance Act, 1926, or section 21 of the Finance Act, 1951, when he paid the £2,000,000 into his deposit account on March 17, 1951. The assessments were made on the footing that he did; the special commissioners held that he did not; the Crown now submits that he did. What, therefore, I have to consider is what was the source of the income arising from the £2,000,000? First, what is a "source"? The only statutory definition of the word, so far as I am aware, is in section 9 of the Water Supplies (Exceptional Shortage Orders) Act, 1934. This is obviously quite unhelpful. Nor do the observations of Lord Atkin in *Rhodesia Metals Ltd.* v. *Commissioner of Taxes* [1] in the Privy Council, give me any real assistance. I come to the conclusion that the word "source" in the context in which I have to consider it is altogether indistinguishable in meaning from the word "origin."

Both sides agreed that the source or origin of the interest on the £2,000,000 is to be sought and found in some contractual relationship (that is to say a contract) between Mr. Sangster and the bank, but they are not agreed as to what that contractual relationship (or contract) was. The Crown's contention is that it was a new contractual relationship resulting from and brought into existence by the tender of the £2,000,000 by Mr. Sangster to the bank, and the acceptance of it by the bank from Mr. Sangster, and indeed that such a new contractual relationship arises on each occasion when money is (to use colloquial language) placed on deposit by a customer in a bank. The opposite view, put forward by Mr. Sangster, is that there was on March 17, 1951, a subsisting pre-existent and continuing contractual relationship affecting and covering whatever money was for the time being and from time to time standing on the deposit account, and that there is no need, and no room, for the conception of a series of contracts arising whenever a new deposit is made. The latter view has the superficial attraction of according with what I may call the popular view of the position, and I was much disposed to accept it as prima facie correct. But does it

[1] [1940] A.C. 774; 56 T.L.R. 799; [1940] 3 All E.R. 422.

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VAISEY J.

stand the test of analysis as the other, that is the Crown's view, does? I think not. The conception of what I may call a running contract is vitiated in my judgment by the principle that a present contract to enter into a future contract or future contracts is in English law no contract at all—see *Von Hatzfeldt-Wildenburg* v. *Alexander*.[2] I think that the contentions of the Crown are well founded and must prevail.

I should add that the special commissioners adopted a view somewhat similar to that put forward by Mr. Sangster when they say that the only source of the income in question was the contractual relationship between himself and the bank which came into existence when he first opened the account. I cannot accept that as an accurate statement of the position.

On the footing of my holding that the contentions of the Crown are well founded it is not, I think, disputed that the income from the new source first arose on June 20, 1951.

My decision seems to me to accord with *Lilley* v. *Harrison*.[3] Both sides relied on *Cull* v. *Cowcher*,[4] in which there is certainly nothing to disturb and perhaps something to fortify the conclusion at which I have arrived. I allow the appeal accordingly, and the matter will go back to the commissioners for the assessments to be finally fixed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Hale, Ringrose & Morrow for Glaisyer, Porter & Mason, Birmingham.*

J. A. G.

[2] [1912] 1 Ch. 284.
[3] (1952) 33 T.C. 344.
[4] 18 T.C. 449.

[CHANCERY DIVISION.]

1956
July 27.

*PRACTICE DIRECTION.

(APPEALS BY CASE STATED, R.S.C., ORD. 58A.†)

Court of Appeal—Case stated—Form—Written decision by tribunal—R.S.C., Ord. 58A.
Tribunal—Statutory—Case stated—Form.
Lands Tribunal—Case stated by—Form.

In cases in which a written decision has been given by a tribunal, containing all necessary findings of fact and indicating the question or questions of law to be decided by the Court of Appeal, a short and formal case agreed by the parties, with a

† See Rules of the Supreme Court (Appeals), 1955 (S.I. 1955, No. 1885).

signed copy of the decision of the tribunal annexed, will be accepted in place of a case stated in the usual form. This procedure should be adopted wherever practicable, as tending to save both time and expense.

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PRACTICE DIRECTION.

EVERSHED, M.R.

July 27, 1956.

[QUEEN'S BENCH DIVISION.]

*RECEIVER FOR THE METROPOLITAN POLICE DISTRICT *v.* CROYDON CORPORATION AND ANOTHER.

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June 5, 6, 7, 8, 11.

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Police — Wages — Wages during incapacity — Recovery — Injury to constable through negligence of defendants — Wages during incapacity paid by receiver—Right of recovery by receiver from defendants of money paid—Power of receiver to sue defendants for wages.

Restitution—Unjust enrichment—Judicial precedent—Decision at first instance—Whether binding on other judge—Ratio of decision of Court of Appeal.

A metropolitan police constable was injured through the negligence of the defendants and as a result of his injuries was incapacitated from performing his duties as a police constable for a period of seven months. During the police constable's period of incapacity the Receiver for the Metropolitan Police District, acting under statutory regulations, paid him his full wages and allowances as a police constable. An action brought by the police constable against the defendants claiming damages for his injuries was settled on the payment by the defendants of a sum of money to the police constable. In that action the police constable had made no claim for loss of wages, but had he been entitled to include and recover his loss of wages as an item of special damage he would have recovered an additional amount of £104. The receiver, basing his claim in quasi-contract, now sued the defendants for £104, part of the wages and allowances which he had paid to the police constable during his period of incapacity:—

Held, that the receiver, who was not the employer of the police constable, was under a legal compulsion to pay to the police constable the sum of £104; that the police constable, had he not been paid that sum by the receiver, would have been entitled to include and recover it in his action against the defendants; that the defendants were primarily liable to pay the £104 to the police constable (for it was their default which had deprived the receiver of the whole of the consideration for the payment); and that, therefore, the defendants had obtained the benefit of the payment of £104 by the receiver in the discharge of their liability to the police constable for precisely the same sum and were indebted to the receiver in that amount.

Principle stated by Cockburn C.J. in *Moule* v. *Garrett* (1872) L.R. 7 Exch. 101, 104, and applied by Lord Wright in *Brook's*

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Wharf and Bull Wharf Ltd. v. *Goodman Brothers* [1937] 1 K.B. 534, 545; 53 T.L.R. 126; [1936] 3 All E.R. 696 applied.

Receiver for the Metropolitan Police District v. *Tatum* [1948] 2 K.B. 68; [1948] 1 All E.R. 612 followed.

ACTION.

On January 25, 1952, John Edward Bowman, a police constable, was on duty standing on a pedestrian crossing when he was run down from behind and injured by a motor lorry owned by the first defendants, the Croydon Corporation, and driven by their employee, Jesse William Holloway, the second defendant; as a result Bowman was incapacitated from carrying out his duties as a police constable for a period of seven months. Bowman brought an action in the Queen's Bench Division [1] against both defendants, claiming damages for his injuries which he alleged were due to their negligence, and that action was settled on the payment by the defendants of a sum of money to Bowman.

The Receiver for the Metropolitan Police District, the present plaintiff, now sued the defendants for £104, money paid to Bowman during his period of incapacity. The receiver alleged that he was compelled to and had paid to Bowman £153 13s. 6d. pay and allowances during the period when Bowman was incapacitated from performing his duties, and that, by reason of their negligence the defendants were liable in damages and had benefited to the extent of £104, part of the sum of £153 13s. 6d. paid by the receiver, and their obligation to Bowman had been reduced pro tanto. The defendants denied that the sum claimed was recoverable.

The following facts were agreed: (1) At all material times John Bowman was a police constable in the Metropolitan Police Force. (2) The defendants paid the sum of £2,513 12s. 6d. in full satisfaction of the claim made by Bowman in the action brought by him in the Queen's Bench Division against the defendants. (3) Bowman made no claim for loss of wages in that action; if he had been entitled to include and recover his loss of wages as an item of special damage in his action against the defendants he would have recovered £2,617 12s. 6d., namely, £2,513 12s. 6d. plus £104. (4) Bowman was incapacitated and prevented from carrying out his duties as a police constable for seven months as a result of injuries caused to him by the negligence of the defendants. (5) During that period of seven months the receiver paid to Bowman his full wages and allowances as a police constable. (6) The net sum so paid by the receiver was £153 13s. 6d. (7) The defendants agreed such figure, subject to liability. (8) The defendants admitted the allegations of negligence in the present action.

Gerald Gardiner Q.C. and *Patrick O'Connor* for the receiver.

Montague Berryman Q.C. and *Humfrey Edmunds* for the defendants.

[1] 1952, B. No. 6002.

The following cases were cited in argument: *Hall* v. *Hollander* [2]; *Admiralty Commissioners* v. *S.S. Amerika* [3]; *Bradford Corporation* v. *Webster* [4]; *Attorney-General* v. *Valle-Jones* [5]; *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.* [6]; *Inland Revenue Commissioners* v. *Hambrook* [7]; *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Brothers* [8]; *Receiver for the Metropolitan Police District* v. *Tatum* [9]; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [10]; *Dennis* v. *London Passenger Transport Board* [11]; *Allen* v. *Waters & Co.* [12]; *Fisher* v. *Oldham Corporation* [13]; *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society* [14]; *Moule* v. *Garrett* [15]; *British Transport Commission* v. *Gourley* [16]; *Edmunds* v. *Wallingford* [17]; *Whitham* v. *Bullock* [18]; *Police Authority for Huddersfield* v. *Watson* [19]; *Cattle* v. *Stockton Waterworks Co.* [20]; *Ruabon Steamship Co. Ltd.* v. *London Assurance* [21]; *Reading* v. *Attorney-General* [22] and *Brown* v. *Hodgson.* [23]

SLADE J. This is a test action brought to decide whether *Receiver for the Metropolitan Police District* v. *Tatum*,[1] a decision of Atkinson J., was rightly decided. I regard the point as a difficult one, and I should like at the outset to express my indebtedness to counsel on both sides for the assistance they have been good enough to give me.

It is common ground that the facts and the principle involved in the present case are indistinguishable from those in *Tatum's* case,[2] where the plaintiff was the same as in this case. I am not bound by that decision, although any judgment of Atkinson J. would be to me of the highest persuasive authority, and I asked Mr. Gardiner whether he was able to find any authorities (other than *Green* v. *Berliner*,[3] where du Parcq J. referred [4] to the

[2] (1825) 4 B. & C. 660.
[3] [1917] A.C. 38; 33 T.L.R. 135.
[4] [1920] 2 K.B. 135; 36 T.L.R. 286.
[5] [1935] 2 K.B. 209; 51 T.L.R. 239.
[6] (1952) 85 C.L.R. 237; [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846.
[7] [1956] 2 W.L.R. 919; [1956] 1 All E.R. 807; [1956] 3 W.L.R. 643 (C.A.).
[8] [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696.
[9] [1948] 2 K.B. 68; [1948] 1 All E.R. 612.
[10] [1943] A.C. 32; 58 T.L.R. 308; [1942] 2 All E.R. 122.
[11] 64 T.L.R. 269; [1948] 1 All E.R. 779.
[12] [1935] 1 K.B. 200; 51 T.L.R. 50.
[13] [1930] 2 K.B. 364; 46 T.L.R. 390.
[14] [1899] 1 Q.B. 161; 15 T.L.R. 76.
[15] (1870) L.R. 5 Exch. 132; (1872) L.R. 7 Exch. 101.
[16] [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.
[17] (1885) 14 Q.B.D. 811.
[18] [1939] 2 K.B. 81; 55 T.L.R. 617; [1939] 2 All E.R. 310.
[19] [1947] K.B. 842; 63 T.L.R. 415; [1947] 2 All E.R. 193.
[20] (1875) L.R. 10 Q.B. 453.
[21] [1900] A.C. 6; 16 T.L.R. 90.
[22] [1951] A.C. 507; [1951] 1 T.L.R. 480; [1951] 1 All E.R. 617; sub nom. *In re Reading's Petition of Right* [1949] 2 All E.R. 68, C.A., affirming [1948] 2 K.B. 268; [1948] 2 All E.R. 27.
[23] (1811) 4 Taunt. 189.
[1] [1948] 2 K.B. 68; [1948] 1 All E.R. 612.
[2] Ibid.
[3] [1936] 2 K.B. 477; 52 T.L.R. 221; [1936] 1 All E.R. 199.
[4] [1936] 2 K.B. 477, 493.

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observations of Bray J. in *Forster* v. *Baker*[5] and to which I referred in a case I tried some years ago[5a]) which establish the position that a judge is not bound by the decision of a judge of co-ordinate jurisdiction and which indicate how far a judge who has to consider the very point which has already been decided by a court of co-ordinate jurisdiction should allow the decision to affect his mind. Mr. Gardiner referred me to an article by Sir William Holdsworth in the Law Quarterly Review, Vol. 50 (1934), at p. 180, where that very learned lawyer, dealing with case law, referred to what he describes as "one of the ablest "books on this subject, entitled 'The Science of Legal Judg-"'ment,'" published by James Ram in 1834. He referred to a statement by Ram which was in these words: "'a case "'decided is called a precedent; and is an authority, which, "'under many circumstances, binds a court to make the same "'decision in a future similar case . . .' Sir Frederick Pollock "thus states the modern rule[6]: 'the decisions of an ordinary "'superior court are binding on all courts of inferior rank within "'the same jurisdiction, and though not absolutely binding on "'courts of co-ordinate authority, nor on that court itself, will "'be followed in the absence of strong reasons to the contrary.'"

Mr. Gardiner also referred to the decision of the Divisional Court in *Huddersfield Police Authority* v. *Watson*,[7] where Lord Goddard C.J. said[8]: "We are considering a decision of this "court. So far as the dictum of Grove J. is concerned, I can "only say for myself that I think the modern practice, and the "modern view of the subject, is that a judge of first instance, "though he would always follow the decision of another judge "of first instance, unless he is convinced the judgment is wrong, "would follow it as a matter of judicial comity. He certainly "is not bound to follow the decision of a judge of equal jurisdic-"tion. He is only bound to follow the decisions which are "binding on him, which, in the case of a judge of first instance, "are the decisions of the Court of Appeal, the House of Lords "and the Divisional Court." I am not, therefore, relieved by the decision in *Tatum's* case[9] of my duty to bring my own judgment to bear, but when I have done so I should act in accordance with the principles that I have just read; and not only, as I have said, should I regard any judgment of Atkinson J. as being of high persuasive authority, but I should follow it unless I am convinced that it is wrong. I am, however, entitled to give my own reasons for arriving at the same conclusion if I do arrive at the same conclusion.

On January 25, 1952, one Bowman, who was a police constable in the Metropolitan Police, was standing on a pedestrian

[5] [1910] 2 K.B. 636, 638; 26 T.L.R. 421 (sub nom. *Bowles* v. *Baker*, 26 T.L.R. 243).

[5a] *Longdon-Griffiths* v. *Smith and Others* [1951] 1 K.B. 295; 66 T.L.R. (Pt. 2) 627; [1950] 2 All E.R. 662.

[6] A First Book of Jurisprudence (6th ed.), 321, 322.

[7] [1947] 1 K.B. 842; 63 T.L.R. 415; [1947] 2 All E.R. 193.

[8] [1947] 1 K.B. 842, 848.

[9] [1948] 2 K.B. 68.

crossing regulating traffic at the junction of Mitcham Road and Kingsley Road in the County Borough of Croydon when he was run down from behind by a motor-lorry owned by the defendants, and driven by the second defendant in the course of his employment. As a result of that accident Bowman sustained serious personal injuries and was incapacitated from performing his duties as a police constable for a period of some seven months from the date of the accident.

[His Lordship read the agreed statement of facts as set out above, and continued:] The plaintiff, the Receiver for the Metropolitan Police District, seeks to recover from the defendants only the sum of £104, part and parcel of the figure of £153 13s. 6d. referred to in the agreed facts.

In the course of the argument Mr. Berryman conceded that by the statutes relating to the Metropolitan Police and the regulations made thereunder the receiver was compelled to pay Bowman the sum claimed in this action; he never conceded that Bowman could have sued the receiver for the money which the receiver in fact paid him; the only concession which he made was that process would have been available, such as a mandamus, whereby the receiver, if he did not pay Bowman, could be compelled to perform his statutory obligations. Mr. Gardiner referred to the whole of the relevant statutes dealing with the Metropolitan Police and with the formation, if I may so use the word, of the receiver as a corporation sole with his liability to sue and to be sued, and the regulations made under the various statutes. They were all gone into in detail by Atkinson J. in *Tatum's* case,[10] and it is sufficient for me to say on that point that I find that the receiver was legally compellable to pay the sum of £104 sued for in this action to Bowman for the reasons given by Atkinson J. in *Tatum's* case.[10]

The present action is based, and based only, on quasi-contract. Mr. Gardiner, at the very outset of his argument, made it clear that the cause of action was not based on an action per quod servitium amisit, and he cited five cases, including the recent decision of the Privy Council in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*,[11] which dealt with the per quod type of action, to show that they were irrelevant.

I am told that so far as the Metropolitan Police area is concerned there are some 70 claims pending by the receiver, who has paid moneys by way of emoluments and, no doubt, by way of hospital expenses, and so on, to police constables in the Metropolitan Police Force who have been injured and whose incapacity has been caused by the alleged negligence of drivers of vehicles. There are probably many others in districts outside the area of the Metropolitan Police. Strangely enough, possibly wisely enough, the receiver has never sought in any case, I am

[10] [1948] 2 K.B. 68.
[11] (1952) 85 C.L.R. 237; [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846.

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told, to attempt to recover moneys paid by him in such circumstances upon the basis of per quod, probably because he had the foresight to see the difficulties of the relationship between a police constable and whoever, if anyone, hereafter may be held to employ him; it was possibly thought that whoever did employ a police constable, it would not be the receiver, who is a corporation sole, so to speak, for the purpose of administering the funds of the Metropolitan Police when they have been obtained in the usual way by precepts on the ratepayers. All the claims by the receiver have been based, I am told, as they were in *Tatum's* case,[12] upon quasi-contract. I mention that merely to show the importance of ascertaining whether the 1948 decision is correct.

In deciding *Tatum's* case,[12] Atkinson J. applied the principle enunciated by Lord Wright in *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Bros.*[13] In that case Lord Wright (the other two members of the court, Romer L.J. and Macnaghten J., concurring) applied the principle stated in the edition of Leake on Contracts current in the year 1872 and cited with approval by Cockburn C.J. in *Moule* v. *Garrett* [14] in the Court of Exchequer Chamber, which principle appears with only slight verbal alteration in the current edition of Leake on Contracts (8th edition, 1931), at p. 46. In *Moule* v. *Garrett* [15] the plaintiff was the lessee and the defendant was a sub-assignee, that is to say, not a direct assignee, from the lessee of certain premises the lease of which contained a covenant to repair. While the sub-assignee was actually in possession he failed to comply with the covenant, with the result that the lessor put in a claim for dilapidations, and the amount claimed for putting the premises into conformity with the state of repair required by the covenant was £75. The £75, of course, would be damages for breach of covenant. As the assignee did not keep the premises in repair the lessor called upon the lessee to pay him the £75 damages. The lessee did so; he would, of course, have had no shadow of defence to the action, for a lessee is liable throughout the term upon his covenant contained in the lease, although the sub-assignee was equally liable to the lessor because a covenant to repair runs with the land, and any assignee, whether immediate or indirect, is liable to the lessor so long as he remains in possession of the demised premises by privity of estate. The lessee, having met the demand of the lessor for payment of the £75 damages for breach of covenant, sought to recover it from the sub-assignee. There being no privity of contract between the lessee and the sub-assignee, there was no contract to sue upon, and he therefore sued him in quasi-contract. In the Court of Exchequer he succeeded, and Channell B. said,[16] in substance, that the lessee was nothing more than a surety vis-à-vis the lessor for the performance by the sub-assignee of

[12] [1948] 2 K.B. 68.
[13] [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696.
[14] (1872) L.R. 7 Exch. 101, 104.
[15] (1870) L.R. 5 Exch. 132; L.R. 7 Exch. 101.
[16] L.R. 5 Exch. 132, 140.

his obligations, and as he had been called upon by the lessor to pay he was entitled to recover from the sub-assignee in the same way that the surety is entitled to recover from the principal debtor. In the Court of Exchequer Chamber Cockburn C.J.,[17] as I read the case, entirely agreed with the ground upon which Channell and Pigot BB. in the court below decided the case, and as other judges have decided. He added, however, that there was another principle on which the plaintiff was entitled to succeed, and said[17]: "Another ground on which the judgment below may be upheld, and, as I think, a preferable one, is that, the premises which are the subject of the lease being in the possession of the defendants as ultimate assignees, they were the parties whose duty it was to perform the covenants which were to be performed upon and in respect of those premises. It was their immediate duty to keep in repair, and by their default the lessee, though he had parted with the estate, became liable to make good to the lessor the conditions of the lease. The damage therefore arises through their default, and the general proposition applicable to such a case as the present is, that where one person is compelled to pay damages by the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the sum so paid. This doctrine, as applicable to cases like the present, is well stated by Mr. Leake in his work on Contracts, p. 41: 'Where the plaintiff has been compelled '' 'by law to pay, or, being compellable by law, has paid money '' 'which the defendant was ultimately liable to pay, so that the '' 'latter obtains the benefit of the payment by the discharge of '' 'his liability; under such circumstances the defendant is held '' 'indebted to the plaintiff in the amount.' Whether the liability is put on the ground of an implied contract, or of an obligation imposed by law, is a matter of indifference: it is such a duty as the law will enforce. The lessee has been compelled to make good an omission to repair, which has arisen entirely from the default of the defendants, and the defendants are therefore liable to reimburse him." I will refer to that in short as the "Leake" or "Cockburn" principle.

In *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Brothers*[18] the defendants, a firm of furriers, stored ten packages of a consignment of squirrel skins which they had imported from Russia in the bonded warehouse of the plaintiffs. Whilst those ten packages were in the bonded warehouse they were stolen, through no default on the part of the plaintiffs as warehousemen. Under the machinery for the collection of customs dues the Commissioners of Customs and Excise do not insist upon the payment of the dues the moment they become due in law, that is to say, at the moment of importation, but allow payment to be deferred so long as they are retained in a bonded warehouse. The goods

[17] L.R. 7 Exch. 101, 103.

[18] [1937] 1 K.B. 534.

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being stolen, could be made available by the thieves on the home market, so the Commissioners of Customs and Excise demanded the amount of the duty upon them from the plaintiffs, and the plaintiffs were forced to pay those duties. The defendants, the importers, were also, and, indeed, primarily liable, for the payment of those dues; but the dues had only to be paid once, and therefore, when the plaintiffs, the warehousemen, complied with the demand of the Commissioners of Customs and Excise and paid the dues they thereby relieved the importers of liability to pay the dues. The plaintiffs asked the defendants to repay them the amount they had paid as customs duty; the defendants refused to pay. The action was brought and Branson J. held that the plaintiffs were entitled to succeed. The action, of course, had to be based upon quasi-contract, because the plaintiffs could derive no support for their claim from the terms of the contract of bailment. In the Court of Appeal Lord Wright M.R., having dealt with the machinery for the collection of dues and emphasized that the dues originally became payable by the importer at the moment of importation into this country, said [19]: "Under these circumstances the plaintiffs claim that "they are entitled to recover from the defendants the amount "which they have paid to the Customs in respect of duties due "on the defendants' goods. They make their claim as for "money paid to the defendants' use on the principle stated in "Leake on Contracts. The passage in question is quoted in the "Exchequer Chamber by Cockburn C.J. in *Moule* v. *Garrett*,[20] "and is in these terms." Lord Wright read the passage which I have already read, and went on [21]: "This passage remains, "with a slight verbal alteration, in the eighth edition of Leake "on Contracts at page 46. The principle has been applied in a "great variety of circumstances. Its application does not "depend on privity of contract." Then he dealt with *Moule* v. *Garrett* [22] and *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*,[23] and said [24]: "The essence of "the rule is that there is a liability for the same debt resting "on the plaintiff and the defendant and the plaintiff has been "legally compelled to pay, but the defendant gets the benefit "of the payment, because his debt is discharged either entirely "or pro tanto, whereas the defendant is primarily liable to pay "as between himself and the plaintiff. The case is analogous to "that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a "right of indemnity against the principal." Having cited what he describes as "two of the numerous cases in which this "principle has been applied," Lord Wright M.R. continued [25]: "These statements of the principle do not put the obligation on

[19] [1937] 1 K.B. 534, 543.
[20] L.R. 7 Exch. 101, 104.
[21] [1937] 1 K.B. 534, 544.
[22] L.R. 7 Exch. 101.
[23] [1899] 1 Q.B. 161; 15 T.L.R. 76.
[24] [1937] 1 K.B. 534, 544.
[25] Ibid. 545.

" any ground of implied contract or of constructive or notional " contract. The obligation is imposed by the court simply under " the circumstances of the case and on what the court decides is " just and reasonable, having regard to the relationship of the " parties. It is a debt or obligation constituted by the act of the " law, apart from any consent or intention of the parties or any " privity of contract."

In *Moule* v. *Garrett*[26] Cockburn C.J. left it open as to whether the liability was to be put on the ground of an implied contract or of an obligation imposed by law. Lord Wright, in the *Brook's Wharf* case,[27] puts it on the ground of an obligation imposed by law. There is a difference of opinion, I gather, amongst distinguished academic lawyers as to which is the true principle upon which it is based. The two schools of thought can be seen by a reference to the Law Quarterly Review (1937), Vol. 53, at p. 302 on the one hand, and pp. 447 and 449 on the other, and also to an interesting article by A. T. Denning, K.C., on the *Craven-Ellis* v. *Canons Ltd.*[28] case, in the Law Quarterly Review (1939), Vol. 55, at p. 54. In *Craven-Ellis* v. *Canons Ltd.*[28] it was difficult to imply a contract because the money was paid under a contract which was held to be void, and it is difficult to imply a contract when there is an express one. It seems to me to matter little in the application of the principle which of the two schools of thought is correct. The question in either case seems to me to be: In what circumstances is a contract to be implied or, as I prefer to say, imputed, or will the law impose the obligation independently of any fictional contract? I think that the authorities establish that the answer to that question depends upon the answer to a further question: Is it fair and reasonable to imply such a contract or to impose an obligation in law? Does natural justice require it? I am at the moment only dealing with what I may call the common law application of the principle, and I shall in due course come to the application of the principle in equity.

Mr. Berryman submitted that there are five requirements for the application of the Leake principle; first, there must be the same debt; secondly, both plaintiff and defendant must be liable to the same person for that debt; thirdly, the defendant must be primarily liable for that debt, that is to say, as between himself and the plaintiff; fourthly, the plaintiff must have been compelled to pay the debt; and fifthly, the plaintiff's payment must have operated to relieve the defendant of his primary liability. Upon the common law principle I think that he is right in saying that all those requirements are necessary, provided that the words " the same debt " and the words " primarily liable " are properly understood. Mr. Berryman said, assuming that there was a debt at all in this case (which he strenuously contested)

[26] L.R. 7 Exch. 101, 104.
[27] [1937] 1 K.B. 534, 544, 545.
[28] [1936] 2 K.B. 403; 52 T.L.R. 657; [1936] 2 All E.R. 1066.

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that it was not the same debt, but that the liability, if any, in the sense of a compellable liability of the receiver to the policeman was in contract or under the requirements of statute, or possibly on a quantum meruit; in any case it was either contractual or possibly quasi-contractual, whereas the liability, if any, of the defendants was in tort for negligence. Furthermore, he said that the defendants' liability in tort, if it existed at all, was not to pay wages, which was the quality of the receiver's liability, but to pay Bowman damages for loss of faculty, and that the amount of the wages would merely be evidence which, with other matters, would assist the court to estimate the value of the loss of faculty. He said that this again shows that the two obligations, assuming they both existed, could not be the same debt.

In the first place, I think that when Lord Wright, in the *Brook's Wharf* case,[29] having re-enunciated the Leake principle, went on to say what the essence of the rule was, he was merely applying it to one of what he called the large variety of circumstances to which it was applicable, namely, the facts of the case with which he was dealing. I feel sure that by "the same debt," for example, he did not mean that it must necessarily be the same liquidated sum of money. As I have pointed out, in *Moule* v. *Garrett*,[30] it was not money in that sense at all: it was damages for breach of covenant. I understand that by the words "the same debt" Lord Wright[31] meant no more than that the third person, the person in the position of a creditor, could have recovered the same sum of money from either of the parties to the action. The cause of action for its recovery need not be the same, and indeed it was not the same in *Moule* v. *Garrett*,[32] where the claim against the lessee, had it been necessary to bring it, would have been damages for breach of covenant under the lease, whereas the claim against the sub-assignee was based upon privity of estate, because there was no privity of contract. Again as to the words "primarily liable"[33] quite obviously the word "primarily" cannot refer to point of time, because in *Moule* v. *Garrett*[34] the liability of the lessee arose under the lease, which ex hypothesi must have been earlier in time than a sub-assignment. "Primarily liable" means, in my view, liable in the sense that as between a principal debtor and a surety, both of whom are equally liable to the creditor, the principal debtor is as between themselves primarily and the surety only secondarily liable.

Mr. Berryman contends that in no circumstances whatever could Bowman ever have included this loss of wages in his claim against the defendant tortfeasors. He says, first of all, that the money had already been paid to him by the receiver and for that reason alone he could not have recovered it from the defendants.

[29] [1937] 1 K.B. 534, 544, 545.
[30] L.R. 7 Exch. 101.
[31] [1937] 1 K.B. 534, 544.
[32] L.R. 7 Exch. 101.
[33] [1937] 1 K.B. 534, 545.
[34] L.R. 7 Exch. 101.

and secondly, that if it had not been paid to him by the receiver he still could not have recovered it because it would have been a complete defence to a claim for special damage based upon that loss to say that, although he had not been paid it by the receiver, in fact he had a legal right to recover it from the receiver. I do not accept either of those propositions in law. As to the second point, in my view, a person in the position of Bowman can recover what he has lost in respect of wages if he has not been paid either from the receiver or from the tortfeasor whose negligence injures him, and is entitled to elect which of the two he will sue. Mr. Berryman contended that no person injured by a tort is entitled to take any step which would have the effect of inflating his claim against the tortfeasor. It is perfectly true he is not entitled to take any such step which the law would regard as unreasonable, but I am satisfied that the law raises no objection to a man adopting a high moral or high-minded attitude in saying: "It is perfectly true that I "can sue the receiver" (assuming that Mr. Berryman's contention that he can never sue the receiver is wrong) "and can "recover from him or I can recover from the person who has "injured me. But I want to be fair. As both courses are "open to me, I prefer to sue and recover the money from "the man who has been the cause of my no longer being "able to give any consideration to the receiver for the wages "he undertook to pay me during the time of my incapacity." I am satisfied that he has an election, and if he had not been paid by the receiver it would be no answer whatever to a claim for loss of wages included in the special damage to say that he could have sued the receiver and recovered them from him. It is, therefore, unnecessary to consider whether, even if he had been paid by the receiver, he could still have recovered from the tortfeasor, although, of course, if he did so he would not be able to retain both sums, but would recover it solely as a trustee to repay it to the receiver.

I therefore arrive at the conclusion that Bowman, if he had not already been paid by the receiver, would have been entitled to include and recover against the defendants his loss of wages which upon that footing is agreed to be the sum of £104. The question can never arise in an action of this kind where the plaintiff has not in fact paid the injured party's wages, because no action based on quasi-contract like this will arise until the plaintiff has actually paid the sum of money which he seeks to recover from the defendants, and that is why it is agreed that the injured party made no claim for that sum in his action against the defendants.

I am satisfied that Lord Wright, in the *Brook's Wharf* case,[35] in detailing the conditions which, he said, were the essence of the rule, was in no way seeking to narrow its interpretation or to

[35] [1937] 1 K.B. 534, 545.

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narrow the words used by Leake, and by Cockburn C.J. in *Moule* v. *Garrett*.[36] I am fortified in that view by the observations of Lord Wright only six years later in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*,[37] the well-known case which overruled *Chandler* v. *Webster*[38] and other "coronation cases"; he said[39]: "It is clear that any civilized "system of law is bound to provide remedies for cases of what has "been called unjust enrichment or unjust benefit, that is to "prevent a man from retaining the money of or some benefit "derived from another which it is against conscience that he "should keep. Such remedies in English law are generically "different from remedies in contract or in tort, and are now recog-"nized to fall with a third category of the common law which has "been called quasi-contract or restitution. The root idea was "stated by three Lords of Appeal, Lord Shaw, Lord Sumner and "Lord Carson in *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.*,[40] "which dealt with a particular species of the category, namely, "money paid under a mistake of fact. Lord Sumner referring to "*Kelly* v. *Solari*,[41] where money had been paid by an insurance "company under the mistaken impression that it was due to an "executrix under a policy which had in fact been cancelled, "said: 'There was no real intention on the company's part to "'enrich her.' Payment under a mistake of fact is only one "head of this category of the law. Another class is where, as in "this case, there is prepayment on account of money to be paid "as consideration for the performance of a contract which in the "event becomes abortive and is not performed, so that the money "never becomes due. There was in such circumstances no "intention to enrich the payee. This is the class of claims for "the recovery of money paid for a consideration which has "failed. Such causes of action have long been familiar and were "assumed to be commonplace by Holt C.J. in *Holmes* v. "*Hall*[42] in 1704."

Lord Wright continued[43]: "By 1760 actions for money had "and received had increased in number and variety. Lord "Mansfield C.J., in a familiar passage in *Moses* v. *Macferlan*,[44] "sought to rationalize the action for money had and received, "and illustrated it by some typical instances. 'It lies,' he said, "'for money paid by mistake; or upon a consideration which "'happens to fail; or for money got through imposition (express, "'or implied); or extortion; or oppression; or an undue advan-"'tage taken of the plaintiff's situation, contrary to laws made "'for the protection of persons under those circumstances. In "'one word, the gist of this kind of action is, that the defen-"'dant, upon the circumstances of the case, is obliged by the

[36] L.R. 7 Exch. 101, 104.
[37] [1943] A.C. 32; 58 T.L.R. 308; [1942] 2 All E.R. 122.
[38] [1904] 1 K.B. 493; 20 T.L.R. 222.
[39] [1943] A.C. 32, 61.
[40] [1926] A.C. 670, 696; 42 T.L.R. 644.
[41] (1841) 9 M. & W. 54.
[42] (1704) Holt K.B. 36.
[43] [1943] A.C. 32, 62.
[44] (1760) 2 Burr. 1005, 1012.

" ' ties of natural justice and equity to refund the money.' " Lord Mansfield prefaced this pronouncement by observations " which are to be noted[45]: ' If the defendant be under an " ' obligation from the ties of natural justice to refund; the law " ' implies a debt and gives this action (sc. indebitatus assumpsit) " ' founded in the equity of the plaintiff's case, as it were, upon " ' a contract (" quasi ex contractu " as the Roman law " ' expresses it).' Lord Mansfield does not say that the law " implies a promise. The law implies a debt or obligation which " is a different thing. In fact, he denies that there is a contract; " the obligation is as efficacious as if it were upon a contract. " The obligation is a creation of the law, just as much as an " obligation in tort. The obligation belongs to a third class, " distinct from either contract or tort, though it resembles " contract rather than tort. This statement of Lord Mansfield " has been the basis of the modern law of quasi-contract, " notwithstanding the criticisms which have been launched " against it. Like all large generalizations, it has needed and " received qualifications in practice. There is, for instance, the " qualification that an action for money had and received does " not lie for money paid under an erroneous judgment or for " moneys paid under an illegal or excessive distress. The law has " provided other remedies as being more convenient. The " standard of what is against conscience in this context has " become more or less canalized or defined, but in substance the " juristic concept remains as Lord Mansfield left it. The gist of " the action is a debt or obligation implied, or, more accurately, " imposed, by law in much the same way as the law enforces as " a debt the obligation to pay a statutory or customary impost."

Later Lord Wright said[46]: " In fact, the common law still " employs the action for money had and received as a practical " and useful, if not complete or ideally perfect, instrument to " prevent unjust enrichment, aided by the various methods of " technical equity which are also available, as they were found " to be in *Sinclair* v. *Brougham*."[47] So much for the common law application of the principle.

I now come to the equitable application of the principle, which is to broaden or, at any rate, to render it more flexible where necessary to meet the requirements of justice. In this connexion I refer to the judgment of Vaughan Williams L.J. in *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*.[48] The question raised in that case was whether an underlessee, who was a mortgagee by sub-demise from an assignee of the lessee and who was in possession of the demised lands, could be sued for money paid by the lessee who had been compelled, according to his covenant, to pay the rent reserved by the principal lease. The demise contained an

[45] Ibid. 1008.
[46] [1943] A.C. 32, 64.
[47] [1914] A.C. 398, 452; 30 T.L.R. 315.
[48] [1899] 1 Q.B. 161.

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express covenant by the mortgagee, if he entered into possession, to keep down the rent. The mortgagee did enter into possession and he did not pay the rent. Consequently the lessee was forced to pay it and the lessee sought to recover it from the mortgagee. Unlike *Moule* v. *Garrett*,[49] there was not only no privity of contract between the mortgagee and the lessor, but there was no privity of estate, since there is no privity of estate between a mortgagee by sub-demise (who is an underlessee) and the lessor, and it was held that the lessee could not recover because there never was a liability on the part of the mortgagee towards the lessor. Vaughan Williams L.J. said[50]: "These being the conditions upon which the defendants in *Moule* v. *Garrett*,[51] the sub-assignees of the lease, were held liable, it is necessary to consider whether one finds these conditions in principle present in a case in which lessees, who have been compelled to pay the rent reserved by the lease, are seeking to get recoupment from underlessees of an assignee of the lease, who are in possession as mortgagees." Then later on he said[52]: "I am now dealing only with the principle upon which the common law liability is based. There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued. The two principles are well illustrated by the case of *Hunter* v. *Hunt*[53] and the observations of Eyre C.B. in *Deering* v. *Winchelsea*.[54] The former was a case in which one underlessee of a separate portion of premises, the whole of which were held under one original lease at an entire rent, who had paid the whole rent under threat of distress, brought an action against an underlessee to recover from him a proportion of the money which he had so paid as money paid to his use, and it was held that at law he had no right of action. In the latter case, the Lord Chief Baron, in dealing with the principle in equity, takes as an illustration of the equitable principle a series of cases, in some of which the defendant seems to have been under no liability

[49] L.R. 7 Exch. 101.
[50] [1899] 1 Q.B. 161, 173.
[51] L.R. 7 Exch. 101.
[52] [1899] 1 Q.B. 161, 174.
[53] (1845) 1 C.B. 300.
[54] (1787) 2 Bos. & P. 270.

" to be sued, but in which the goods of one had been legally taken " or sacrificed for the benefit, not of himself alone, but of himself " and others, and says, that [55] ' the reason is that they are all in " ' aequali jure, and, as the law requires equality, they shall " ' equally bear the burden. This is considered as founded in " ' equity. The principle operates more clearly in a court of " ' equity than at law. At law the party is driven to an audita " ' querela or scire facias to defeat the execution and compel " ' execution to be taken against all. There are more cases of " ' contribution in equity than at law.' "

Later Vaughan Williams L.J. further said [56]: " For these " reasons I think that the right of the lessor to distrain or re-enter " does not constitute a liability in the underlessee to the lessor " within the meaning of the condition of the common law principle. " But the plaintiff may be entitled to recover within the equitable " principle, if he has been compelled to pay or bear the burden, " and can establish that the defendant has such an interest or " benefit as to make the maxim apply ' Qui sentit commodum " ' sentire debet et onus '; but in my judgment an underlessee " has no such interest in the lease or benefit from the payment " of the rent as to make that maxim apply or to bring him within " the equitable principle. The equitable principle seems to me " based upon natural justice requiring that equity should " neutralise ' inter se ' the accident that the burden has been " borne by one for the benefit of others associated with him in " interest, whether such incidence of burden is the result of " election of a plaintiff who might have sued all those interested, " or whether it is the result of the requirements of the law as " to the parties to actions, or whether it is the result of what " may be more properly called ' accident ' like the ' jettison ' of a " part of a cargo severally owned, or the seizure of wines on " behalf of the Crown in right of prisage. In each of these cases " the application of the equitable principle depends on com- " munity of interest in something in respect of which one has " borne a burden for the benefit of another or others." I remind myself that the corresponding words used by Lord Wright in *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Brothers* [57] were: " The obligation is imposed by the court simply under the " circumstances of the case and on what the court decides is " just and reasonable, having regard to the relationship of the " parties." " Just and reasonable, having regard to the relation- " ship of the parties " is the way it is put by Lord Wright. " Community of interest in something in respect of which one " has borne a burden for the benefit of another or others " is the way the equitable principle is formulated by Vaughan Williams L.J.

Mr. Berryman submitted that if the receiver was under any duty to pay Bowman, that duty continued and was not affected

[55] Ibid. 273.
[56] [1899] 1 Q.B. 161, 176.
[57] [1937] 1 K.B. 534, 545.

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by the negligence of the defendants. That is incontrovertible. Therefore, he says that the receiver had lost nothing by way of the negligence, save the loss of service, which was a loss of service, not to the receiver but to the Crown. That would have been a cogent argument had this case been based upon per quod, and I think that Mr. Gardiner was right in saying that what that argument really amounts to is this: "If you had "sued me per quod servitium amisit, I should have had two "answers: first, there is no relationship of master and servant "properly so called between the receiver and the metropolitan "policeman; secondly, in any case it is not you who have lost "the services of the police officer; it is someone else. You are "merely the trustee for the administration of the police funds." Of course, in most cases of quasi-contract the plaintiff does sustain a loss because he is called upon to pay a debt for which the defendant is primarily liable. It is not essential, however, to a cause of action based on quasi-contract that the plaintiff should sustain a loss at all. It is sufficient in another type of case that the defendant should have come into possession of moneys which it would be unconscionable for him to recover, for example, the receipt of bribes: see *Reading* v. *Attorney-General*.[58]

In his Law of Quasi-Contracts (1952) Professor Winfield, at p. 62, deals with the form of quasi-contract arising from compulsory discharge of the liability of another person, and he says at p. 63: "In spite of our endeavour to extract from the decided "cases some broad general principle underlying the law as to "compulsion in quasi-contract, the utmost we can do is to "enlarge our conclusion that, where A, under what the law "regards as compulsion, has paid money to B or to C in such "circumstances that the law considers that its retention by B "(where the payment was to B), or B's failure to recoup A "(where the payment was to C), would constitute an unjust "benefit to B at the expense of A, A can recover the amount "of payment from B. Vague as this statement is, it is impos-"sible to make it more exact, for (i) what the law regards as "'compulsion' does not tally with the layman's idea of it; a "striking illustration of this is the limited interpretation attached "by the courts to the phrase 'voluntary payment'; the cases, "as a whole, do not warrant any hard and fast definition of "'unjust benefit'; most of them can be grouped under one "or other of the first four classes mentioned below, but, as is "shown under the fifth class, the preceding four classes are not "exhaustive." He gives the first class: "Payment, under the "application of legal process, of money not in fact due." The second class with which I am primarily concerned is on p. 73: "Payment, under a legal obligation, to a third party, of money "which the defendant was also liable to pay to the third party." Professor Winfield then deals with Lord Wright's judgment in

[58] [1951] A.C. 507; [1951] 1 T.L.R. 480; [1951] 1 All E.R. 617.

the *Brook's Wharf* case [59] and a little bit lower down on p. 74 cites the following passage from Rowlatt's Law of Principal and Surety, 3rd ed. (1936), p. 173: "Quite apart from suretyship, "there is a broad rule in equity that 'if, as between several "'persons or properties all equally liable at law to the same "'demand, it would be equitable that the burden should fall in a "'certain way, the court will so far as possible, having regard to "'the solvency of the different parties, see that, if the burden is "'placed inequitably by the exercise of the legal right, its inci-"'dence should afterwards be readjusted.'" This passage was also cited with approval by Clauson L.J. delivering judgment of the court in *Whitham* v. *Bullock*.[60] In that case the court also said that the principle had been authoritatively expounded in the judgment of Vaughan Williams L.J. in *Bonner's* case,[61] and also by Lindley L.J. in *Edmunds* v. *Wallingford*.[62] Moreover, in *Whitham* v. *Bullock* [63] the principle was held to apply in equity where the plaintiffs in the quasi-contract action would not have been liable for the debt they paid in an action at law. The head-note reads [63]: "*Held*, by the Court of Appeal, that inasmuch as "the plaintiffs had paid the whole of the sum claimed by the "landlord under the threat of the process of distress, though they "were not liable to be directly sued for that amount, they were "entitled to sue the defendant for reimbursement by her of the "defendant's proportion of the rent so paid by the plaintiffs." The equitable principle recognizes that the requirements of justice may necessitate the relaxation of the rule that both should be liable for the same debt in the sense of being legally compellable to pay it.

Finally, I quote the fifth class referred to by Professor Winfield because he says that it shows that the classes are not exhaustive, and because he refers to what I may call the "progressive" as opposed to the static attitude of the law where the requirements of justice demand some elasticity in the application of the principle. He says, at page 80: "Compulsion arising "from other circumstances. Cases have arisen that cannot very "well be affiliated to any of the preceding classes, and that "depend so much on their own peculiar facts that it would be "difficult to mark them as additional classes. Moreover, it is "probable that new cases will similarly arise in the future, for "this branch of the law is elastic, and rightly so, for the needs "of the community make it progressive." In other words, the circumstances in which the principle is to be applied can never be catalogued or rendered precise.

Mr. Gardiner, basing himself upon the authorities and upon the propositions in Professor Winfield's book, submitted the following propositions: (1) Where A under what the law regards as compulsion has paid money to C in such circumstances that the

[59] [1937] 1 K.B. 534, 543.
[60] [1939] 2 K.B. 81, 83; [1939] 2 All E.R. 310.
[61] [1899] 1 Q.B. 161.
[62] (1885) 14 Q.B.D. 811, 814.
[63] [1939] 2 K.B. 81.

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law considers that B's failure to recoup A would constitute an unjust benefit to B at the expense of A, A can recover the amount of the payment from B. (2) If C is injured by the negligence of B, B is liable in damages to C. No one disputes that. (3) If in relation to a particular sum £X, in this case £104, the sole reason why that sum cannot be recovered by C as part of such damages is that it has already been paid to him by A who was legally obliged to pay him, B's failure to recoup A would constitute an unjust benefit to B at the expense of A. Those propositions are based both upon the common law and upon the equitable application of the rule. In my judgment, they are sound and are supported by the authorities. It is true, as Professor Winfield pointed out, that it is not always easy to decide what constitutes an unjust benefit, but I feel little difficulty in reaching a conclusion upon this point upon the facts of the present case. If Mr. Gardiner's third proposition is not correct, that is to say, if the failure of the defendants in this case to recoup the receiver does not mean that they have secured an unjust benefit at the expense of the receiver, and if the present form of action does not lie to compel such recoupment, then it would seem that the receiver for the metropolitan police, and other legal entities occupying similar positions, have no legal redress against persons who by their negligence injure members of the police force, and so deprive the receiver of their services; that is to say, of the consideration for the wages that he is compelled to pay to them; whilst the negligent parties (or their insurers) will continue to reap the benefit of the receiver's payments in that such payments will serve to exonerate them from liability pro tanto. I am not in this connexion confusing quasi-contract with "per "quod." On the contrary, I say "no legal redress," because so far as the latter cause of action is concerned it would no longer be safe to place too much reliance on the decision of A. T. Lawrence J., in *Bradford Corporation* v. *Webster*,[64] since the recent judgment of the Privy Council in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*,[65] and the even more recent decision of the present Lord Chief Justice in *Inland Revenue Commissioners* v. *Hambrook*.[66]

I have already held that the receiver, being compellable by law, has paid to Bowman £104 which he seeks to recover, and which the defendants were ultimately liable to pay, and that if Bowman had not received his wages from the receiver he could and would have recovered them from the defendants in the action which he brought in the Queen's Bench Division and he would have had his damages in that action increased by precisely £104. I am satisfied that the defendants are primarily liable to pay the £104 to Bowman because it is their negligence which has deprived

[64] [1920] 2 K.B. 135; 36 T.L.R. 286.

[65] [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846.

[66] [1956] 2 W.L.R. 919; [1956] 1 All E.R. 807; [1956] 3 W.L.R. 643 (C.A.).

the receiver of the whole of the consideration for this payment. Applying the "Leake rule," I hold, therefore, that the defendants are indebted to the receiver in the amount claimed.

In *Tatum's* case[67] Atkinson J. made it clear[68] that the action before him was not based on loss of service but, as this action is, was based purely on quasi-contract. Mr. Berryman criticized a passage where Atkinson J. said[69]: "In this case I "hold that it was through the sole negligence of the defendant "that the receiver has incurred the expenses which he is claiming "to recover from the defendant." In that passage I think that Atkinson J. was referring merely to the incurring of the hospital expenses, and the passage may be accurate upon that ground, but he does repeat it when he was clearly dealing with pay and allowances, and in that context there does seem to be some ground for the criticism, since it was not the negligence of the defendants which causd or compelled the receiver to pay the wages and allowances. The negligence of the defendants had nothing to do with that. The liability to pay the wages and allowances arose upon the acceptance of the police constable as a member of the Metropolitan Police Force and arose either by statute or under contract. The default of the defendants was in rendering the police constable incapable of giving any return for the wages and allowances in this case for a period of seven months, and the action succeeds not because the receiver thereby lost those services but upon the application of the principles to which I have already referred.

In the result, therefore, I agree with the conclusion at which Atkinson J. arrived in *Tatum's* case,[70] although I have preferred to express in my own words my reason for arriving at the same conclusion. Had I taken the contrary view, I should have done so with such doubt and hesitation that I should have followed the decision of Atkinson J.,[71] for the reasons which I gave at the outset of my judgment. Indeed, I have found the point of law which arises in this case so difficult to decide that if I felt any conviction upon the matter at all I should be more likely to feel convinced that it was I, and not Atkinson J., who was wrong.

Therefore, there must be judgment for the plaintiff for the sum of £104.

Solicitors: *Ponsford & Devenish, Tivendale & Munday; Herbert Smith & Co.*

J. F. L.

[67] [1948] 2 K.B. 68.
[68] Ibid. 72.
[69] Ibid. 71.
[70] Ibid. 73.
[71] [1948] 2 K.B. 68.

[MONMOUTHSHIRE SUMMER ASSIZES.]

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June 12, 13, 14, 15.

Lynskey J.

* MONMOUTHSHIRE COUNTY COUNCIL *v.* SMITH.

Police — Wages — Wages during incapacity — Police officer injured through negligence of third party—County council continuing to pay officer's emoluments during sickness—County council's claim to be reimbursed by third party.

Restitution—Unjust enrichment. Judicial Precedent—Decision at first instance—Whether binding on other judge—Ratio of decision of Court of Appeal.

A police constable, whose emoluments were by statute payable out of the county fund of the plaintiff county council, was injured in the execution of his duty by the negligence of the defendant. As a result, after a period of sick leave, a period on light duty only, and a further period of sick leave, during which periods he received his emoluments in full, the constable was retired from the force on pension. The constable brought a successful action for damages for personal injuries against the defendant, but made no claim in respect of loss of wages during the periods of sick leave and light duty and brought into account his pension in the claim for loss of wages during the period after his retirement and in the estimate of future loss of wages. The county council, having paid the constable his emoluments in full during the periods of sick leave and light duty, and his pension subsequent to his retirement, and having also paid the fees of the doctor who certified the constable to be unfit, now claimed to be reimbursed these sums by the defendant on the ground of unjust enrichment:—

Held, that as none of the sums in question could have been recovered by the constable in his action against the defendant, the constable having suffered no loss in respect thereof, the county council had no cause of action and their claim failed.

Brook's Wharf & Bull Wharf Ltd. v. *Goodman Bros.* [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696 applied.

Metropolitan Police District Receiver v. *Tatum* [1948] 2 K.B. 68; [1948] 1 All E.R. 612 and *Receiver for the Metropolitan Police District* v. *Croydon Corporation*, ante, p. 1113; [1956] 2 All E.R. 785 not followed.

Per curiam. In the *Croydon* case the judge apparently took up the position that there was a liability in the defendant to pay the relevant sum to the constable. The *Brook's Wharf* principle applies only where a liability for the same debt rests on the plaintiff and the defendant in the sense that the third person could have recovered from either, though one is primarily liable as in the case of principal debtor and surety.

ACTION.

On November 7, 1952, William Frank Nash, a police constable serving in the Monmouthshire Constabulary, was injured while in the execution of his duty by a motor-car negligently driven by the defendant, Eric George Smith. On December 21, 1952, Nash was certified unfit for duty by a police surgeon and went on sick leave. When he returned to duty on February 21, 1953, he was able to do light work only and on July 3, 1954, he again became totally unfit and was compulsorily retired as from December 31, 1954.

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

During the 35 weeks when he was on sick leave and the 71 weeks when he was on light duty only, Nash was entitled to and received full pay and allowances (including a house allowance in respect of the rent of his house), and after December 31, 1954, he was entitled to and received a pension. By virtue of section 30 (3) of the Local Government Act, 1888,[1] section 33 and the Third Schedule to the Police Act, 1890,[1] and the regulations made under the Police Act, 1919, and the Police Pensions Act, 1948,[1] plaintiffs were obliged to make these payments out of their county fund.

On February 16, 1956, Nash recovered damages from the defendant in an action for negligence. He did not, however, claim in respect of loss of wages prior to December 31, 1954, as he had lost none, and his pension was taken into account in assessing the damages for the period after his retirement. The plaintiffs now claimed that they should be reimbursed the following sums, totalling in all £751 18s.: (i) full pay and allowances (other than house allowance) paid to Nash for the periods when he was on sick leave; (ii) one half of the full pay and allowances (other than house allowance) paid to Nash for the period when he was on light duty; (iii) the house allowance paid to Nash for the periods when he was on sick leave; (iv) one half of the house allowance paid to Nash for the period when he was on light duty; (v) the pension paid to Nash for the period from his retirement down to the date of his action against the defendant, and (vi) fees paid to the police surgeon in respect of certificates given by him in connexion with Nash's disablement. The plaintiffs claimed that these sums, which they said had been paid to or on behalf of Nash, were sums which the defendant was ultimately liable to pay.

John Bussé Q.C. and *R. C. Hutton* for the plaintiffs.
R. G. Micklethwait Q.C. and *C. N. Pitchford* for the defendant.

The following cases were cited: *Lampleigh* v. *Brathwait*[2]; *Dawson* v. *Linton*[3]; *Moule* v. *Garrett*[4]; *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*[5]; *Fisher* v. *Oldham Corporation*[6]; *Brook's Wharf & Bull Wharf Ltd.* v. *Goodman Brothers*[7]; *Metropolitan Police District Receiver* v. *Tatum*[8]; *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)*[9]; *Receiver for the Metropolitan Police District* v. *Croydon Corporation.*[10]

[1] The relevant provisions of these enactments are set out in the judgment.
[2] (1615) Hob. 105.
[3] (1822) 5 B. & Ald. 521.
[4] (1872) L.R. 7 Exch. 101.
[5] [1899] 1 Q.B. 161; 15 T.L.R. 76.
[6] [1930] 2 K.B. 364; 46 T.L.R. 390.
[7] [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696.
[8] [1948] 2 K.B. 68; [1948] 1 All E.R. 612.
[9] (1952) 85 C.L.R. 237; affd. P.C. [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846.
[10] Ante, p. 1113; [1956] 2 All E.R. 785.

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LYNSKEY J. In this case the plaintiffs are claiming from the defendant, Eric George Smith, six sums totalling in all £751 18s., as money which, by reason of the defendant's negligence in causing personal injury to a Police Constable William Frank Nash, the defendant was ultimately liable to pay by way of damages, and which by reason of their statutory obligations the plaintiffs have paid to or on behalf of the said William Frank Nash. The defendant, by his defence, denies that he was liable to pay any one of the said six sums to William Frank Nash either ultimately or at all by reason of his admitted negligence.

The facts of the case, which although not admitted are not really in dispute, are that the Monmouthshire Standing Joint Committee are the police authority for the County of Monmouth. The police fund for that area is the county fund of Monmouthshire County Council, under the provisions of the Police Act, 1890, section 33 and the Third Schedule thereto. By section 30 (3) of the Local Government Act, 1888: "all such expenditure "as the said joint committee determine to be required for the "purposes of the matters above in this section mentioned"—that is to say, inter alia, police purposes and buildings—"shall "be paid out of the county fund, and the council of the county "shall provide for such payment accordingly." The effect of this section is that the county council must pay or provide out of the county fund all sums required of them by the standing joint committee, and they have no discretion in the matter.

On March 11, 1947, William Frank Nash, who was then aged 25 years and was a married man, was admitted to the Monmouthshire Constabulary as a constable, and continued to serve in the force as a constable until 1954. In November, 1952, he was selected by the chief constable to attend a detective training course at the police college near Preston in Lancashire. He attended the course, living in a hut in the police college grounds, attending lectures in the college building and feeding there, and using the common room there. On November 7, 1952, one of the lecturers told him that he would have to deliver a lecture on the following day to his fellow students. The set lectures finished at 5.30 in the afternoon, but thereafter he was preparing his lecture for the next day and was asking certain questions of his instructor, Detective Sergeant Prescott, who advised him to go for a breath of air, and, if he was still worried about his lecture on his return, to see the instructor in the common room. Nash went out with another student from the Essex Constabulary, and whilst out they had a drink at a licensed house. Nash and his companion were then returning to the police college, for the purpose of Nash continuing his preparation for his lecture and later to have supper, and he was on the footwalk in Gib Lane, Hoghton, near Preston, when the defendant, a member of the Derbyshire Constabulary, came along driving his Ford 8 h.p. saloon motor-car in the same direction as Nash. The motor-car came into collision with Nash who was on the footwalk, and as a

result Nash sustained a severe injury to the ulnar nerve of his right elbow.

Although severely hurt Nash continued with his course and passed the examination at the end of the course. He returned to Monmouth on December 20, 1952, and reported sick on December 21, 1952, and was certified as unfit for duty by the police surgeon, Dr. Jordan. He remained off work until February 21, 1953, when he asked to be given some work and returned to light duties, such as attending the telephone, running messages and serving summonses, which he did for some 71 weeks. On July 3, 1954, he became totally unfit again and was off police work thereafter. On October 4, 1954, Dr. Jordan certified him as disabled from performing his duty as a police constable, and that the disablement was likely to be permanent, and the doctor assessed the disablement as 70 per cent., and certified for the purpose of the supplemental pension that his injuries were sustained in the execution of his duty. On the report of the chief constable the standing joint committee recommended Nash's compulsory retirement and payment of the statutory pension and a supplemental pension, totalling in all £270 1s. 3d. per annum, as from December 31, 1954, which was duly paid and is still being paid.

The pay of the police is provided for by the Police Act, 1919, section 4 (1) of which provides: "It shall be lawful for the "Secretary of State to make regulations as to the government, "mutual aid, pay, allowances, clothing . . . expenses and "conditions of service of the members of all police forces within "England and Wales, and every police authority shall comply "with the regulations so made." The police authority are, of course, under the Police Act, 1890, the standing joint committee. In pursuance of the powers conferred upon him the Home Secretary has issued several statutory instruments. The Police Regulations, 1952 (S.I. 1952, No. 1704) deal, inter alia, with pay. Regulation 23 deals with the rate of pay of constables and others by reference to the First Schedule, Part I. Regulation 28 deals with rent allowances, and regulation 33 with boot allowances. I need not deal with the payments and allowances in detail, as the figures stated in the amended statement of claim were admitted before me as having been paid to Nash, and that such payments were in accordance with the scales set out in the regulations of 1952, and the Police Regulations, 1954 (S.I. 1954, No. 27).

It appears from the terms of the regulations that police officers are entitled to these rates of pay and allowances so long as they remain members of the police force, and even although unfit for duty as a result of illness or injury. Regulation 49 of the Police Regulations, 1952, provides: "A member of a police "force shall not be entitled to be absent from duty on account "of injury or illness unless a registered medical practitioner has

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" certified him to be unfit for duty or in quarantine." Regulation 50 of the same regulations provides: " There shall be " deducted from the pay of a member of a police force the amount " of any sickness benefit under the National Insurance Acts, " 1946 to 1952, or injury benefit under the National Insurance " (Industrial Injuries) Acts, 1946 to 1952, to which he may be " entitled."

The effect of these regulations and the provisions of the Police Act, 1919, is that, even although a police officer is totally incapacitated as a result of an injury received in an accident he is still entitled to full pay and allowances, so long as he remains a member of the force and until he resigns or is compulsorily retired.

The Police Pensions Regulations, 1949 (S.I. 1949, No. 1241), contain the regulations issued by the Home Secretary dealing with the question of pensions. By regulation 1 it is provided: " (1) Subject to the provisions of these regulations, every man " or woman who is a regular policeman, that is to say, a member " of a home police force who is not an auxiliary policeman and " a member of an overseas corps who is a reversionary member " of a home police force, shall, on retiring from the force of which " he is a member, be entitled to an award under these regula- " tions. (2) Subject to the provisions of these regulations, every " man or woman who is permanently disabled as the result of " any injury or disease whether of body or mind (hereafter in " these regulations referred to as ' an injury ') received without " his own default in the execution of his duty as a member of a " police force shall be entitled to an award under these regula- " tions on retiring from the police force or, where he has retired " before becoming disabled, on the date when he becomes so " disabled which, if it cannot be ascertained, shall be taken to be " the date when the claim that he is disabled is first made known " to the police authority." By regulation 2 it is provided: " An " award which is payable on retirement shall be payable by the " police authority of the force of which the person in question " was a member at the time of his retirement." Regulation 3 provides: " (1) A pension shall be for life unless it is forfeited " under the Act or varied, suspended or terminated under these " regulations. (2) The amount of a pension payable to a person " who has been a member of a police force shall, in the manner " hereafter provided, be calculated with reference to his average " pensionable pay and shall be payable in respect of each year " after his retirement." Regulation 5 provides: " Where a " regular policeman retires from a police force on the ground " that he is permanently disabled, the award shall be an ill-health " award which—(*a*) if at the time when he so retires either—(i) he " is entitled to reckon ten years' pensionable service, or (ii) his " disablement is the result of an injury received in the execution " of his duty, shall be a pension (hereafter in these regulations

" referred to as an ' ill-health pension '), and (*b*) in other cases, " shall be a gratuity."

Nash had served some six years or more before he met with this injury. He had served seven years at the time of his compulsory retirement, but he had not served 10 years, but the police surgeon had certified that his disablement was the result of an injury received in the execution of his duty. That certificate was given under regulation 43 of the regulations of 1949, which provides: " (1) Subject as hereinafter provided, the question " whether a person is entitled to any and, if so, what awards " under these regulations shall be determined in the first instance " by the police authority. (2) Where the police authority are " considering whether a person is disabled they shall refer for " decision to a duly qualified medical practitioner selected by " them the following questions:—(*a*) whether the person con- " cerned is disabled, (*b*) whether the disablement is likely to be " permanent, and, if they are further considering whether to " grant a supplemental pension, shall so refer the following " questions:—(*c*) whether the disablement is the result of an " injury received in the execution of duty, and (*d*) the degree of " the person's disablement, and, if they are considering whether " to revise a supplemental pension, shall so refer question (*d*) " above. . . (4) The certificate of the selected medical practi- " tioner on the questions referred to him under the preceding " provisions of this regulation shall, subject to the provisions of " regulations 44 and 45, be final." I need not deal with regulations 44 and 45, because they do not assist in this case, but they give a right of appeal to the police officer to a medical referee, if he objects to the decision of the medical practitioner.

Regulation 7 provides for a policeman's supplemental pension: " (1) Where a member of a police force or a person who has " ceased to be such a member on or after the appointed day is " permanently disabled as a result of an injury received without " his own default in the execution of his duty (hereafter in this " regulation referred to as the ' relevant injury ') the award " shall "—the word is " shall "—" include a supplemental pen- " sion in respect of any week in respect of which—(*a*) none of the " payments described in paragraph (3) is payable to him; or (*b*) if " one or more of the said payments is payable, that payment or " the aggregate of those payments, as the case may be, is less " than the standard amount appropriate to his case determined " in accordance with Part IV of the First Schedule to these " regulations."

Regulation 36 deals with pensionable pay: " (1) The pension- " able pay of a member of a police force shall be his pay at the " rate to which he is, from time to time, entitled. (2) The " average pensionable pay of a member of a police force shall " be the aggregate of his pensionable pay during the three years " immediately preceding the relevant date, ignoring any tem- " porary reduction in rate of pay by way of punishment. . . ."

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I only read that to show that the fixing of the pension seems to have reference to the officer's service with the police force, apart from any question of incapacity thereafter. Regulation 54 deals with who is responsible for the payment, and provides: "(1) Subject to the provisions of this regulation, all payments "by or to a police authority under these regulations shall be "paid out of or into the police fund." As I have already pointed out, the police fund in this case is the fund of the Monmouthshire County Council.

I do not think that regulation 77 arises here. There seemed to be a question directed in cross-examination whether it did or not, but regulation 77 defines what is the meaning of an injury received in the execution of duty by a member of the police force, and it means: "an injury received in the execution of "that person's duty as a constable and, where the person con- "cerned is an auxiliary policeman, during a period of active "service as such, . . . and includes any injury received while on "duty and while on a journey necessary to enable him to report "for duty or to return home after duty."

In this case the doctor has given a certificate that Nash received these injuries in the execution of his duty. I have set out the facts of the accident and the circumstances of it, and I am satisfied that the doctor's decision there is right, even though I have no power to deal with it on the facts that are before me. Nash was paid in full his salary and allowances from December 21, 1952, the day he reported sick, off duty, until December 31, 1954, and thereafter he was paid the pension to which he was entitled under the Pensions Regulations. These figures are set out in the amended statement of claim and they are also admitted by the defendant as having been paid. On November 4, 1953, proceedings were commenced by Nash, jointly with the Monmouthshire Standing Joint Committee as plaintiffs, against the present defendant. Nash claimed damages for his personal injuries and losses, but made no claim by way of special damage or otherwise for any loss of wages. Obviously he could not, because no such loss had been sustained. The standing joint committee, as second plaintiffs, claimed the salary and allowances which they had paid to him, as damages for loss of the first plaintiff's services.

After the decision of the Privy Council in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[1] the standing joint committee discontinued their action, realizing that it was useless to pursue it on the basis of lost services. Nash, however, continued his action, which was heard by Hallett J. at these assizes on February 16 of this year. In that action no claim was put forward, as I have already indicated, for loss of salary or earnings, notwithstanding the discontinuance by the standing joint committee of the county of their claim for the earnings they had paid to him. There was, however, an

[1] [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846.

agreement as to special damage as from December 31, 1954, that is, for the period after the county council had ceased to pay him his full pay and allowances and had paid him a pension. The special damage, taking Nash's present earnings plus his pension, minus his house allowance, as against his police pay, was agreed at a sum of £51 5s. 11d. He was entitled to his pension. He had not lost it as a result of the injury caused by the defendant's negligence, and, being entitled to it by Act of Parliament and the regulations, it was obvious that he had to set off what he had received against what he had lost as a result of the injuries caused by the defendant's negligence. The pension was also taken into account in assessing, by agreement, Nash's continuing loss for the future. This was agreed at 16s. 4d. a week, on the basis that he was entitled to receive his pension of £5 3s. 10d. a week, which, added to his earnings as an insurance collector, amounted to £13 13s. 10d. as against what would have been his police pay of £12 16s. 5d., and the value of a rent free house, £1 3s. 9d., which equals £14 0s. 2d., giving a net loss of income of 16s. 4d.

In the present case the plaintiffs, the Monmouthshire County Council, are claiming £751 18s., made up of six items. The first item is £273 17s. 2d., being reimbursement of full pay for 35 weeks. That is the full pay and allowances which Nash was paid as from the date when he reported sick, on December 21, 1952, to the time he started work in February, 1953, and, again, as from the time he ceased work in July, 1954, to December, 1954. In other words, that is an item claiming full pay and allowances apart from the house allowance. The third item, which I can deal with on the same basis as the first, is for the rent of his house, in respect of which he was entitled to an allowance under the Police Act, 1919, and the Police Regulations, 1952, which he received in full during the time when he was doing no work for the force. Those two items may be considered, I think, together, but separately from the other items.

The next items are quite different from the point of view of a claim of this character, because the second item is a claim for reimbursement of half-pay during 71 weeks when Nash was on light duties, and the fourth item, which can be taken with the second, is a claim for reimbursement of half the rent of the house for the same number of weeks. The plaintiffs are not, there, asking for payment of what they paid Nash. They are asking for payment of half of what they paid Nash, apparently on the basis that Nash's services were only worth half as much when he was doing the light duty as when he was doing full duty. It is apparently on that basis that the plaintiffs are putting forward the items 2 and 4.

The fifth item is a claim for the reimbursement of pension paid by the plaintiffs to Nash after he ceased to be a police constable. They do not claim the pension paid to date, or the value of the pension, for the rest of his life; they only claim that

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pension from January 1, 1955, the day after he had ceased to belong to the force, until February 16, 1956, which was the date when Hallett J. heard the proceedings and gave judgment for Nash.

The last item which the plaintiffs claim is for the reimbursement of doctor's fees paid by the plaintiffs in connexion with Nash's disability. That is rather a misleading statement as to that payment. In fact it was paid to Dr. Jordan, who acts as a police doctor—there were eight sums of one guinea each—for services given by him in examining Nash for the purpose, first of all of allowing Nash to be absent from duty as being sick; later, to assess his disability; later, to say whether it was permanent or not, and later for the purposes of the supplemental pension. That is why the eight guineas really are charged, which is now claimed against the defendant.

It probably would be right to say that if it was open to the plaintiffs to claim damages on the basis of lost services, or on the basis of per quod servitium amisit, as is the technical phrase, each of these heads of damage might have been recoverable from the defendant. No doubt that is how, I suppose, these items originally came to be put forward, because this claim was originally put forward on that basis, but it is obvious now that that cause of action is not open to the plaintiffs. I do not think it ever was, but it is quite clear since the decision in the *New South Wales* case [2]—although it is not binding in the courts of this country it obviously would be followed having regard to other decisions—that the plaintiffs cannot avail themselves of that cause of action, and that is why they discontinued their original proceedings on that basis.

The cause of action which is relied on in the present case by the plaintiffs—and I have set it out at the beginning of my judgment almost verbatim—is the statement as set out in paragraph 8 of the statement of claim, that is a claim for money "which by reason of the defendant's aforesaid negligence the "defendant was ultimately liable to pay by way of damages to "the said William Frank Nash and which by reason of their "statutory obligation as aforesaid the plaintiffs have paid to "or on behalf of the said William Frank Nash." That refers primarily to pay during the time he was rendering no service at all. Before the plaintiffs could succeed on their claim as pleaded they would have to show that the defendant was liable, whether ultimately or not, to pay to Nash each of the items of money claimed by the plaintiffs. An action for negligence is an action on the case, and the plaintiff in such an action can only recover such damages as flow from the injuries or damage caused to him by the defendant's negligence. A plaintiff in such an action can only claim for loss of earnings or wages if he can prove (1) that he has lost such earnings or wages, and

[2] [1955] A.C. 457.

(2) that such loss was the result of the defendant's negligence or the personal injuries caused thereby. If, as in this case, he has not lost any wages at all and is entitled to be paid his wages notwithstanding the injuries received as a result of the defendant's negligence, there is no liablity on the defendant to compensate him for a loss he has never sustained, and unless the plaintiffs can establish here that there was that ultimate liability on the defendant it is obvious that they cannot succeed upon their claim as pleaded.

The bases of claims of this character are, at any rate, exemplified, I think, if not originated, in *Moule* v. *Garrett*.[3] The authority upon which the plaintiffs' case is pleaded is based on what Cockburn C.J., in that case, said in his judgment: "This doctrine, as applicable to cases like the present, is well "stated by Mr. Leake in his work on Contracts, at p. 41: "'Where the plaintiff has been compelled by law to pay, or, "'being compellable by law, has paid money which the defen-"'dant was ultimately liable to pay, so that the latter obtains "'the benefit of the payment by the discharge of his liability; "'under such circumstances the defendant is held indebted to "'the plaintiff in the amount.'" From this statement of the law it seems clear that it can only be applied where the defendant is liable to pay the amount—I do not want to call it "debt" because I think this doctrine covers any payment of money by reason of contract or tort—to the person to whom the plaintiff has paid it.

A rather strong case from the point of view of what has been called in argument "unjust enrichment," was *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*,[4] in which there was a lease of certain premises. The lessees assigned the term to an assignee, who mortgaged the premises by way of sub-demise. The mortgage provided that upon default by the mortgagor, the mortgagees might enter into possession, or receipt of the rents and profits of the premises, and demise or sell the same, and out of moneys so received by them, whether as rents and profits or purchase money, should in the first place pay the rent reserved by the original lease. The mortgagees, having entered into possession, did not pay rent which accrued due under the lease while they were in possession. The lessees having been compelled to pay it, sued the mortgagees to recover the amount so paid by them. In fact, the mortgagees had gained by the payment made by the lessees, because it kept the lease in existence, and so protected their sub-demise which was carved out of the lease, but notwithstanding that the Court of Appeal held that the lessees who had paid the rent could not recover it from the mortgagees because under their covenant to pay the rent the mortgagees were liable under their covenant to the mortgagor, and not to the landlord of the head lease. The money

[3] (1872) L.R. 7 Exch. 101, 104.

[4] [1899] 1 Q.B. 161; 15 T.L.R. 76.

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payable by the lessees was, therefore, not payable to the same person as the money which was payable by the mortgagees under the mortgage.

In dealing with the matter A. L. Smith L.J. said [5]: "The "ratio decidendi of *Moule* v. *Garrett* [6] is this: If A is compellable "to pay B damages which C is also compellable to pay B, then "A, having been compelled to pay B, can maintain an action "against C for money so paid, for the circumstances raise an "implied request by C to A to make such payment in his case. "In other words, A can call upon C to indemnify him. See the "notes to *Lampleigh* v. *Brathwait*,[7] and cases there cited. To "raise this implied request, both A and C must, in my judgment, "be compellable to pay B; otherwise, as it seems to me, the "payment by A to B so far as regards C is a voluntary payment, "which raises no implication of a request by C to A to pay." That view of A. L. Smith L.J. prevailed as all three judges, A. L. Smith, Rigby and Vaughan Williams L.JJ., agreed that in that case, although money had been paid by the lessees and it had enured to the advantage of the mortgagees, nevertheless it could not be recovered because it was not money payable to the same person as the money which would be payable by the mortgagee under his sub-demise would be payable. Therefore, it was held that the doctrine—if I may so call it—of *Moule* v. *Garrett* [8] did not apply.

The doctrine was later considered, in more recent times, in *Brook's Wharf & Bull Wharf Ltd.* v. *Goodman Brothers*.[9] That was a case where the defendants, who were a firm of furriers, had imported from Russia into this country a consignment of squirrel skins, in August of 1934. Out of the consignment 10 packages were stored by the defendants in the bonded warehouse of the plaintiffs. Whilst in the warehouse they were stolen. Under the Customs Consolidation Act, 1876, and the Import Duties Act, 1932, the liability to pay duty upon the importation of those furs fell upon the defendants, as the owners of the goods and the importers of the goods, but, under the provisions of section 13 of the Act of 1876 when goods were stored in a bonded warehouse belonging to a warehouseman the warehouseman was under a heavy bond to the Customs for the pleasure of having all the business and of having a bonded warehouse, and under the provisions of section 85 of the Act of 1876 if goods were removed from that warehouse, whether by theft or otherwise, an obligation was imposed upon the bonded warehouseman to pay. It was in those circumstances that the plaintiffs were called upon by the Customs to pay a claim of £823 17s. 10d. for customs duty in respect of those goods, and they brought their action against the importers and owners for recoupment of that amount from them, on the ground that the importers were the

[5] [1899] 1 Q.B. 161, 167.
[6] L.R. 7 Exch. 101.
[7] (1615) Hob. 105.
[8] L.R. 7 Exch. 101.
[9] [1937] 1 K.B. 543; 53 T.L.R. 126; [1936] 3 All E.R. 696.

persons who ought to pay. There were counterclaims which I need not trouble about, alleging negligence and other matters, which were dismissed.

In dealing with this point Lord Wright M.R., delivering the judgment of the Court of Appeal on an appeal from Branson J., who had found that the plaintiffs were entitled to recover against the defendants, considered the doctrine set out in *Moule* v. *Garrett*,[10] and said[11]: "The principle has been applied in a "great variety of circumstances. Its application does not depend "on privity of contract. Thus, in *Moule* v. *Garrett*, which I "have just cited, it was held that the original lessee who had "been compelled to pay for breach of a repairing covenant "was entitled to recover the amount he had so paid from a "subsequent assignee of the lease, notwithstanding that there "had been intermediate assignees. In that case the liability "of the lessee depended on the terms of his covenant, but the "breach of covenant was due to the default of the assignee, "and the payment by the lessee under legal compulsion relieved "the assignee of his liability. That class of case was discussed "by Vaughan Williams L.J. in *Bonner* v. *Tottenham and* "*Edmonton Permanent Investment Building Society*,[12] where "*Moule* v. *Garrett*[13] was distinguished. The essence of the rule "is that there is a liability for the same debt resting on the "plaintiff and the defendant and the plaintiff has been legally "compelled to pay, but the defendant gets the benefit of the "payment, because his debt is discharged either entirely or pro "tanto, whereas the defendant is primarily liable to pay as "between himself and the plaintiff. The case is analogous to "that of a payment by a surety which has the effect of discharg-"ing the principal's debt and which, therefore, gives a right of "indemnity against the principal." It is quite clear there that Lord Wright was saying, in effect: "What is the essence of the "rule? The essence of the rule clearly is that there must be a "common liability to pay money to a particular person; that the "plaintiff has been compelled to pay it by law; that the defen-"dant is liable to pay that money, and the defendant's debt or "liability has been discharged by the plaintiff's payment." That is the whole basis, as I see it, of that particular rule.

Lord Wright, after citing from the judgment of Abbott C.J. in *Dawson* v. *Linton*,[14] continued: "These statements of the "principle do not put the obligation on any ground of implied "contract or of constructive or notional contract. The obligation "is imposed by the court simply under the circumstances of the "case and on what the court decides is just and reasonable, "having regard to the relationship of the parties. It is a debt or "obligation constituted by the act of the law, apart from any "consent or intention of the parties or any privity of contract."

[10] L.R. 7 Exch. 101.
[11] [1937] 1 K.B. 534, 544, 545, 546.
[12] [1899] 1 Q.B. 161.
[13] L.R. 7 Exch. 101.
[14] (1822) 5 B. & Ald. 521, 523

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In other words, Lord Wright was there discussing what is the basis of the reason why the law allows the claim. He was not altering what he had said earlier, that the essence of the rule was that there was a liability for the same debt resting on the plaintiff and the defendant, and, as he said there: "It is a debt "or obligation constituted by the act of the law, apart from any "consent or intention of the parties or any privity of contract"— the relationship of the parties there being that both parties are under an obligation to pay the same sum of money to the same person. He went on to say: "It is true that in the present "case there was a contract of bailment between the plaintiffs "and the defendants, but there is no suggestion that the obliga- "tion in question had ever been contemplated as between them "or that they had ever thought about it. The court cannot say "what they would have agreed if they had considered the matter "when the goods were warehoused. All the court can say is "what they ought as just and reasonable men to have decided "as between themselves. The defendants would be unjustly "benefited at the cost of the plaintiffs if the latter, who had "received no extra consideration and made no express bargain, "should be left out of pocket by having to discharge what was "the defendants' debt." In other words, all the way through Lord Wright is remembering the fact that there must be a debt due from the defendant which has been either discharged fully or pro tanto as the result of the payment made by the plaintiff.

Lord Wright expressed agreement with the judge in holding that that principle applied to that case, and explained that the duties were due from the importers. He went on to say: "The "plaintiffs were no doubt liable to pay the Customs, but, as "between themselves and the defendants, the primary liability "rested on the defendants. The liability of the plaintiffs as "warehousemen was analogous to that of a surety. It was "imposed in order to facilitate the collection of duties in a case "like the present, where there might always be a question as to "who stood in the position of importer. The defendants as actual "importers have obtained the benefit of the payment made by "the plaintiffs and they are thus discharged from the duties "which otherwise would have been payable by them." That case settled the law at that date, and settled it by the Court of Appeal.

Although it is not binding as an authority, I have had cited to me by way of argument passages from The Law of Quasi-Contracts (1952) by Professor Winfield. He deals with this matter at p. 73 under the heading "Payment, under a legal obligation, "to a third party, of money which the defendant was also liable to "pay to the third party" as follows: "The principle underlying "the rule relating to this was stated as follows by Lord Wright "M.R. in *Brook's Wharf & Bull Wharf Ltd.* v. *Goodman* "*Brothers*,[15] in a judgment in which his brethren concurred: "'Where the plaintiff has been compelled by law to pay, or, being

[15] [1937] 1 K.B. 543.

" ' compellable by law, has paid money which the defendant was " ' ultimately liable to pay, so that the latter obtains the benefit " ' of the payment by the discharge of his liability; under such " ' circumstances the defendant is held indebted to the plaintiff " ' in the amount. . . . The essence of the rule is that there is " ' a liability for the same debt resting on the plaintiff and the " ' defendant and the plaintiff has been legally compelled to pay, " ' but the defendant gets the benefit of the payment, because " ' his debt '"—that is the defendant's debt—" ' is discharged " ' either entirely or *pro tanto*, whereas the defendant is primarily " ' liable to pay as between himself and the plaintiff.' "

That, in my view, correctly states the law, certainly as it existed immediately after the decision in the *Brook's Wharf* case.[15] That is a decision of the Court of Appeal and is binding upon all courts of first instance, so that in applying that principle one is bound to apply the test which the Court of Appeal have laid down, that the essence of the application of this doctrine, before it can come into play, is that there must be a liability, either primarily or ultimately—I do not think it matters which—on the part of the defendant to pay the money which the plaintiff has in fact paid. That, in my view, is the law as laid down by the Court of Appeal.

The present case has really been brought forward because of the decision by Atkinson J. in *Metropolitan Police District Receiver* v. *Tatum*.[16] The plaintiffs rely upon that decision and also upon the recent decision of Slade J. in *Receiver for Metropolitan Police District* v. *Croydon Corporation*,[17] who followed that decision. Under sections 10 and 12 of the Metropolitan Police Act, 1829, the receiver for the metropolitan police district is appointed by the Crown as custodian of a fund for the purposes of the police, and is charged with the duty of paying the wages and allowances of members of the force and all other charges and expenses which the Home Secretary shall direct to be paid for carrying the Act into execution. Under section 1 of the Metropolitan Police (Receiver) Act, 1861, the receiver is a corporation sole, with capacity to sue and be sued, and to " do all other " acts necessary or expedient to be done in the execution of the " duties of his office." In *Metropolitan Police District Receiver* v. *Tatum*,[18] the receiver, having paid hospital charges and pay and allowances during disablement of a police officer injured through the negligence of the defendant, brought an action to recover from the defendant the sums so paid. The defendant contested the receiver's right to sue, on the ground that the claim for hospital charges should have been brought by the Attorney-General on behalf of the Crown, and that as a claim for pay and allowances must be based on loss of services, and police officers are servants of the Crown and not of the receiver, the Crown alone could bring such a claim. It was held that the

[15] [1937] 1 K.B. 543.
[16] [1948] 2 K.B. 68.
[17] Ante, p. 1113.
[18] [1948] 2 K.B. 68.

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hospital charges being an expense which the receiver, as a result of the defendant's negligence, was legally bound to incur, he was entitled to recover them from the defendant; that as those charges had been paid out of a public fund of which he was the custodian on behalf of the Crown, the receiver alone could bring the action; and that as the claim for pay and allowances was not based on loss of service but on the fact that the receiver, acting under statutory regulations, had been compelled by the defendant's negligence to pay the sums in question and thus deplete the public fund of which he was custodian, he was entitled to be indemnified by the defendant.

That is a new statement of the principle of law which Atkinson J. decided, because I know of no principle of law which renders a person who has been guilty of negligence in injuring a police officer liable, or which enables the custodian of a public fund to claim for moneys he has paid, unless he has a legal right to claim them, and I know of no principle of law, apart from the decision in this case, which would, in the absence of a liability in the defendant to pay that sum to a plaintiff which the receiver was compelled to pay, enable a receiver to bring such an action.

Atkinson J., who cited the passages I have read from the judgment of Lord Wright M.R. in the *Brook's Wharf* case,[19] gave the following reasons for his decision[20]: "Is there any real "difference between the claim for hospital charges and the claim "to recover the pay and allowances? Counsel for the defence "says that the latter claim must be based on loss of services, "and, if a servant has been injured through someone else's "negligence, the claim can only be made by a person who has "been deprived of the loss of the servant's services. That is "perfectly true. It was held by McCardie J. in *Fisher* v. *Oldham* "*Corporation*[21] that police officers were servants of the Crown, "and it is therefore said that the receiver has not lost any "services, because the services were rendered, not to him, but "to the Crown. That also is true, but here the claim is not "based on loss of service. The receiver is saying that acting "under statutory regulations, he has been compelled to cause "this fund of the Crown to be depleted by a sum of £336 17s. 6d., "money which the defendant, by his negligence, has compelled "him to pay for no return." If that means that the negligence has compelled him to pay, that, of course, is not so. He paid because he was under a legal obligation to pay under the Metropolitan Police Act. If he means by that that he has been compelled to pay and in respect of that payment has received no return of service, then that is a claim for loss of service; it is not a claim for anything else, and although the judge is saying in the first part that this is not a claim for loss of service, when he comes to give his judgment it seems to me from what he is

[19] [1937] 1 K.B. 543.
[20] [1948] 2 K.B. 68, 72.
[21] [1930] 2 K.B. 364.

saying: " . . . he has been compelled to cause this fund of the " Crown to be depleted by a sum of £336 17s. 6d., money which " the defendant, by his negligence, has compelled him to pay for no return "—that it means nothing else but a claim for loss of service, and, of course, in fact there was no service lost to the receiver at all.

Atkinson J. went on: " That being so, he is entitled, he says, " to be indemnified by the defendant, and he relies on the words " of the Act that it is his duty to sue and to do all acts necessary " or expedient to be done in the execution of his office. He " contends that to maintain this fund and recover money which " he has been forced to pay out under the regulations to no " purpose are certainly acts which are expedient to be done in the " execution of his office." That may be, but those words in the section do not give him any rights which he has not already got against third parties. He can only do those things which that section enables him to do. It seems to me that in that case the receiver had no ground at all for saying: " I have got a " cause of action against a third party." Atkinson J. continued: " It seems to me that this argument is sound. I think the matter " comes within the principle enunciated by Lord Wright in " *Brook's Wharf & Bull Wharf Ltd.* v. *Goodman Brothers*,[22] " which, shortly stated, is that where A is compelled to pay " money which B is legally liable to pay, A can recover from B, " on whom the real liability rests." That, if I may say so with great respect, is a correct statement of what was decided, but the facts do not fall within it. There is no liability here on the defendant to pay any wages because the person who is entitled to claim against him has not lost them.

The judge continued: " In the present case there is no doubt " that the real legal liability for the payment of this money rests " on the defendant, because his negligence was the cause of the " receiver being compelled to pay." If that were so it would mean, of course, that an action for lost services would still exist where payment for services existed. That means a great deal more than it was thought to mean by the Court of Appeal and, in my view, I can find no legal liability resting on the defendant to pay any money to the receiver. " As Lord Wright M.R. said: " ' The obligation is imposed by the court simply under the " ' circumstances of the case and on what the court decides is " ' just and reasonable, having regard to the relationship of the " ' parties. It is a debt or obligation constituted by the act of " ' the law, apart from any consent or intention of the parties " ' or any privity of contract.' " Lord Wright did say that, and he said that in relation to a claim where it was essential to the making of the claim that there should be a liability on the part of the defendant to pay to the third party money which the plaintiff had paid, and in my view—although I do not like to

[22] [1937] 1 K.B. 543.

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disagree with the decisions of my brother judges, because it is natural that I should desire to follow them—this decision of Atkinson J. was not correct. It seems to me that it ignores the law as laid down in the Court of Appeal in *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Brothers.*[22] The curious thing is, that, although it is not in any way a cogent argument, this decision is treated by the editors both of Salmond on Torts (11th ed.) (1953) p. 406, and Pollock on Torts (15th ed.) (1951) p. 54, as dealing with the question of recovery of moneys by reason of lost services.

The decision of Atkinson J. was considered by the High Court of Australia in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*,[23] which subsequently went to the Privy Council.[24] In his judgment Kitto J. said[25]: "The court was "referred to the case of *Receiver for the Metropolitan Police* "*District* v. *Tatum*,[26] but no separate argument was based upon "it. The case has no bearing upon the matter I have been "discussing, [a claim for lost services] . . . but, if correctly "decided, it might provide support for an alternative argument "in favour of the appellant." That is just what has been done in the present case. It has been sought to use that as an alternative argument to claim moneys which were sought originally to be claimed in an action for lost services. Kitto J. went on: "With great respect to the learned judge who decided it, I "find myself unable to regard his decision as a correct applica- "tion of the principles to which he referred, and in my opinion "the case affords no assistance to the appellant here."

It seems to me that it is difficult to reconcile the decision of Atkinson J. with the law as laid down by the Court of Appeal in *Brook's Wharf & Bull Wharf Ltd.* v. *Goodman Brothers.*[27] However, it has been followed by Slade J. in *Metropolitan Police District Receiver* v. *Croydon Corporation*,[28] in which judgment was given on June 11, 1956. That case was brought with the idea of testing whether *Tatum's* case[29] could be supported. It was a case where the facts, which were indistinguishable from those in *Tatum's* case,[29] were agreed as follows: John Bowman was a police constable in the Metropolitan Police; the defendants had paid the sum of £2,513 12s. 6d. in full satisfaction of a claim brought by him in the Queen's Bench Division against the defendants; Bowman made no claim for loss of wages in his action. If he had been entitled to include and recover his loss of wages as an item of special damage in his action against the defendants he would have recovered an additional £104. Bowman was incapacitated and prevented from carrying out his duties as a police constable for seven months as a result of injuries caused to him by the negligence of the defendants; and during that

[22] [1937] 1 K.B. 543.
[23] (1952) 85 C.L.R. 237.
[24] [1955] A.C. 457.
[25] 85 C.L.R. 237, 305.
[26] [1948] 2 K.B. 68.
[27] [1937] 1 K.B. 534.
[28] Ante, p. 1113.
[29] [1948] 2 K.B. 68.

period the plaintiff paid Bowman his full wages and allowances as a police constable. The defendants agreed the figure subject to the question of liability and they also admitted the allegations of negligence in this action.

Slade J. said that the action was a test action brought to decide whether or not the decision in *Metropolitan Police District Receiver* v. *Tatum* [29] was right. He took the view that it was and, apparently, he took that view based upon the acceptance of certain arguments, with qualifications in one case and absolutely in the other. The arguments he accepted were those of Mr. Berryman, on behalf of the defendants, who submitted that there were five requisites for the application of the principle—that is the principle I have been referring to in the *Brook's Wharf* case [30]: (1) there must be the same debt; (2) both plaintiff and defendant must be liable to the same person for that debt; (3) the defendant must be primarily liable for that debt; (4) the plaintiff must have been compelled to pay the debt; (5) the plaintiff's payment must have operated to relieve the defendant of his primary liability. Upon the common law principle Slade J. thought that all those requirements were necessary. In other words, he is apparently accepting the submissions of Mr. Berryman, and, subject to the qualification that, instead of using the word "debt," one should use the word "money," I think that this doctrine can operate where the money was payable as it was in *Moule* v. *Garrett* [31] for breach of contract.

Slade J. said [32]: "Mr. Berryman said assuming that there "was a debt at all in this case . . . that it was not the same "debt, but in that the liability . . . of the receiver to the police-"man was in contract, or under the requirements of statute, or "possibly on a quantum meruit . . . whereas the liability, if any, "of the defendants was in tort for negligence. Furthermore, he "said that the defendants' liability in tort, if it existed at all, "was not to pay wages . . . but to pay Bowman damages for loss "of faculty, and that the amount of the wages would merely be "evidence of the value of the loss of faculty." The judge thought that by the words "the same debt" Lord Wright meant no more than that the third person could have recovered the sum of money from either the plaintiff or defendant, and that the cause of action need not be the same. The words "primarily "liable," in his view, meant liable in the same sense as it does between a principal debtor and a surety, both of whom were equally liable to the creditor, the principal debtor being as between themselves primarily and the surety only secondarily liable.

I entirely agree that that is a correct statement of the principle. There was, however, no liability for this loss of wages by the defendants to the third party, the policeman. As I have already pointed out, the policeman cannot claim for a loss he has

[29] [1948] 2 K.B. 68.
[30] [1937] 1 K.B. 534.
[31] L.R. 7 Exch. 101.
[32] Ante, p. 1113.

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not sustained. He can claim for damages for personal injuries and he can claim for loss of faculty, but one thing he cannot claim for is loss of wages when he has lost none. Where, in fact, as a result of his injuries, although he has been incapacitated, he has not lost any earnings, one cannot include in a claim for negligence a claim for damages under that head.

The position the judge was taking up there was, apparently, that there was a liability in the defendant to pay this sum and that thereby, by the fact that the receiver had paid it, he was not discharged from that liability. It seems to me, with great respect to my learned brother, that he accepted the fact that in other circumstances it may be, with another plaintiff who was not, perhaps, a police officer, there would be a liability to pay to the injured plaintiff damages under the head of loss of earnings, if in fact he had lost them, but if in fact he has not lost them there is no liability at all. As far as I can say I know of no liability upon a tortfeasor to pay damages of that sort.

Mr. Gardiner, for the plaintiff, submitted three propositions of law to Slade J. First, where A, under what the law regarded as compulsion, had paid money to C in such circumstances that the law considered that B's failure to recoup A would constitute an unjust benefit to B at the expense of A, A could recover the amount of the payment from B. That submission is taken from Winfield on the Law of Quasi-Contract, but omits one thing, there must be a liability on the part of B to the person to whom A has paid the money, and in my view that liability does not exist. At least, I know of no authority to show that it does. The practice has been, for years, and still is, that a plaintiff cannot recover in a personal injuries action damages for a loss he has not in fact sustained. Mr. Gardiner's second proposition was that if C was injured by the negligence of B, B was liable in damages to C. Of course he would be, but he would not be liable in damages to C for an item of damage which B had not suffered. Then his third proposition was: if, in relation to a particular sum the sole reason why that sum could not be recovered by C as part of such damages was that it had already been paid by A who was legally obliged to pay it, B's failure to recoup A would constitute an unjust benefit to B at the expense of A. I do not know where that submission comes from, and unless there is a legal liability upon B to pay to C then it seems to me that that submission is not one which, at any rate, would find favour with me, although it seems to me that Slade J. accepted it.

Naturally I regret very much the fact that I have to differ from Atkinson J. and from Slade J., and I would not do so unless I felt compelled to. One always desires to follow the decisions of one's brother judges, but in the present case I feel that I am bound by the Court of Appeal's decision and the essential that the Court of Appeal have fixed before this type of action can succeed. Being bound by that, it seems to me that there can be no legal

liability upon the present defendant to pay Nash any sum for loss of wages, and that, under those circumstances, the essential element which is necessary to constitute this cause of action is missing.

So far I have been dealing with the first and third items of the claim, that is to say, the moneys appearing in the claim as having been paid, and agreed as having been paid, by the plaintiffs to Nash during the period when he was not doing any duty at all. As regards the second and fourth items, namely, half the wages paid and half the rent of the house, I cannot understand at all how they can be recoverable even if the decision in *Tatum's* case [33] and the *Croydon* case [34] applied. That is a pure claim for damages for loss of service—damages for depreciation of the service is, I suppose, the proper way to put it—and I know of no authority which would enable the plaintiffs to recover that, based on this cause of action. If, indeed, they could have sued on the basis of lost services, then that is a matter which they might have recovered, but in this form of action it could not possibly be recovered, as far as I can see, because here no money is paid. The defendant cannot possibly be held liable to pay to the plaintiffs money for depreciation in the value of the service of Nash. To whom would it be payable? Not to the plaintiffs, because the plaintiffs are not entitled to his services on any view of the case. In view of the decisions, it could not even be claimed by the standing joint committee. I cannot see how, under any circumstances, the items under the second and fourth heads can possibly be claimed. There never was any personal liability in the defendant to reimburse the plaintiffs by the sum which they say they have paid in excess of the value of Nash's service to somebody—I suppose to the standing joint committee? So far as that part of the claim is concerned, it seems to me it is quite impossible for the plaintiffs to succeed.

Then there is the claim that the defendant should reimburse the plaintiffs the moneys they have paid by way of pension to Nash. Again, it might be that if it was open to them to bring an action for loss of services that might have been put forward as some form of money they have had to pay prematurely by reason of loss of services, although, again, I should find difficulty even in that contention. It seems to me quite impossible to comprehend how it can be said that the defendant was ever liable to pay a pension. This pension was payable and Nash is entitled to his pension under the Police Pensions Act, 1948, and the Police Pensions Regulations, 1949, which have the effect of legislation. He is entitled to that, assuming he gets the necessary certificate from the doctor about being permanently disabled, and, being entitled to it, under no circumstances could he have claimed that from the defendant, so that I cannot see how this form of action could possibly be applied to this question of pension.

[33] [1948] 2 K.B. 68.

[34] Ante, p. 1113.

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What Nash could recover, of course, if he had ceased to get his full pay, was the difference, the loss he sustained as a result of the injuries he had received through the negligence of the defendant; that is to say, the loss he sustained between what he could earn in a new occupation—having regard to his physical condition and the pension he received in respect of his old occupation—and what he would have had if he had remained in the police force. He has had that. He claimed it and he obtained it in his judgment from Hallett J., but he did not claim for pension; he obviously could not. The whole point here is that Nash has claimed, as far as I can see from the statement of claim, everything to which he was entitled, and he has recovered everything to which he was entitled. Now the plaintiffs come along and say: "Oh, but you have got to pay us something" —on what basis? The only basis put before me is that the defendant is liable to pay Nash. The defendant is not liable at all, because Nash has exhausted his liability. The result is, it seems to me, that it is quite impossible for the plaintiffs to succeed on any view of the principles put before me.

Finally, as to the doctor's fees. It is only a small matter, but it shows what this action really is. It is an action, in truth, to try to recover damages for loss of service, because the last item is a claim for £8 8s. paid to Dr. Jordan, the police surgeon; not for medical treatment of Nash, but to carry out the machinery, first of all, of allowing him to be off duty, absent through sickness and certified by the doctor, or else for their own purposes in fixing the pension. How it can be said that the doctor could have sued the defendant for his fees seems to me to pass all comprehension, when the plaintiffs instructed him. In order to apply the principle which the plaintiffs are seeking to apply here they must, as they allege in their statement of claim, show that the defendant is ultimately liable to pay doctor's fees. I know of no principle which can bring it that far. In fact, again, I do not think, even if they brought an action for loss of service, they could have recovered that item.

That deals with the whole of the case. I shall end by saying again that I regret very much having to differ from my two brother judges, Atkinson J. and Slade J. I would not have done so unless I had felt compelled to by reason of what I regard as the binding authority of the Court of Appeal. The result is that there must be judgment for the defendant.

Judgment for the defendant.

Solicitors: *Vernon Lawrence, Newport, Mon.; Myer, Cohen & Co., Cardiff.*

[CHANCERY DIVISION.]

In re MERCURY MODEL AIRCRAFT SUPPLIES LTD.

1956 *June* 19.

Roxburgh J.

[No. 957 of 1952.]

Costs—Taxation—Solicitor and own client—Company party to action—Compulsory winding up—Taxation in companies winding-up department of company's solicitor's costs—Taxation as between solicitor and own client—Solicitor's objections on taxation—Disallowance by registrar of objections—Summons to review taxation—"Necessary" or proper" costs, charges and expenses—R.S.C., Ord. 65, r. 27, reg. 29.

Company—Winding up—Costs—Taxation of costs as between solicitor and own client when client a company.

Barrister—Fees—Refresher—Five-hour rule—Inapplicability to solicitor and own client taxation—R.S.C., Ord. 65, r. 27, reg. 48.

A company's solicitor's bill of costs of an action in the Queen's Bench Division against the company was taxed, as between solicitor and own client, in the companies winding-up department while the company was in compulsory liquidation. On taxation the solicitors lodged objections, all of which the registrar disallowed.

The first four items related to conferences with counsel, instructions to draft the defence, and instructions for brief. By his answers the registrar did not indicate that he appreciated any difference that might be contemplated by Ord. 65, r. 27, reg. 29,[1] between a taxation between solicitor and own client and other forms of taxation, and did not distinguish between what costs might be "necessary" from what might be "proper," basing his views on what were "necessary" only. On the fifth item, relating to the solicitors' attendance at court, the registrar allowed no more than the maximum fee permissible under fee No. 172 in Appendix N. to the Rules of the Supreme Court, although the solicitors had been in attendance during the hearing at times beyond the sitting of the court from 10 a.m. to 6 p.m. On the sixth item, relating to counsels' refreshers, the hearing lasted five days after the first day, and the solicitors had paid five days' refreshers; the registrar computed the time under the five hour rule in Ord. 65, r. 27, reg. 48, and allowed only 37 minutes for the last day's refresher.

On a summons by the solicitors to review the taxation:—

Held, (1) that reg. 29 contemplated a marked distinction between a taxation between a solicitor and his own client and other forms of taxation, and drew a distinction between costs that were "necessary" and those which were "proper";

(2) that, in making his disallowances in the first four items, the registrar had adopted a wrong approach, in that he had failed to take such distinctions into account;

(3) that in item 5 the registrar had given no satisfactory

[1] Order 65, r. 27, reg. 29: "On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

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reasons for refusing extra remuneration to the solicitors for their attendance beyond actual court hours;

(4) that the method adopted by the registrar for apportioning the time for the computation of counsels' refreshers was irregular and improper;

(5) that orders for taxation made in the companies winding-up department should state whether the taxation should take place in that department or in the Supreme Court taxing office;

(6) that a taxation as between solicitor and own client relating to proceedings in the Queen's Bench Division at a time when the company client was a going concern should be carried out in the taxing office of the Supreme Court; and, as none of the registrar's disallowances could be supported on the grounds set up by him, the items in question should be referred to that office for further consideration.

In re Defiant Cycle Co. Ltd. [1955] Ch. 490; [1955] 2 W.L.R. 932; [1955] 2 All E.R. 58 considered and applied.

SUMMONS to review taxation.

A summons was issued by Ernest Frederick James Perkins and Roy Perkins, solicitors to Mercury Model Aircraft Ltd. (hereinafter called "the company"), which was at the date of this summons in liquidation, to review a taxation in the companies winding-up department of their bill of costs of an action against the company, on the ground that the registrar had wrongly disallowed their objections on taxation.

The facts are fully stated in the judgment of Roxburgh J.

W. A. Bagnall for the applicants, the solicitors.

K. W. Mackinnon for the official receiver as liquidator.

Case cited in argument not referred to in judgment: *In re Harrison.*[2]

ROXBURGH J. Mercury Model Aircraft Supplies Ltd. is in compulsory liquidation, and the official receiver is the liquidator. The matters to which I have to direct my attention all occurred before the liquidation at a time when the company was a going concern and the parties were sui juris. I am not concerned with a party and party taxation or with a taxation of costs as between solicitor and client, which takes place where costs are payable out of a fund or out of a company's assets, but with a taxation between a solicitor and his own client. I wish to emphasize that fact because, while I shall find reason to regret the course that has been taken in this case, I wish to make it plain that that is the foundation of that regret. The company in liquidation had two unfortunate experiences. One had relation to purchase tax and I need not consider it further. The other arose in this way, and this is the matter with which I have to deal: the company controlled or owned an invention under which a toy aircraft could be made to respond to radar direction. They did not

[2] (1886) 33 Ch.D. 52; 2 T.L.R. 671.

themselves attempt to manufacture it, but A. C. Cossor Ltd. contracted to do so on their behalf in accordance with a prototype which was successful, and then the company was itself to dispose of the manufactured article. Some, if not all, of the toy aircraft manufactured by Cossor failed to respond to the radar direction.

On March 14, 1950, Cossor began proceedings against the company for the price of the toys which it had manufactured and the company counterclaimed alleging that it was the fault of Cossor that the toy aircraft did not respond. This dispute involved some complicated electrical and mechanical considerations. The action was tried for seven days in the Queen's Bench Division before Lloyd-Jacob J., sitting as an additional judge. In the end the company had to pay the purchase price (which was never really disputed) but on the other hand received substantial damages on the footing that the fault was with Cossors and not with the prototype.

The solicitors to the company had in their hands at the commencement of the liquidation a substantial sum of money paid to them on account of costs generally. The official receiver did what he was entitled to do and obtained an order on the solicitors to deliver an itemized bill of costs. This they did and the official receiver applied by summons under section 66 of the Solicitors Act, 1932, for an order for taxation of the bill. On April 25, 1955, the registrar made the order for taxation, though the order does not in terms say where the taxation was to take place. But the order was made so soon after Vaisey J.'s decision in *In re Defiant Cycle Co. Ltd.*[1] that the full force and effect of that case had not by that time been appreciated, and it seems to have been assumed that an order made in the companies winding-up department which did not specify where the taxation was to take place would involve a taxation in that department. I apprehend that since that case, orders for taxations of this kind made in the companies winding-up department have taken a different form; if they have not, they certainly should do. Vaisey J. said[2]: "My own view is that I have jurisdiction to "direct the taxation in such a case as the present to be carried "out either in the companies winding-up department or by a "taxing master of the Supreme Court, at my discretion. I can "imagine cases in which the choice should fall on the first "alternative. Here, I think that the reference should be to the "taxing department of the central office of the Supreme Court, "and this is probably the course which ought generally and in "normal circumstances to be followed."

Clearly it is now incumbent to set out in every order made in the companies winding-up department whether taxation is to take place in that department or in the central office of the Supreme Court. It is, in my view, a pity that an order for taxation in the companies winding-up court was made in the

[1] [1955] Ch. 490; [1955] 2 W.L.R. 932; [1955] 2 All E.R. 58.

[2] [1955] Ch. 490, 494.

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present case, though I ought to say that I do not think anybody argued the matter before the registrar. I say that it was a pity for two reasons. In the first place, this was a taxation in relation to proceedings in the Queen's Bench Division, involving technical and mechanical matters of some complication. Secondly, this is not a case of a taxation out of a fund such as takes place where costs are to be paid out of a company's assets in a winding up. This is a taxation as between a solicitor and his own client, and it is undesirable that costs as between a solicitor and his own client should be taxed by different tribunals and (if I am to judge from the answers to objections in this case) apparently on different principles according to whether the client is a company in liquidation or not, which, after all, is not a relevant consideration. The directors could have asked for this taxation while they were in control, and the question is what charges were necessary or proper as between a going concern and the solicitors of the going concern.

The taxation proceeded and the solicitors lodged objections. Each one was disallowed, and I have come to the conclusion that none of the disallowances can be supported on the grounds set up by the registrar. It is, I think, unfortunate that the taxing officer did not formulate his objections by reference to Order 65, r. 27, reg. 29, because, had he done so, two things would have emerged which might have altered his approach to the problems. First, he would have noticed the marked difference which the regulation contemplates between taxation between a solicitor and his own client and any other form of taxation; and, secondly, he would have noticed that in the regulation not only the word "necessary" but also the word "proper" occurs and it has been decided that "proper" might include costs not strictly necessary; in other words, that "necessary" and "proper" are not interchangeable terms. Order 65, r. 27, reg. 29, reads as follows: "On every taxation the taxing master shall allow all "such costs, charges and expenses, as shall appear to him to "have been necessary or proper for the attainment of justice or "for the defending the rights of any party, but save as against "the party who incurred the same no costs shall be allowed which "appear to the taxing master to have been incurred or increased "through over-caution, negligence or mistake or by payment of "special fees to counsel or special charges or expenses to "witnesses or other persons, or by other unusual expenses." There is the differentiation. In considering whether costs, charges and expenses ought to be allowed in a taxation between a solicitor and his own client the taxing officer has only to decide whether they appear to him to have been "necessary or "proper for the attainment of justice or for defending the rights "of any party." But where it is a taxation other than one between solicitor and own client, he has to take other things into consideration, because even if the costs are proper, they must not be allowed if they appear to the taxing officer to have been

"incurred or increased through over-caution, negligence or "mistake or by payment of special fees to counsel or special "charges or expenses to witnesses or other persons, or by other "unusual expenses."

The first objection is to the disallowance of three items, namely: "Attending appointing conference. Conference fee and "clerk. Attending conference." The reasons for the objection are: "Conference on brief to counsel on the plaintiffs' applica- "tion for further and better particulars of defence and counter- "claim had reference to the technical aspect of the particulars "required. Such conference was attended by Mr. H. J. Nicholls "of the defendant company, charged for and fee paid." This is a striking disallowance because the solicitor had paid the costs. It was a disbursement and therefore if this item is disallowed he will have to bear that loss personally. He cannot recover the fees from counsel save by agreement. What is more, a representative of the defendant company attended at the conference and therefore must presumably have authorized it. It seems to me almost impossible under those circumstances to say that the conference was not proper, but I should have been unhappy in interfering if the registrar had said that the conference did not appear to him to have been proper.

The registrar's answer is as follows: "It is not usual to allow "a conference on such an application in the Queen's Bench "Division, especially where counsel settles the document the "subject of the application and in this case further and better "particulars. A double conference on September 29 is charged "and allowed on the same page of the bill." That answer does not seem to me to indicate that the taxing officer has taken all the circumstances into consideration and arrived at the conclusion that the conference was not proper. Only on that basis could he properly disallow this item, a conference attended by a director of the client company.

Item No. 2 and the objection to the partial disallowance thereof are: "Fee to counsel to settle particulars of defence and "counterclaim. The fee charged for settling particulars of "defence and counterclaim was the fee charged and paid. It is "respectfully submitted such fee was reasonable as between "solicitor and own client having regard to the data which fell "to be considered by counsel." £2 4s. 6d. was allowed. There again the taxing officer's duty was to consider and settle for himself what appeared to him to be a proper fee for settling particulars of the defence and counterclaim having regard to the data which fell to be considered by counsel. If he had said that in his opinion the proper charge was £2 4s. 6d., and no more, I could not have interfered with that exercise of his discretion. What he has said is: "This was the fee charged on the party "and party taxation and I see no reason for increasing it." That is the wrong approach. He ought not to start with the fee allowed on party and party taxation but with the fee paid to

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counsel, and then decide whether he sees any reason to reduce it on the ground that it was excessive. This was a disbursement and the solicitor was entitled to be reimbursed unless it was not a proper payment.

The next item was No. 3: "Consultation fee to senior "counsel; attending to appoint consultation; consultation fee to "junior counsel; attending consultation." Nothing was allowed. The reasons for the objection were: "On the plaintiffs' applica- "tion made February 6, 1952, the hearing of the action was fixed "for February 19, 1952, on grounds that one Roberts, the plain- "tiffs' former general manager, was going to Far East and would "be away several months. It subsequently became known "Squadron Leader Hunt was proposing departing for Belgium "on February 17 with some heavy equipment in connexion with "an exhibition. Squadron Leader Hunt designed the prototype "of the apparatus the subject-matter of the action and his "evidence was vital to the defence. The plaintiffs refused under "any circumstances whatsoever to consent to an adjournment "and intimated any application to the court would be strenuously "opposed. The defendant company considered Hunt's evidence "so essential to their case that they instructed leading counsel "be briefed to make the application. Consultation was duly had "between senior and junior counsel as to the vital necessity of "Hunt's evidence, consultation fees were charged by both "counsel and paid," and I may add that it appears from the bill of costs that the solicitor attended the consultation. To this the registrar answered: "These fees were charged on a brief to "fix a new date for hearing. I consider (as did the taxing "master on the party and party taxation) that a consultation "was not necessary. A fee of seven guineas was allowed to "junior counsel to advise on evidence." There again the registrar seems to have forgotten that he had to say not only that the disbursement and charge was not necessary, but that it did not appear to him to be proper. He gives no reasons why he should hold that the consultation was improper and he seems to think that what happened on the party and party taxation assisted his conclusion. I cannot take that view. The solicitor may have been expressly authorized to hold the consultation. There is no evidence that he was; but I must assume, in the absence of evidence to the contrary, that the solicitor would not have attended the consultation unless he considered it necessary or proper in his client's interest. The solicitor in his objections sets out the reasons why he thought it necessary or proper. If the taxing officer thought that it was not proper, he ought to have said so, and I think he might well have been expected to give some reasons for his view.

Now comes the biggest item, No. 4: "Instructions for brief "allowed at £236 5s. 0d." The reasons for the objection to this are: "The amount allowed on the contested party and party "taxation was £157 10s. 0d. The issues between the parties

" were technically complex and an unusual amount of work of " a solicitor and own client nature was necessitated for reasons " amongst others (a) it was necessary to show that whilst the " plaintiffs were an established company with a world wide " reputation in matters of radio, radar control and aerodynamics " with a large staff of qualified research and other engineers, they " had failed to appreciate the technicalities involved in the proper " functioning of the apparatus, the manufacture of which formed " the subject-matter of the proceedings; (b) the apparatus was " entirely novel and at that time despite the widest inquiry it " was not possible to find experts with sufficient technical " appreciation to prove such failure by the plaintiffs, to the satis- " faction of the court, without the fullest introductory explana- " tion and demonstration, before they could begin to qualify to " give evidence. The work of a purely solicitor and own client " nature involved, was at least as great as that of a party and " party nature, and taking into account the allowance for solicitor " and own client items in respect of letters, instructions and " attendances disallowed as separate items in other parts of the " bill, it is respectfully submitted the allowance of £78 15s. 0d. " for solicitor and own client work is inadequate." If the registrar had said that he considered that a fee of £236 5s. 0d. was a reasonable fee for work which it was necessary or proper for the solicitors to do, I should not have interfered, for I have no idea whether it was or was not a reasonable fee for that work. But it is to be remembered in this connexion that costs are not necessarily to be disallowed between solicitor and his own client because the solicitor was over-cautious or because of any other unusual expenses. Therefore it is quite plain that the words " necessary " and " proper " are not in this connexion by any means coterminous. The solicitors may have done work which was not necessary but which none the less was proper even if due in some degree to over-caution or some other cause. Therefore the registrar does not sufficiently answer the objection by finding, as he does find, that he has considered all the work necessarily done. What he says is: " On fixing this fee, I have " considered all the work necessarily done by the solicitors. I " do not consider it necessary for a solicitor to go fully into " technical complexities, other than necessary to draw the proofs " of experts." His answer seems to me to indicate that he has deliberately excluded from his consideration any work which could not be said to have been " necessary." That is, of course, a wrong approach.

I now come to Item 5: " Attending court " on four occasions. £3 3s. 0d. was allowed for each attendance. The objection is: " On each day of the hearing the defendants " (Messrs. Nicholls & Gold) and such of their expert witnesses " as were not at the time under oath attended all day (beginning " before 10 a.m. and concluding after 6 p.m.) by a solicitor and " managing clerk on technical matters and fresh considerations

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" which arose out of the examination and cross-examination and " notes were prepared for counsel. It is respectfully submitted " that on a solicitor and own client basis the figure of £7 7s. 0d. " inserted in the bill is fair and reasonable." To that the answer is: " The allowance is in accordance with Fee No. 172, Appen- " dix N." Nos. 170, 171 and 172 of Appendix N read as follows: " 170. On hearing or trial of any cause, or matter, or issue of " fact, in London or Middlesex, or the town where the solicitor " resides or carries on business, whether before a judge with or " without a jury, or commissioner, or referee, or on assessment " of damages, when in the paper, 10s. 0d. 171. When heard or " tried, 13s. 4d. 172. Or according to circumstances not to " exceed £3 3s. 0d." Three guineas is, of course, the maximum. But it will be noticed that that relates to attendance at the hearing. The registrar continues " which applies to solicitor and " client as well as party and party." So it does; but it is pertinent to observe, though it is not the ground of my decision on this objection, that regulation 29 was altered in January, 1902, and that in *In re Ermen*[3] Farwell J., after an exhaustive investigation of the altered position, said: " I see no reason why " he should not have a two-fold discretion, namely, a discretion " to allow the maximum or minimum, or something between the " two, and, in addition to that, in special cases a general " discretion to allow ' all such costs, charges and expenses, as " ' shall appear to him to have been necessary or proper for the " ' attainment of justice or for defending the rights of any party.' " That appears to me to be the true construction of rule 8 and " the new sub-rule 29, nor do I find anything contrary to that in " the addition to sub-rule 37."

The registrar proceeds: " There is no justification for the " allowance for more than the fee allowed as between party and " party: *In re Lynch to Chance.*[4] " If the charge had been limited to attendance at the hearing in court, I would have been prepared to hold, though with some hesitation, that the registrar had appreciated the twofold duties prescribed for him by *In re Ermen*,[5] and that he had reached a conclusion that there was no justification for allowing more than the maximum fee. But this charge for attendance extends to a time before the sitting of the court and to a time long after the conclusion of its sitting, and it seems to follow that more should be allowed than would have been allowed if the attendance had been confined to the hearing in court. Therefore, again it seems to me that the registrar has made a wrong approach.

The last item, No. 6, is: " Refresher fee to senior counsel," allowed at 11 guineas. " Refresher fee to junior counsel," allowed at £7 12s. 0d. The objection was: " The hearing of the " action lasted five whole days after the first day and it is respect- " fully submitted counsel is entitled to five refreshers. Five

[3] [1903] 2 Ch. 156, 162.
[4] (1892) 30 L.R.Ir. 278.
[5] [1903] 2 Ch. 156.

"refreshers were charged and paid." The refreshers which were paid were £53 15s. 0d. to leading counsel and £35 13s. 0d. to junior counsel. Here again, in my view, the question which the taxing officer had to consider was whether these payments of refreshers to counsel were proper in amount in the circumstances of the case. What he says is: "In accordance with Order 65, "r. 27, reg. 48, the fee was fixed on the five hour rule. Five "refresher fees have been allowed, the last being apportioned as "there was an odd time of thirty-seven minutes." (The whole time occupied on the hearing was 25 hours 37 minutes.) "The "first four refresher fees have been allowed as charged, although "they are larger figures than those allowed on the party and "party taxation."

To deal with the last point first, I expect they are, and why not?—because different considerations apply altogether. For example, it might have been (though it was not the case here) that the client might have desired an expensive counsel whose fee was 1,000 guineas, and might have instructed the solicitor to employ that counsel knowing that his fee would be that or something in that region. In those circumstances quite obviously that 1,000 guineas would be a proper disbursement in a taxation as between a solicitor and his own client, though it is hardly to be imagined that a fee of that magnitude would be allowed on a party and party taxation; but the real point relates to the apportionment.

I have heard of a refresher being reduced when a case has lasted for only a short part of a further day, as far as I know generally by agreement; I do not really know of any other method of doing it. I have also known only a small refresher to be charged in such circumstances; but the one principle which I should have thought was quite unfair was to apportion the refresher on a mere time basis, because, after all, the 37 minutes in the morning may from counsel's point of view be equivalent to the loss of a whole day from other work, or they may not; everything depends on the circumstances. The one thing that I should have thought would be quite unfair would be to adopt a rigid mathematical rule of apportionment. I never heard in my experience at the Bar (which was quite long) of an apportionment of that sort being made, though, as I have said, I have heard of refreshers being reduced by agreement in those circumstances or even remitted altogether; but I never remember hearing of any mathematical apportionment, and I know of no practice of that kind, and I cannot think it is right to say that a solicitor made an improper payment to counsel because he did not insist on a mathematical apportionment.

Therefore, it seems to me that again the registrar has made a wrong approach. I am expressing no opinion as to what is the proper amount to allow for the refreshers.

These matters are not matters in respect of which I can possibly fix an amount, and I have already given the reasons

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why I should be reluctant to have a further taxation in the companies winding-up department. These objections and answers, as I have already said, have really nothing to do with the fact that the company is being wound up. It is a kind of taxation which I should imagine is not common in the companies department, a taxation as between a solicitor and his own client of costs incurred in an action in the Queen's Bench Division. It is extremely desirable that all taxations of that sort should be as far as possible conducted under the same body of taxing officers, and, in my judgment, I ought to refer all the items to which objection has been taken to the taxing department of the central office of the Supreme Court for further consideration and for a further certificate.

Now, what about costs? I suppose the official receiver has got to pay. The taxation of the costs of this application is a different kind of taxation which can conveniently be conducted in the companies department. I will order payment of the applicant's costs of today's proceedings to be taxed as between party and party.

Order accordingly.

Solicitors: *Perkins & Co.; Stafford Clark & Co.*

K. R. A. H.

[PRIVY COUNCIL.]

J. C.† 1956 *July* 12, 26.

* ANDREAS CHARILAOU ZAKOS AND ANOTHER APPELLANTS;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Cyprus—Criminal law—Emergency regulations—Charge of carrying and discharging firearms—Framed under relevant regulations read with sections of Criminal Code—Whether sections of Code applicable to the regulations—Charge valid—Emergency Powers (Public Safety and Order) Regulations, 1955, *regs.* 52 (*a*) (*c*), 72—*Criminal Code* (*Laws of Cyprus,* 1949, *c.* 13), *ss.* 20, 21—*Interpretation Law* (*Laws of Cyprus,* 1949, *c.* 1), *s.* 2.

Privy Council—Jurisdiction—Criminal matter—Essential principle of justice.

The appellants were charged with and convicted of discharging and carrying firearms contrary to paragraphs (*a*) and (*c*) of regulation 52 of the Emergency Powers (Public Safety and Order) Regulations, 1955, and sections 20 and 21 of the Criminal Code of Cyprus. Section 20 of the Code made aiders and abettors guilty

† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD TUCKER, LORD COHEN and LORD SOMERVELL OF HARROW.

of the offence charged, and section 21 related to common intent, and the appellants, alleging that they were not found guilty of themselves discharging or carrying firearms and that their "offence" lay in the application to their case of section 20 or 21 of the Code, contended that those provisions did not apply to regulation 52 and that they had therefore been charged with and convicted of offences unknown to the law of Cyprus. They submitted that in the Criminal Code an "offence" was defined in section 4 as meaning an act punishable by law, that section 2 of the Interpretation Law of Cyprus defined "law" as "any enactment by the competent "legislative authority of the Colony," that regulations made by the Governor under the Emergency Powers Orders in Council of 1939 and 1952 were made by him in his executive, not his legislative, capacity and did not fall within the definition of "law," that therefore an offence against the regulations was not an offence punishable by law, and that therefore sections 20 and 21 of the Code had no application to such an offence.

They contended secondly that if the regulations did fall within the definition of "law," yet sections 20 and 21 of the Code did not apply to their case because section 2 (*a*) of the Code provided that "nothing in the Code shall affect the liability, trial or punishment "of a person for an offence against any law in force in the Colony "other than the Criminal Code." They further submitted that sections 20 and 21, or at any rate section 20, of the Code had been impliedly repealed by other regulations made under the Emergency Powers Orders in Council, and particularly regulation 72, which substantially repeated many of the provisions of sections 20 and 21 of the Code:—

Held, (1) that the regulations themselves, in providing in paragraph 2 (2) that "the Interpretation Law shall apply to the "interpretation of these regulations . . . as it applies to the inter-"pretation of a law and, for the purposes of the said law, these "regulations shall be deemed to be laws," meant that where in the relevant sections of the Criminal Code the word "law" was used it should be deemed to cover the regulations. Apart from that consideration, the word "law" as used in the definition of "offence" in the Criminal Code more appropriately meant the whole body of law for the infraction of which penalties were imposed.

(2) That there was no validity in the appellants' second contention. The purpose and effect of section 2 (*a*) of the Code was merely to provide that the Criminal Code should not be regarded as exhaustive; and it must have been contemplated that further legislation dealing with particular offences might be passed. Section 2 (*a*) could not reasonably be construed as excluding the operation of the Code where it was not inconsistent with the provisions of a particular legislation.

(3) The duplication of provisions in sections 20 and 21 and regulation 72 did not involve the repeal of the Code or any part of it.

Judgment of the Supreme Court of Cyprus affirmed.

APPEAL (No. 13 of 1956), by special leave, from a judgment of the Supreme Court of Cyprus (Hallinan C.J., Zekia and Zannetides JJ.) (April 6, 1956) dismissing the appellants' appeals from a judgment of the Special Court of Nicosia (Shaw J., sitting without a jury) (February 28, 1956) whereby they were convicted of discharging and carrying firearms and were sentenced to death.

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Each of the appellants was charged in the following form:

"Statement of Offence

"First Count

"Discharging firearms, contrary to regulation 52 (*a*) of the "Emergency Powers (Public Safety and Order) Regulations, "1955, and the Criminal Code, cap. 13, sections 20 and 21.

"Particulars of Offence

"The accused on the 15th day of December, 1955, at Galini, "in the District of Nicosia, did discharge firearms at Major Brian "Jackson Coombe of the 37 Field Squadron Royal Engineers.

"Statement of Offence

"Second Count

"Carrying firearms, contrary to regulation 52 (*c*) of the "Emergency Powers (Public Safety and Order) Regulations, "1955, and the Criminal Code, cap. 13, sections 20 and 21.

"Particulars of Offence

"The accused at the time and place in count 1 hereof men- "tioned, did carry firearms."

The relevant parts of regulation 52 were as follows:

"52. Any person who shall without lawful authority, the "burden of proof of which shall lie upon him, (*a*) discharge any "firearm at any person or any group or body of persons, or at "any place where persons may be, . . . (*c*) carry any firearm or "ammunition or any bomb or grenade; . . . shall be guilty of an "offence and shall on conviction be liable to be sentenced to "death or to imprisonment for life or for such lesser term as the "court may see fit to impose."

Sections 20 and 21 of the Cyprus Criminal Code, to which the charge also referred, were as follows:

"20. When an offence is committed each of the following "persons is deemed to have taken part in committing the offence "and to be guilty of the offence, and may be charged with "actually committing it, that is to say—(*a*) every person who "actually does the act or makes the omission which constitutes "the offence; (*b*) every person who does or omits to do any act "for the purpose of enabling or aiding another person to commit "the offence; (*c*) every person who aids or abets another person "in committing the offence; (*d*) any person who counsels or "procures any other person to commit the offence.

"In the fourth case he may be charged either with himself "committing the offence or with counselling or procuring its "commission.

"A conviction of counselling or procuring the commission of "an offence entails the same consequences in all respects as a "conviction of committing the offence.

"Any person who procures another to do or omit to do any "act of such a nature that, if he had himself done the act or "made the omission, the act or omission would have constituted "an offence on his part, is guilty of an offence of the same kind, "and is liable to the same punishment as if he had himself done

" the act or made the omission; and he may be charged with " himself doing the act or making the omission.

" 21. When two or more persons form a common intention to " prosecute an unlawful purpose in connexion with one another, " and in the prosecution of such purpose an offence is committed " of such nature that its commission was a probable consequence " of the prosecution of such purpose, each of them is deemed to " have committed the offence."

The main point raised in the appeal was whether sections 20 and 21 of the Criminal Code had any application to the regulations; it was contended for the appellants that those sections had no application to the regulations and that therefore they had been convicted of offences which were unknown to the law of Cyprus.

The argument for the appellants giving three reasons for the submission that sections 20 and 21 of the Code had no application to charges of offences created by the regulations appears from the judgment of the Judicial Committee.

1956. July 11, 12. *D. N. Pritt Q.C.* and *D. A. Grant* for the appellants.

Gerald Howard Q.C. and *J. G. Le Quesne* for the Crown.

The following cases were referred to in argument: *Watson* v. *Winch* [1]; *N. A. Subramania Iyer* v. *King-Emperor* [2]; *Knowles* v. *The King* [3]; *Meek* v. *Powell* [4]; *Rex* v. *Taylor*.[5]

July 12. VISCOUNT SIMONDS announced that their Lordships would humbly advise Her Majesty that the appeals should be dismissed and that they would give their reasons later.

July 26. Their Lordships' reasons for dismissing the appeals were delivered by VISCOUNT SIMONDS. This is an appeal from a judgment of the Supreme Court of Cyprus dismissing the appellants' appeal from a judgment of the Special Court of Nicosia whereby the appellants were convicted of discharging and carrying firearms and were sentenced to death.

The appeal was brought (as such appeals can only be brought) by special leave, which was granted upon the allegation that the appellants had been tried for, and convicted of, offences unknown to the law of Cyprus. Upon an appeal recently brought from the Supreme Court of Cyprus their Lordships thought fit to state once more the nature of the jurisdiction which is exercised by the Board in criminal matters and to refer to some of the cases in which the principle had been asserted or applied. To such

[1] [1916] 1 K.B. 688, 690; 32 T.L.R. 244.
[2] (1901) L.R. 28 I.A. 257.
[3] [1930] A.C. 366, 370; 46 T.L.R. 276.
[4] [1952] 1 K.B. 164; [1952] 1 T.L.R. 358; [1952] 1 All E.R. 347.
[5] (1924) 40 T.L.R. 836.

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citations may be added a passage from the judgment of the Board delivered by Lord Dunedin in *Mohinder Singh* v. *King-Emperor* [1]: "Their Lordships have frequently stated that they do not sit "as a Court of Criminal Appeal. For them to interfere with a "criminal sentence there must be something so irregular or so "outrageous as to shock the very basis of justice," and a passage from the judgment of the Board delivered by Viscount Simon L.C. in *Muhammad Nawaz* v. *King-Emperor* [2]: "Broadly "speaking, the Judicial Committee will only interfere where "there has been an infringement of the essential principles of "justice."

It is possible that such an allegation as that which has been mentioned and which in fact is the first of the appellants' reasons in their formal case, viz., that they have been convicted of offences unknown to the law of Cyprus, might be supported by facts which would justify interference by the Board upon the principle above stated. But so general an allegation may cover defects of a trivial or technical character which would by no means justify either special leave to appeal or, if leave was granted, the allowance of the appeal. It is therefore necessary to examine carefully the facts of each case, and their Lordships proceed to do so in this case.

As has already been said, the appellants were convicted of the offence of discharging firearms and carrying firearms, and it must be at once stated that the judgment of the trial judge, Shaw J., was conspicuously careful, accurate and moderate. Their Lordships have no doubt that counsel for the appellants was right in conceding that, if he failed upon the points of law on which he relied, he had no valid ground of attack upon the facts. It must be stated, too, that neither before the trial judge nor on appeal to the Supreme Court were such points of law taken. The latter court was invited to reverse the judgment of the trial judge solely on grounds which raised questions of fact. Their Lordships, therefore, have not the advantage of the opinions upon the matters now raised of the courts below, to which they would naturally attach great weight. Nor, assuming that the points now taken had been well founded, do they know whether, if such points had been taken before the trial judge, an amendment might not have been made under section 81 of the Criminal Procedure Law with the consequence for which section 150 of that Law provides. Nor, again, do they know what course the Supreme Court might have taken under section 142 of the same Law, which authorizes the court to convict an accused person of any offence of which he might have been convicted on the evidence adduced at the trial. These are considerations which illustrate the mischief and inconvenience (to repeat the words of the Board in *Attorney-General for New South Wales* v.

[1] (1932) L.R. 59 I.A. 233, 235. [2] (1941) L.R. 68 I.A. 126, 128.

Bertrand [3]) that may arise from an intervention in the administration of the criminal law.

Nevertheless, having said so much, their Lordships must examine the contention that the appellants have been convicted of an offence unknown to the law of Cyprus. It will appear that this contention is not well founded.

Each of the appellants was charged in the following form: [His Lordship stated the terms of the charges and of sections 20 and 21 of the Criminal Code as set out above, and continued:] Upon these charges the submission of the appellants was that sections 20 and 21 of the Code had no application to the regulation and that therefore they were charged with offences unknown to the law of Cyprus. They were not, it was said, found guilty of themselves discharging or carrying firearms: their "offence" lay in the application to their case of one or other of the provisions of section 20 or section 21 of the Code: if these provisions did not apply to regulation 52, then there was no offence of which they could lawfully be convicted.

The argument proceeded thus. In the Criminal Code an "offence" is defined in section 4 as meaning an act, attempt or omission punishable by law: the Criminal Code does not contain a definition of law, but by section 2 of the Interpretation Law (chapter 1 of the Laws of Cyprus, 1949) as amended by Law No. 30 of 1953, "Law" is defined as meaning "any enactment "by the competent legislative authority of the Colony, but does "not include . . . an Order of Her Majesty in Council, Royal "Charter, or Royal Letters Patent": Regulations made by the Governor under the Emergency Powers Orders in Council of 1939 and 1952 are the act of the executive authority and do not fall within the definition of "Law": therefore an offence against the regulations is not an offence punishable by "law": therefore sections 20 and 21 have no application to such an offence.

In their Lordships' opinion the answer to this contention is supplied by the regulations themselves, which by paragraph 2 (2) provide that "the Interpretation Law shall apply to the inter-"pretation of these regulations and of any order made or direction "given thereunder, as it applies to the interpretation of a Law "and, for the purposes of the said Law, these regulations shall "be deemed to be Laws." It was urged on behalf of the appellants that the sole effect of this provision was to provide that the provisions of the Interpretation Law as to the proper interpretation of laws should apply to the interpretation of the regulations. But this is the meaning and effect to be given to the first part of the subparagraph: the latter part of it appears to their Lordships precisely to meet the present case and to provide that, where, as for instance in the relevant sections of the Criminal Code, the word "law" is used, it shall be deemed to cover the regulations. But, apart from this consideration, it is by no means clear to

[3] (1867) L.R. 1 P.C. 520.

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their Lordships that the word "law" where it is used in the definition of "offence" in the Criminal Code has the meaning ascribed to the word "Law" by the Interpretation Act. In its context it more appropriately means the whole body of law for the infraction of which penalties are imposed.

It was then urged that if, contrary to the appellants' contention, the regulations fall within the definition of "law," yet sections 20 and 21 of the Criminal Code do not apply to their case because it is provided by section 2 (*a*) of that Code that "nothing in the Code shall affect the liability, trial or punishment "of a person for an offence against any Law in force in the "Colony other than the Criminal Code." There is no validity in this argument. At the time when the Criminal Code came into operation, other legislation creating offences remained in force and it must have been contemplated that further legislation dealing with particular offences might be passed. The purpose and effect of section 2 (*a*) was merely to provide that the Criminal Code should not be regarded as exhaustive. It cannot reasonably be construed as excluding the operation of the Code where it is not inconsistent with the provisions of particular legislation. This is equally true whether sections 20 and 21 are under consideration or sections such as sections 16 and 17, which are for the benefit of accused persons. This view is emphasized by the further provisions of section 2 itself, and in particular by the proviso which provides that, if a person does an act which is punishable under the Code and is also punishable under another Law of any of the kinds mentioned in the section, he shall not be punished for that act under both Laws.

Finally, it was urged that sections 20 and 21, or at any rate section 20, of the Code had been impliedly repealed by other regulations made under the Emergency Powers Orders in Council and particularly by regulations 72 and 73. This contention also fails. It is true that many of the provisions of sections 20 and 21 of the Code are repeated (some of them verbatim) in regulation 72, but this duplication does not involve the repeal of the Code or any part of it. This is clearly recognized by regulation 76 (the counterpart of the proviso to section 2 of the Code) which provides that "Nothing in these regulations shall affect the liability of any "person to trial and punishment for any offence otherwise than "in accordance with these regulations: Provided that no person "shall be punished twice for the same act or omission."

In their Lordships' opinion, therefore, this appeal fails on all the points of law which have for the first time been raised before them. But the contention last referred to, that the relevant sections of the Code had been impliedly repealed by the regulations, leads them to make a final observation.

Whatever be the correct view with regard to sections 20 and 21 of the Code, a study of the careful judgment of Shaw J. indicates that a conviction under regulations 52 and 72 must have resulted

if the charge had been so framed without reliance on these sections.

Their Lordships have, for the reasons herein appearing, humbly advised Her Majesty that this appeal should be dismissed.

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Solicitors: *Bischoff & Co.; Charles Russell & Co.*

C. C.

[CHANCERY DIVISION.]

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Upjohn J.

Revenue — Income tax — Charity — Fund for benefit of employees of company—Consent orders (with acquiescence of Attorney-General) involving scheme—Subsequent claim for charitable exemption from income tax opposed by Crown — Estoppel — Validity of scheme—Whether scheme an "imperfect trust provision" — Charitable Trusts Validation Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 58), *ss.* 1, 2.
Estoppel—Per rem judicatam.

A testator, who died on January 24, 1919, by his will bequeathed his shares in a partnership to be divided equally between three brothers and a sister on condition "that they shall pay 20 per cent. "of all moneys received to some organization or charity at their "discretion for the benefit of the employees of [the partnership] "in reward of long or meritorious service with the firm or for an "institute or other object for the recreation of the employees at "the discretion of the several beneficiaries to the separate amount "of 20 per cent. of their share."

A summons was taken out by the trustees of the will to determine (inter alia) whether that condition was (a) a valid charitable trust or disposition and (b) if not, whether it was void as infringing the rule against perpetuities. The Attorney-General was joined as a defendant.

A compromise was, however, agreed to and sanctioned by an order of Peterson J. dated December 11, 1919, which was prefaced by a recital: "The Attorney-General by his counsel not objecting to "the order hereby made and the other parties consenting . . ." It was ordered that a scheme be prepared for the administration of the fund "to be settled and approved by the judge in this action. "The objects of the scheme are to be limited to charitable "purposes." By an order of Eve J., dated June 23, 1921, a scheme for the administration of the fund was approved by the court. This order contained the following paragraph: "And the "Attorney-General by his counsel not objecting to the order hereby "made and the other parties by their counsel consenting the judge "doth approve and sanction the scheme . . . set forth in the "schedule hereto . . ."

In 1920 the business was sold to a company, and in 1927 it was acquired by another company and the benefits of the fund became available for its employees.

Pursuant to the scheme the trustees purchased certain lands and buildings in London and Liverpool which were used as club houses and recreation grounds for the persons designated as entitled to the

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benefits of the scheme; at the date of the hearing they held the Liverpool property and substantial investments representing war damage payments received in respect of the London property.

A claim by the trustees for exemption from income tax as a charitable body pursuant to sections 447 and 448 of the Income Tax Act, 1952, was rejected by the special commissioners. On appeal to the court, where it was conceded that the scheme was not charitable, having regard to *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31:—

Held, (1) (a) that as the scheme was made pursuant to the order of Eve J., the order of Peterson J. could not estop the Attorney-General from questioning the validity of the scheme; (b) that as no lis or issue as to whether the scheme was or was not charitable was raised before Eve J., the Attorney-General was not so estopped by his order.

Per curiam. Where a scheme has per incuriam been sanctioned by the court as charitable, the Attorney-General and the trustees have the right and power, and maybe the duty, to bring the matter to the attention of the court and seek some amendment.

Observations of Lord Simonds in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] A.C. 31, 74; 63 T.L.R. 424; [1947] 2 All E.R. 217 applied.

Quaere, whether if the Attorney-General, acting for the Crown in its capacity as parens patriae had been so estopped, such estoppel would also apply to the Revenue.

(2) That the scheme was not validated by section 1 of the Charitable Trusts (Validation) Act, 1954,[1] as it did not constitute "an imperfect trust provision," in that the remaining real property could not be used exclusively for charitable purposes.

(3) That the scheme was not invalid apart from the income tax aspect, so that it should be amended so as to conform to the direction of Peterson J. that the objects should be limited to those wholly charitable.

APPEAL from the Commissioners for the special purposes of the Income Tax Act.

The trustees of a trust fund for the employees of a certain company appealed from a decision of the special commissioners, who affirmed a refusal of the Commissioners of Inland Revenue to grant exemption from income tax to the fund under the provisions of sections 447 and 448 of the Income Tax Act, 1952 (which give exemption to charities in certain cases), in respect of the income of the fund for the years 1951–1952 and 1952–1953.

The case, so far as relevant, provided: "2. The question for "our determination was whether or not the Commissioners of

[1] Charitable Trusts (Validation) Act, 1954, s. 1: "In this Act, "'imperfect trust provision' means "any provision declaring that the "objects for which property is to be "held or applied, and so describing "those objects that, consistently with "the terms of the provision, the "property could be used exclusively "for charitable purposes, but could "nevertheless be used for purposes "which are not charitable. (2) . . . "any imperfect trust provision con- "tained in an instrument taking "effect before December 16, 1952, "shall have, and be deemed to have "had, effect in relation to any dis- "position or covenant to which this "Act applies—(*a*) as respects the "period before the commencement of "this Act, as if the whole of the "declared objects were charit- "able. . . ."

" Inland Revenue are estopped from denying that the objects " of the fund are charitable by reason of the orders made in the " Chancery Division of the High Court on December 11, 1919, " and June 23, 1921, in proceedings arising out of the trusts of " the will of the late Thomas Thorneycroft Vernon (hereinafter " called ' the testator ').

" 3. The following documents were produced and admitted or " proved at the hearing of the application: [after enumerating " the documents the case continued:] The facts found by us " on the foregoing evidence or agreed between the parties are set " out in the following paragraphs numbered 4 to 10 inclusive."

" 4. The testator, who died on January 24, 1919, by his will " dated March 3, 1913, bequeathed certain shares in the firm " of W. Vernon & Sons to four legatees subject to certain " conditions including the following: ' This condition is imposed " ' on each of the above four beneficiaries—that they shall pay " ' 20 per cent. of all moneys received to some organization or " ' charity at their discretion for the benefit of the employees of " ' the firm of William Vernon & Sons in reward of long or " ' meritorious service with the firm or for an institute or other " ' object for the recreation of the employees at the discretion of " ' the several beneficiaries to the separate amount of 20 per cent. " ' of their share.'

" 5. An application was made by originating summons to the " High Court on May 20, 1919, for the determination of certain " questions arising out of the trusts of the will. One of these " questions was whether the conditions set out in paragraph 4 " above created a valid charitable trust of the fund so con- " stituted and, in any event, asking for the directions of the " court as to this fund. The Attorney-General was joined as a " defendant to the summons.

" 6. Before this question had been determined by the court " the executors and beneficiaries under the will agreed after " negotiations to a compromise upon terms which included a " proposal that a scheme should be prepared for the administra- " tion of this fund as a charitable bequest to be settled and " approved by the court.

" 7. By an order of December 11, 1919, Peterson J. sanctioned " a compromise of the various questions raised by the said sum- " mons upon the terms set out in the schedule thereto and " ordered that a scheme be prepared by the four legatees and " settled by the judge for the administration and management " of the fund with its objects limited to charitable purposes as " provided by the terms of compromise. This order was prepared " by (amongst other things) a recital: ' The Attorney-General by " ' his counsel not objecting to the order hereby made and the " ' other parties consenting.'

" The relevant terms of compromise were as follows:—

" ' 2. Out of each payment to be received by the defendants " ' Sir John Herbert Vernon, William Allen Vernon, Elizabeth

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" ' Cooper Vernon and the Reverend Henry Richard Cooper " ' Vernon, the four legatees of the said shares in the said " ' partnership from William Vernon & Sons in respect of the " ' said capital sum of £150,000 or any interest thereon 20 per " ' cent. thereof is to be set aside as a fund (hereinafter referred " ' to as " the employees' fund ") for complying with and in " ' full satisfaction of the condition in the said will contained " ' which is referred to in questions 3, 4 and 5 in the within- " ' mentioned originating summons.

" ' 3. A scheme to be prepared by the said four legatees for " ' administration of the said employees' fund is to be settled " ' and approved by the judge in this action. The objects of the " ' scheme are to be limited to charitable purposes which are " ' primarily to be for the benefit of:—the persons hereinafter " ' designated under (1) and (2) and may include the provision " ' of a recreation ground and/or a working men's club.

" ' (1) Persons for the time being and from time to time in " ' the employ of William Vernon & Sons or any company which " ' may take over and carry on the business of the said firm " ' and/or their wives children or other dependants.

" ' (2) Any person who at any time has been or shall have " ' been in the employ of the said firm or of any such company " ' as aforesaid and/or the wives children or other dependants " ' of any such past employees or of any deceased employees.

" ' The said fund except so far as under the said scheme " ' the same shall be required for capital expenditure and " ' except so much thereof as represents income shall be invested " ' in trustee investments in the name of the Official Trustee of " ' Charitable Funds and shall subject to the provisions contained " ' in the said scheme be administered by the partners for the " ' time being in the said firm or the directors of any company " ' which may take over and carry on the said business of the " ' said firm or failing them by such trustees as may upon the " ' application of any person interested be appointed by the " ' Charity Commissioners and the income of the employees' fund " ' shall be paid to such partners, directors or last-mentioned " ' trustees (as the case may be) upon the trusts of such scheme " ' as aforesaid.'

" 8. In 1920 the business of the firm of W. Vernon & Sons " was sold to the company which was incorporated on " February 10, 1920.

" In 1920, whilst the scheme ordered by the court to be " prepared had not been approved by the court, the members of " the Vernon family who had been proposed as the original " trustees of the scheme took the opportunity to acquire the " Heathbank Estate which was most suitable as a club and " recreation ground, and which was on the market at a price " which was considered to be reasonable. The purchase money " was advanced by the company for the purposes of the fund. " A club was formed in accordance with the terms of the schedule

" to the order of the court of December 11, 1919. Pursuant " to paragraph 2 of the said terms of compromise, the four " defendants in the said paragraph named set aside the " employees' fund, and the capital of such fund was at the date " of the order next hereinafter mentioned represented by the " sum of £30,000 held by the said defendants in equal shares.

" 9. Upon an application being made to settle the scheme, " Eve J., on June 23, 1921, ordered as follows:—

" ' The court being satisfied from the said affidavits that the " ' lands authorized to be purchased by the scheme hereby " ' sanctioned are required for actual occupation for the purposes " ' of the charity thereby constituted And the Attorney- " ' General by his counsel not objecting to the order hereby " ' made and the other parties by their counsel consenting The " ' judge doth approve and sanction the scheme for the adminis- " ' tration and management of the said employees' fund which is " ' set forth in the schedule hereto, and doth order that the said " ' scheme be carried into effect and that the trustees of the " ' said scheme be at liberty notwithstanding the 5th section of " ' the Mortmain and Charitable Uses Act, 1891, to retain the " ' lands by the said scheme authorized to be purchased for the " ' purposes thereof.'

" 10. The Heathbank Estate mentioned in paragraph 8 above " is still held by the trustees and continues to be used as a club " and recreation ground in accordance with the terms of the " scheme sanctioned and approved by the court. A club for the " employees of the London branch of the company was subse- " quently set up and administered by the trustees. The club- " house was destroyed by enemy action and since then the " London branch has had no club house or ground.

" In 1927 the company's business was acquired by Spillers " Ltd. and the benefits of the fund thereupon became available to " its employees. No grants have been made during the year " under appeal to needy employees or their dependants.

" 11. It was contended for the trustees that the Commissioners " of Inland Revenue, being a department of the Crown, were " estopped from denying that the objects of the fund were limited " to charitable purposes, because the proposition that such " objects were wholly charitable was fundamental to the orders " made by the High Court in proceedings to which the Attorney- " General representing the Crown was a party, and that such " estoppel enured for the benefit of the appellants as the privies " in estate of the original legatees of the fund who were also " parties to the said proceedings, and that accordingly (the Com- " missioners of Inland Revenue not disputing that, during the " relevant years, the fund and the income thereof had been " applied for the purposes of the scheme only) the fund was " entitled to repayment of income tax under the exemptions " granted by sections 447 and 448 of the Income Tax Act, 1952, " for the two years 1951–1952 and 1952–1953.

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"12. It was contended for the Commissioners of Inland "Revenue: (i) that, as the trusts of the fund were primarily for "the benefit of the employees, former employees and dependants "of employees of the company, this fund was not charitable; "(ii) that as the orders of 1919 and 1921 were judgments inter "partes they were not binding upon the Commissioners of Inland "Revenue; (iii) that an estoppel did not arise because the parties "in this application were not the same parties nor in the same "capacities as the parties to the originating summons; (iv) that "the question decided by the court in 1919 and 1921 was not the "same question as that under appeal in this application; (v) that "the fund was not entitled to exemption from income tax under "sections 447 and 448, Income Tax Act, 1952, for the years "1951–1952 and 1952–1953.

"We, the commissioners, who heard this application, gave "our decision in writing on February 11, 1954, as follows:—

"1. The appellants in this case are the trustees of the "employee's fund, and under the provisions of section 450 of the "Income Tax Act, 1952, they appeal against the refusal by the "Commissioners of Inland Revenue to grant exemption from "income tax under Schedules A, B and D in respect of the "income of the fund for the two years 1951–1952 and 1952–1953.

"2. It is not disputed that in view of the decision of the "House of Lords in *Oppenheim* v. *Tobacco Securities Trust "Ltd.*,[2] the objects of the fund are not charitable only; "nor is it disputed that as the law was thought to be when the "fund was constituted its objects were charitable only.

"3. The ground of the appeal is that the Commissioners of "Inland Revenue are now estopped from denying that the "objects of the fund are charitable only; and this estoppel is "said to arise from the proceedings in the Chancery Division of "the High Court which were commenced by the originating "summons of May 20, 1919. It is not disputed that the "ultimate effect of these proceedings was not that of a judgment "in rem; it is said to be that of a judgment inter partes.

"4. We think that for an estoppel of the kind contended for "by the appellants to arise it is essential (among other things) "that the subject-matter in dispute in this appeal should be the "same as that which was in dispute in the Chancery action, that "is to say, that everything that is in controversy in this appeal "as the foundation for the appellants' claim for relief was also "in controversy in that action; and that the parties to this "appeal should be appearing in the same capacities as they "appeared in the Chancery action.

"5. The originating summons of May 20, 1919, did not, of "course, raise the issue whether the scheme for the administra- "tion and management of the fund constituted a valid charitable "trust. It did raise the issue whether the condition in the will

[2] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

" was a valid charitable trust or disposition, a question of some " importance to the beneficiaries under the will. This issue was " compromised after negotiations, and we do not think that the " court pronounced a final judgment on it.

" 6. By the order of December 11, 1919, the court sanctioned " a compromise upon the terms set forth in the schedule to the " order, and ordered that a scheme for the administration and " management of the fund to be constituted under clause 2 of " the Schedule should be prepared. Clause 2 of the Schedule " provided for the setting aside of certain moneys ' as a fund " ' for complying with and in full satisfaction of the condition " ' in the said will . . .' Clause 3 of the Schedule provided for " the preparation of a scheme to be approved by the court, the " objects of the scheme to be limited to charitable purposes, and " the court by the order of June 23, 1921, approved and sanc- " tioned the scheme which had been prepared.

" 7. We appreciate fully that, though the above-mentioned " orders were in one sense at least consent orders, they were not " formalities; that the court would have considered carefully the " terms of the suggested compromise and of the scheme to " which the court's approval was given; and that the orders were " made and the scheme drawn up on the basis that the objects " of the scheme were charitable only. We do not think, how- " ever, that the effect of the orders sanctioning a negotiated " compromise is that of a judgment that the fund was a charit- " able fund, for it appears to us that in the then view of the " law this was assumed and not decided.

" 8. If these views are wrong, and there was a decision of " the court that the objects of the fund are charitable only, " nevertheless we do not think that the issue in this appeal " is the same as the issue which the court decided. The only " issue in this appeal is whether the income of the fund is " exempt from income tax for the two years 1951–1952 and 1952– " 1953. Obviously the question of tax in respect of these two " years was not before the court. Furthermore, the claim to " exemption arises under sections 447 and 448 of the Income " Tax Act, 1952, and it appears to us that the only procedure " by which this exemption can be claimed is that provided by " section 450 of that Act, and that a claim to exemption from " income tax could not have been an issue in the Chancery " action.

" 9. If again we are wrong, and the court did decide the " point which arises in this appeal, we do not think that the " parties are now appearing in the same capacities. The appel- " lants in this appeal are the trustees of the fund and in that " capacity they were not parties to the Chancery action. The " Attorney-General, joined as one of the defendants in that action, " represented the Crown in its capacity as parens patriae. We " think that the Crown, though a corporation sole, may have " different capacities, and in its different capacities may have

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" conflicting interests, as happened in *Attorney-General* v. *Mayor* " *of Bristol.*[3] In our opinion the Crown as parens patriae and " represented by the Attorney-General appeared in a capacity " different from that in which it is represented in this appeal by " the Commissioners of Inland Revenue, and we do not think " that the fact that the Attorney-General did not object to the " orders in the Chancery action binds the Commissioners of Inland " Revenue in these proceedings.

" Accordingly we hold that the claim to exemption from " income tax for the years 1951–1952 and 1952–1953 fails.

" 15. The trustees immediately after the determination of the " application declared to us their dissatisfaction therewith as " being erroneous in point of law and in due course required us " to state a case for the opinion of the High Court.

" 16. The question of law for the opinion of the High Court " is whether the orders of the court of 1919 and 1921 create an " estoppel so as to preclude the Commissioners of Inland Revenue " from denying that the objects of the fund are for charitable " purposes only."

Sir Lynn Ungoed-Thomas Q.C. and *E. G. Wright* for the trustees.

J. G. Foster Q.C., Sir Reginald Hills and *E. Blanshard Stamp* for the Crown.

Denys Buckley as amicus curiae.

Cases referred to in argument not cited in the judgment: *In re Waring*[4]; *Hoystead* v. *Commissioners of Taxation*[5]; *Inland Revenue Commissioners* v. *Sneath*[6]; *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*[7]; *In re South American and Mexican Co.*[8]; *Leggott* v. *Great Northern Railway Co.*[9]; *Marginson* v. *Blackburn Borough Council*[10]; *R.* v. *Miles*[11]; *Attorney-General* v. *Magdalen College, Oxford*[12]; *Attorney-General* v. *Lindegren*[13]; *Robertson* v. *Minister of Pensions*[14]; *Attorney-General* v. *Mayor of Bristol*[15]; *Ware* v. *Cumberlege*[16]; *Inland Revenue Commissioners* v. *Baddeley*[17]; *In re Hobourn Aero Components Ltd.'s Distress Fund*[18]; *In re Royal Society's Charitable Trusts.*[19]

[3] (1820) 2 Jac. & W. 294.
[4] [1948] Ch. 221; 64 T.L.R. 147; [1948] 1 All E.R. 257.
[5] [1926] A.C. 155; 42 T.L.R. 207.
[6] [1932] 2 K.B. 362; 48 T.L.R. 241; 17 T.C. 149.
[7] [1926] A.C. 94.
[8] [1895] 1 Ch. 37; 11 T.L.R. 21.
[9] (1876) 1 Q.B.D. 599.
[10] [1939] 2 K.B. 426; 55 T.L.R. 389; [1939] 1 All E.R. 273.
[11] (1890) 24 Q.B.D. 423; 6 T.L.R. 186.
[12] (1854) 18 Beav. 223, 240.
[13] (1819) 6 Price 287, 308.
[14] [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2 All E.R. 767.
[15] (1820) 2 Jac. & W. 294, 309.
[16] (1855) 20 Beav. 503, 511.
[17] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525; 34 T.C. 22.
[18] [1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501.
[19] [1956] 1 Ch. 87; [1955] 3 W.L.R. 342; [1955] 3 All E.R. 14.

UPJOHN J., after stating the facts and the contentions as to estoppel and to the questions under the Act of 1954, continued: I understand that at the present time the value of the total properties subject to the trusts is about some £35,000, of which some £17,000 is in Exchequer bonds representing war damage payments received when a recreation ground provided under the trust for employees in London was damaged by enemy action. The premises at Heathbank are still retained.

It is common ground that, in sanctioning the scheme, all parties thought that a valid charitable trust was thereby constituted, although it is perhaps a little surprising that it was drawn in terms which were so wide. It is, however, now conceded that the trusts as declared by the scheme are not valid charitable trusts, and the reason is this:

Thirty years ago it was not always appreciated that in order to constitute a valid charitable trust it must be a public trust, and that if a trust is limited to the employees of a company the personal nexus constituted by that common employment does not satisfy the necessary test of the character of publicity. That is now well established, and it was established in a line of authorities after the last war culminating in the case of *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[1] Therefore, it is common ground that the scheme does not constitute valid charitable trusts unless indeed those trusts be validated by the Charitable Trusts (Validation) Act, 1954. The question then is whether the order of Peterson J. or the order of Eve J. estopped the Commissioners of Inland Revenue from alleging that the trusts are not valid charitable trusts.

As a first step in that argument, it is of course necessary to show that the Attorney-General himself is so estopped. If he is estopped, then the further question arises whether that estoppel binds and affects the Commissioners of Inland Revenue.

With regard to the order of Peterson J., I do not think there can be any real doubt upon the matter. That order by way of compromise decided that a certain fund, to be called the employees' fund, was to be held on charitable trusts, and it seems to me to be quite clear that the legatees and the Attorney-General at any rate in his capacity as representing the residue of the estate would be estopped for ever after from denying that that fund was to be established on valid charitable trusts. That, however, in my view, does not determine the matter.

The court, pursuant to the directions of Peterson J., subsequently was asked to sanction and did sanction a particular scheme, the relevant terms of which I have already read. That was an intended implementation of the directions of Peterson J. I think possibly the cardinal point in this case is whether the trustees can say that, because of the order of Peterson J., the Attorney-General is bound and that concludes the matter, or

[1] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

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whether they have to take the matter a step further and contend successfully that the order of Eve J. sanctioning the trusts also estops the Attorney-General. I think they have to go to the second point. It cannot, in my judgment, be denied that the trusts on which the property is now held are the trusts of a scheme sanctioned by Eve J. Those trusts admittedly are not charitable. The trustees must therefore show that the Attorney-General is estopped from taking the point that the trusts declared by the scheme are not charitable. In my judgment, it is not sufficient for them to show that the trusts which Peterson J. intended should be charitable estop the Attorney-General.

To constitute estoppel by res judicata it is, I think, clear that there must be a lis or issue and there must be a decision. It does not matter whether the decision is after argument or whether it is by consent or whether it is by default, although in the last of those alternatives one must have regard to the observations in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[2] It is at all events essential that there should be a lis or an issue, and if, of course, the decision upon that lis or issue involves a finding, whether or not after argument, that finding cannot again be litigated. As was stated by Somervell L.J. in *In re Koenigsberg*,[3] "If the order as made by "the court necessarily involves a finding (whether there was "argument or not) on the point which is later sought to be "litigated, the cases lay down that that point cannot be raised."

But in the present case, so far as the scheme sanctioned by Eve J. was concerned, the question whether the trusts were or were not charitable was never in issue. There may, no doubt, have been arguments and negotiations either in court or out of court during the preparation of the scheme upon some particular clauses or provisions, but it is clear that after the order by Peterson J. there never was any lis or issue with regard to the question whether the scheme was to be charitable. The whole underlying assumption was that it was to be charitable in order to carry out the compromise sanctioned by Peterson J.

In my judgment, however, the situation is this, that the scheme must be considered on its fair construction. It is conceded on that construction, in the light of the law as we now know it, that it does not constitute a valid charitable trust. I cannot see how any estoppel arises. The court has never construed this scheme; there was no decision that this scheme constituted a valid charitable trust. The court intended to carry out the directions of Peterson J. and, exercising its administrative jurisdiction over charities, sanctioned a scheme which per incuriam was not charitable. That sometimes happens. There may be some failure in point of draftsmanship, some failure, as in this case, to appreciate the true law affecting the matter, or there may be some other mistake but, in my judgment, there is

[2] [1939] A.C. 1; 55 T.L.R. 266; [1938] 4 All E.R. 747.

[3] [1949] Ch. 348, 362; [1949] 1 All E.R. 804.

no estoppel for there is no lis or issue relative to the only matter —that is, whether or not the scheme was charitable.

In my judgment the Attorney-General, far from being estopped, in these circumstances has the power—it may also be the duty—to come to the court and point out the error which has crept in, and ask for the scheme to be amended to conform to the overriding direction of Peterson J., namely, that a charitable scheme was to be constituted. If that be right, as I think it is, then in my judgment there can be no question that the Attorney-General is estopped from challenging the terms or the effect of the scheme. It is quite clear that, where a scheme is erroneous—that is to say, it does not carry out as nearly as may be the wishes of the testator or the settlor—the scheme may be amended, although many years afterwards. That appears from *Attorney-General* v. *Buller*.[4] It is clear from the well-known authority of *Attorney-General* v. *Bishop of Worcester*[5] that there is nothing necessarily permanent or irrevocable about a scheme once constituted. Circumstances may change and render it impracticable or not so useful as before and the court has a jurisdiction, to be exercised carefully and sparingly, to alter and vary trusts so that the testator's true charitable intentions may be carried out in the circumstances then arising.

It is clear, too, that not only the Attorney-General but also the trustees of the charity themselves have that right, that power—and, indeed, it may be, duty—to bring the matter to the attention of the court and seek some amendment. That appears clearly from the speech of Lord Simonds in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*.[6] Those principles seem to me to apply precisely where per incuriam the court has sanctioned a scheme which does not in fact carry out the original intentions. Accordingly, in my judgment, the appellants here do not establish the first step in their argument that the Attorney-General is estopped from raising the question of the validity of the trusts declared by the scheme.

It is therefore unnecessary for me to consider the interesting points which were argued as to whether, had he been so estopped, that would have precluded the Commissioners of Inland Revenue from challenging the claim to exemption from tax many years later, in 1951 and 1952.

There is, however, the second point to which I must now turn, and that is whether the trusts, not being charitable, have been validated by the Charitable Trusts (Validation) Act, 1954. Section 1 of that Act is in these terms: " In this Act, ' imperfect " ' trust provision ' means any provision declaring the objects for " which property is to be held or applied, and so describing those " objects that, consistently with the terms of the provision, the " property could be used exclusively for charitable purposes, but

[4] (1822) Jac. 407.
[5] (1851) 9 Hare 328.
[6] [1948] A.C. 31, 74; 63 T.L.R. 424; [1947] 2 All E.R. 217; 28 T.C. 311, 375.

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" could nevertheless be used for purposes which are not charitable. " (2) Subject to the following provisions of this Act, any " imperfect trust provision contained in an instrument taking " effect before the sixteenth day of December, 1952, shall have, " and be deemed to have had, effect in relation to any disposition " or covenant to which this Act applies—(*a*) as respects the period " before the commencement of this Act, as if the whole of the " declared objects were charitable; and (*b*) as respects the period " after that commencement as if the provision had required the " property to be held or applied for the declared objects in so far " only as they authorise use for charitable purposes." Of course, in this appeal I am concerned only with the period before the commencement of the Act, which was July 30, 1954.

The first question, therefore, that I have to consider is whether the scheme constituted an " imperfect trust provision " as defined in section 1 (1) of the Act. I have to see whether " consistently with the terms of the provision, the property "—and that, Sir Lynn concedes, must mean the whole property subject to the trusts—" could be used exclusively for charitable " purposes, but could nevertheless be used for purposes which are " not charitable." Of course, the last condition is fulfilled, and the question is whether the whole property could, consistently with the terms of the provision, be used " exclusively for " charitable purposes."

If the only property was the sum of Exchequer bonds held by the trustees, I should have thought that the scheme fell within the definition of an " imperfect trust provision," for the reason that the whole of the income could, consistently with the terms of clause 8, be applied in the manner set out in sub-clause (3) thereof, which I have already read. The Crown have not challenged the view that that sub-clause, taken in isolation, would constitute a valid charitable provision.

But the matter does not end there, because a large part of the property is Heathbank, held upon the trusts set out in clause 4 of the scheme. Those trusts permit the employees (putting it briefly) " and such other persons as shall from time to time be " authorized by the trustees " to " use and enjoy the same . . . " —that is, the recreation grounds and the club—" or such part " or parts thereof as the trustees may determine for all or any " of the purposes aforesaid." It is common ground that the " purposes aforesaid " refer back to clause 2 (A), which has reference to " the purposes of a club house and recreation ground " for the benefit of the employees at the Liverpool branch. . . ."

Sir Lynn very properly concedes that, in so far as a trust is formed for the employees of the company, that is not a charitable trust, but he relies on the wording that the trustees may permit others to use and enjoy the recreation ground facilities and the club house facilities. He says they could, consistently with that, invite the whole of the village or some defined area to enjoy those privileges and then that would be a charitable

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trust, because it would be for a defined section of the public. I cannot accept that argument. The primary trust is for the benefit of the employees of the company. The trustees may admit others; but that is not in itself a public trust. The persons to be admitted are those who are to be determined by the trustees; they have a complete discretion in the matter. I cannot see that that confers on this scheme the necessary character of being a public trust. Accordingly, it seems to me that, as the Heathbank property cannot be used exclusively for charitable purposes, it is not an imperfect trust provision and, therefore, it is not validated by the Act.

But there is, I think, another point with which I must deal. Section 2 of the Charitable Trusts (Validation) Act, 1954, says that the "Act applies to any disposition of property to be held "or applied for objects declared by an imperfect trust pro- "vision . . . where apart from this Act the disposition or "covenant is invalid under the law of England and Wales." I have to ask myself: Even assuming this to be an imperfect trust provision, would it be invalid under the law of England and Wales? The section is plainly pointing to invalidity because of the rule against perpetuities, uncertainty or some other ground of that sort. I think that the answer given by Mr. Foster is correct. This scheme is not invalid at all. All that happens is that, the imperfect quality of the trusts having been pointed out to the court, the court must amend them to conform with the original directions of Peterson J. Therefore, there is no invalidity about the scheme.

Accordingly, it seems to me that, even if this was an imperfect trust provision, this scheme would fail to satisfy section 2 of the Charitable Trusts (Validation) Act, 1954. For these reasons, it seems to me that the special commissioners reached a correct conclusion on the matter, and I must therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *Richards, Butler & Co. for Weightman, Pedder & Co., Liverpool; Solicitor of Inland Revenue.*

J. L. D.

[LIVERPOOL ASSIZES.]

* BRYERS *v.* CANADIAN PACIFIC STEAMSHIPS LTD.

1956
June 20, 21, 27.

Diplock J.

[1955 B. No. 2096.]

Dock—Regulations—Shipbuilding—Public dry dock—Several repairers contracting with shipowners—No notional occupier—Accident to shipowners' employee — Liability of shipowners — Shipbuilding Regulations, 1931 (*S.R. & O.*, 1931, *No.* 133), *reg.* 10, "*Duties.*"

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

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Bryers v. Canadian Pacific Steamships Ltd.

Factory — Persons benefited by regulations — "Person employed" — Breach of regulation—Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act*, 1948 (11 & 12 *Geo.* 6, *c.* 55), *s.* 12)—*Shipbuilding Regulations*, 1931 (*S.R. & O.*, 1931, *No.* 133), *reg.* 10.

An able seaman employed as a yeoman carpenter by the owners of a ship which was undergoing repair in a public dry dock sustained injuries when, in the ordinary course of his work of clearing the scuppers and bilges, he fell into an opening in a deck of the vessel. At the time of the accident a number of contractors had undertaken to make specialist repairs to the ship under direct contract with the shipowners:—

Held, (1) that the only condition to be satisfied in order to bring into operation the proviso contained in the section of the Shipbuilding Regulations, 1931, headed "Duties,"[1] was that the ship should be undergoing repair in a dry dock; that there was not a further condition that there should be a notional occupier; that, if the proviso came into operation, the exceptions thereto also came into operation and, accordingly, in the circumstances, the shipowners were under a duty to comply with regulation 10.[1]

Wilkinson v. *Rea Ltd.* [1941] 1 K.B. 688; [1941] 2 All E.R. 50 considered.

Donovan v. *Cammell Laird & Co.* [1949] 2 All E.R. 82 not followed.

(2) That the shipowners' employee came within the category of persons for whose protection the regulations were made.

Hartley v. *Mayoh & Co.* [1954] 1 Q.B. 383; [1954] 1 W.L.R. 355; [1954] 1 All E.R. 375 and *Wingrove* v. *Prestige & Co. Ltd.* [1953] 1 W.L.R. 449; [1953] 1 All E.R. 694; affd. [1954] 1 W.L.R. 524; [1954] 1 All E.R. 576 distinguished.

Per curiam. "It is plain that the restriction of that category "of persons [to whom Parliament intended to give a right of action "for breach of the Regulations] to those employed by the con- "tractors is not one which I ought to accept as a matter of con- "struction, and it seems to me that any one who is employed in "a place where the regulations apply—employed in the sense of its "being his normal place, the place where it is his duty to work, "and certainly to work regularly—is obviously covered by the "expression 'the persons employed.'"

[1] Shipbuilding Regulations, 1931: "Duties: It shall be the duty of "the occupier to comply with Parts "I to VIII of these regulations. Pro- "vided that, when a ship is being "repaired in public dry dock, the "person who contracts with the owner "of the ship or with his agent to "execute the work of repair, shall be "deemed to be the occupier for the "purposes of Parts I to VIII and it "shall be his duty to comply with "the said parts, except as follows:— ". . . (*b*) Where the control of the "ship apart from the work of repair "remains with the shipowner, it shall "be the duty of the shipowner, "master, or officer in charge, to pro- "vide the protection specified in regu- "lation 10 in so far as concerns those "hatches or openings which are not "required to be used for the pur- "poses of the repairs, but if such "protection be removed by any per- "son or persons in the employment "of the occupier or at his or their "request, the occupier shall be re- "sponsible for its replacement as "soon as practicable."

"Reg. 10: "All openings in decks "and tank tops shall be securely pro- "tected. Such protection shall be "maintained in position and when "necessarily removed in the course "of work shall be replaced as soon "as practicable. . . ."

ACTION.

The plaintiff, James Bryers, an able seaman, was employed by the defendants as a yeoman carpenter on the *Empress of Scotland*, a vessel owned by the defendants. The scuppers and bilge openings of the vessel had been covered while a cargo of grain was carried and it was the plaintiff's task to remove the covering cement from the scuppers, etc. The plaintiff had performed this work in most of the holds in the ship while she was in one of the basins in port, but at the time the plaintiff met with his accident the ship had been moved into a public drydock for her annual survey and overhaul. Harland & Wolff Ltd. undertook, under a direct contract with the shipowners, to carry out general repairs upon the ship and, in addition, some 17 other contractors, also under direct contract with the shipowners, undertook to execute specialist repairs, ranging from such matters as the repair of the storeroom locks by Chubb & Sons to repairs to the steering gear.

On December 8, 1954, the plaintiff, who had had 13 years' service at sea, was proceeding, in accordance with the defendants' instructions, to clear the scuppers on "F" deck and the bilges in the well therein after the vessel had gone into drydock. "F" deck was formed by the flat top of the tunnels housing the propeller shafts of the ship and the space between the port and starboard tunnels formed a well about 12 feet deep. With the assistance of a plumber, who was working on "E" deck, the plaintiff opened the hatch covers and he then descended to "F" deck and walked to the edge of the well to shine his torch down into the well when he slipped and fell into the well and sustained injuries.

The plaintiff brought this action claiming damages from the defendants on the ground, inter alia, of breach of regulation 10 of the Shipbuilding Regulations, 1931.

Rose Heilbron Q.C. and *Jack Tarsh* for the plaintiff.
J. S. Watson Q.C. and *J. M. Kennan* for the defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

June 27. DIPLOCK J. stated the facts which are substantially summarized above, referred to the pleadings, and continued: I must deal first with the case as it rests upon breach of statutory duty. Whether the plaintiff can succeed upon this depends upon the construction of the Shipbuilding Regulations, 1931. As long ago as 1949 Devlin J., in *Donovan* v. *Cammell Laird & Co.*,[1] drew attention to the difficulties of these regulations, and recommended that a redraft of them should be made by the Secretary of State, with the assistance of somebody with some knowledge of the

[1] [1949] 2 All E.R. 82.

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conditions under which work is done. That, Devlin J. thought, might result in a more comprehensible section being drafted. Unfortunately, that has not been done, and I am faced in my turn with the unenviable task of seeking to discover what the meaning of these regulations is.

The plaintiff puts his case in this way: The regulations throw duties upon the occupier. "The occupier" is the occupier of the shipbuilding yard. That was decided by the House of Lords in *Smith* v. *Cammell Laird & Co.*[2]; but while the duty is placed prima facie upon the occupier, there is in the regulations a proviso to that obligation in these terms: "Provided that, when a ship "is being repaired in *public dry dock*, the person who contracts "with the owner of the ship or with his agent to execute the "work of repair, shall be deemed to be the occupier for the "purposes of Parts I to VIII and it shall be his duty to comply "with the said Parts except as follows: (*a*) . . . (*b*) Where the "control of the ship apart from the work of repair remains with "the shipowner, it shall be the duty of the shipowner, master, or "officer in charge, to provide the protection specified in regula-"tion 10 in so far as concerns those hatches or openings which "are not required to be used for the purposes of the repairs, but "if such protection be removed by any person or persons in the "employment of the occupier or at his or their request, the "occupier shall be responsible for its replacement as soon as "practicable."

It is not contended that the ship was not in a public dry-dock, or that the well in "F" deck was not an opening in the deck, or that the well was not securely protected or maintained in position. The plaintiff puts his case very simply. He says the proviso applies because the ship was being repaired in a public drydock; the control of the ship apart from the work of repair remained with the shipowner; and it was therefore the duty of the shipowner (the defendants) to provide the protection specified in regulation 10, because the well in "F" deck was not a hatch or opening required to be used for the purposes of the repair. That indeed also is common ground.

The defendants put forward two arguments in answer to that. The first logically, although the points were argued in the opposite order, is that the regulations do not apply at all. The second is that if the regulations did apply then the plaintiff did not fall within that class of persons who is given a civil right of action as a result of a breach of the regulations.

I will deal first with the contention that the regulations did not apply. The argument involves two steps. The first step is that where more than one person contracts with the owner of the ship to do the repairs in a ship in public drydock there is no notional occupier under the proviso. The authority relied on for that proposition is the judgment of Lord Oaksey in *Hartwell* v.

[2] [1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381.

Grayson Rollo & Clover Docks,[3] and the judgment of Devlin J. in *Donovan* v. *Cammell Laird & Co.*[4] That is the first step. The second step is that where there is no notional occupier under the proviso, then there is no liability upon the shipowner under the exceptions to the proviso. The authority for that proposition is the judgment of Devlin J. in *Donovan* v. *Cammell Laird & Co.*[5] Both those steps are essential to the defendants' argument upon this branch of the case; if either of them fails this part of his argument breaks down.

As to the first step—the proposition that where more than one person contracts with the owner of a ship to do repairs there is no notional occupier under the proviso—it is to be noted that there is no authority which is binding upon me; although Lord Oaksey expressed that view in *Hartwell's* case.[6] Bucknill L.J.[7] expressly refrained from expressing an opinion upon this matter, and Roxburgh J.[8] took the same course, finding it unnecessary for the purpose of the decision in that case. Devlin J. in *Donovan's* case[9] accepted and followed the reasoning of Lord Oaksey, to which I have just referred. Such opinions are, of course, entitled to great respect, and although not binding upon me I have reached the same conclusion as Lord Oaksey and Devlin J. If one looks at the regulations one finds the reference is to "the person who contracts with "the owner of the ship or with his agent to execute the work "of repair." No doubt the words "the person" in the singular can, if the context so admits, by application of the Interpretation Act, be understood as meaning "the persons," in which case presumably some joint liability could be put upon all the persons in any way concerned in the repairs; but it seems to me upon an examination of the Shipbuilding Regulations, 1931, that the context of these regulations does exclude that statutory rule of construction. Leaving aside the possibility of de minimis, had Harland & Wolff, for instance, been doing the general repairs, and had the only other repairers been Messrs. Chubb, repairing the locks of the storeroom, I should have felt no difficulty in saying that Harland & Wolff were "the person" doing the repairs. But leaving aside that—as I must in this case, having regard to the wide nature of the other repairs—it seems to me that when one looks at the regulations it cannot have been intended to put a joint liability upon a number of different repairers. One has only to look, for instance, at regulation 1 relating to safe means of access: at regulation 6, which requires all ladders to be of sound material—it would be odd, indeed, if one repairer who had no access to a part of the ship where another repairer was working, for example, to the refrigerating chambers, were to be responsible penally for the safety of the ladders

[3] [1947] K.B. 901.
[4] [1949] 2 All E.R. 82, 89.
[5] Ibid. 89.
[6] [1947] K.B. 901.
[7] Ibid. 915.
[8] Ibid. 917.
[9] [1949] 2 All E.R. 82.

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provided by another repairer, over which he had no control. There are many other examples: regulations 11 to 17, relating to staging, and regulation 28, relating to oil tanks. Quite plainly, it would be an absurd result if a repairer who had no work to do in relation to oil tanks and no right to go to the oil tanks were liable, and liable criminally, for the failure of someone over whom he had no control to comply with the regulations relating to oil. The fact of the matter is, as Devlin J. pointed out, that the draftsman of the section appears to have proceeded on the assumption that in every case there would be one repairer, and other repairs would be done by sub-contractors to him. I accept the reasoning of Lord Oaksey and of Devlin J. in the cases which I have cited, and I agree that where more than one person contracts with the owner of a ship to do the repairs there is no notional occupier under the proviso. That is not sufficient for the defendants. In order to succeed on this part of the case they must satisfy me that the next step in the reasoning is correct, namely, that where there is no notional occupier under the proviso there is no liability upon the shipowner under the exceptions.

I turn back to the proviso to consider its true construction. Read literally, it is plain that it imposes liability upon the shipowner if two conditions are fulfilled: first, that the ship is being repaired in a public drydock and, secondly, that the control of the ship, apart from the work of repair, remains with the shipowner. Read literally, therefore, since those conditions are fulfilled in the present case, the liability is placed upon the shipowner by the proviso and exception (*b*) thereto, and there is a decision of the Court of Appeal, *Wilkinson* v. *Rea Ltd.*,[10] where that court, having decided that there was no notional occupier, because in that particular case only minor repairs were being carried out, unanimously held that the shipowner was under a liability under exception (*c*) to the proviso, which is in pari materia with exception (*b*). In that case no argument was addressed to the Court of Appeal on the lines which were addressed to and commended themselves to Devlin J. in *Donovan* v. *Cammell Laird & Co.*[11] I am not sure whether it is open to me in the light of the decision in *Wilkinson* v. *Rea*[12] to refuse to follow on the basis that it was decided per incuriam, but in any event, and with great hesitation, I have come to a different conclusion from Devlin J. on this point. I agree with what he says in *Donovan's* case,[13] that the condition precedent to the proviso's coming into operation is when a ship is being repaired in a public drydock, and that there is not a further condition precedent that there must be a notional occupier. It was indeed upon this basis that Devlin J. in *Donovan's* case held that the occupier or the owner of the drydock (the Mersey Docks and

[10] [1941] 1 K.B. 688; [1941] 2 All E.R. 50.
[11] [1949] 2 All E.R. 82.
[12] [1941] 1 K.B. 688.
[13] [1949] 2 All E.R. 82, 87.

Harbour Board) had not imposed upon them a liability to comply with the regulations. If that be so, then the proviso comes into operation in this case, and if the proviso comes into operation, prima facie the exceptions to the proviso, which are part of the proviso, come into operation too, and those exceptions impose expressly upon the shipowner, in the circumstances when the control of the ship (apart from the work of repair) remains with him, the duty of providing the protection for hatches, openings in decks and tank tops.

Devlin J., who expressed his own doubt on the matter in his judgment, took the view that he was entitled to depart from the literal meaning of the words, because he was satisfied from the construction of exception (*b*) that the regulations were drafted upon the assumption that there must necessarily be a notional occupier when a ship is repaired in drydock, and he pointed out that it would lead to odd results if there were no such occupier. He relied particularly upon the division of responsibility between the shipowner and the occupier which exception (*b*) contemplates, since it places the liability upon the shipowner only "in so far as concerns those hatches or openings "which are not required to be used for the purposes of the "repairs," and then the more important words, "but if such "protection be removed by any person or persons in the employ- "ment of the occupier or at his or their request, the occupier "shall be responsible for its replacement as soon as practicable." If there is no occupier, of course, that exception cannot apply.

It does not seem to me that there is a sufficiently compelling reason to make me depart from the literal meaning of the words. If the shipowner chooses to divide the responsibility for the repairs among a number of repairers, so that there is no notional occupier under the regulations, it does not seem to me unreasonable that he should accept complete responsibility for the maintenance of the protection of the hatches and for the replacement of the covering when the repairs are completed. I therefore hold that the regulations did apply in the present case.

That does not complete the defendants' possible lines of defence, because there remains their second ground, that if the regulations did apply then the plaintiff did not fall into the category of persons upon whom the regulations conferred a civil right of action. For that purpose the defendants rely upon two cases: *Hartley* v. *Mayoh & Co.*[14] and *Wingrove* v. *Prestige & Co. Ltd.*[15] Those cases were decided within about one month of one another, and Singleton and Hodson L.JJ. were members of the courts which dealt with each of them. The rationes decidendi of those two cases are quite different. In order to follow this argument it is necessary to look at the power under which the regulations were made. The regulations were originally made under section 79 of the Factory and Workshops Act, 1901, which

[14] [1954] 1 Q.B. 383; [1954] 1 W.L.R. 355; [1954] 1 All E.R. 375.

[15] [1954] 1 W.L.R. 524; [1954] 1 All E.R. 576.

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was in these terms: "Where the Secretary of State is satisfied "that any manufacture, machinery, plant, process or descrip- "tion of manual labour, used in factories or workshops, is "dangerous or injurious to health or dangerous to life or limb, "either generally or in the case of women, children or any other "class of persons, he may certify that manufacture, machinery, "plant, process or description of manual labour to be dangerous; "and thereupon the Secretary of State may, subject to the "provisions of this Act, make such regulations as appear to him "to be reasonably practicable and to meet the necessity of the "case."

It is to be noted that that section refers to danger or injury to health or danger to life or limb generally. In 1937, section 60 of the Factories Act, 1937, continued the power in somewhat different terms, the relevant part of it reading as follows: "Where the Minister is satisfied that any manufacture, "machinery, plant, equipment, appliance, process or description "of manual labour used in factories is of such a nature as to "cause risk of bodily injury to the persons employed, or any "class of those persons, he may, subject to the provisions of this "Act, make such special regulations as appear to him to be "reasonably practicable and to meet the necessity of the case." The regulations were, therefore, after that date relating to the risk of bodily injury to persons employed in connexion with the processes. In 1948 that section was amended, and the words "persons employed" were substituted for the words "persons "employed in connexion therewith."

That being the history of the legislation, it is always a question of construction whether an Act of Parliament or regulations made thereunder imposing penalties gives a right of action to a person injured as a result of a breach of the regulations, and the authority for that proposition is *Groves* v. *Wimborne (Lord)*.[16] In *Hartley* v. *Mayoh & Co.*[17] the Court of Appeal applied that principle to the case of a fireman called to deal with a fire at a factory, who was injured by a breach of the Electricity Regulations. They held that the regulations were, by the Act, intended for the benefit of persons employed and that the fireman did not fall within that protection. That was an application of the principle of *Groves* v. *Wimborne (Lord)*.[18] In *Wingrove* v. *Prestige*,[19] decided by the Court of Appeal a month afterwards, two members being common to both courts, it was held that a clerk of the works employed upon a building site by the owners of the site was not entitled to a cause of action as a result of a breach of regulation 5 of the Building (Safety, Health and Welfare) Regulations, 1948, which relates to the provision of scaffolding and safe means of access. Now if the clerk of the works, who was a person employed upon the site, although not employed by the occupier, had not fallen

[16] [1898] 2 Q.B. 402; 14 T.L.R. 493.
[17] [1954] 1 Q.B. 383.
[18] [1898] 2 Q.B. 402.
[19] [1954] 1 W.L.R. 524.

within the category of "persons employed" there was a very simple answer to the case, and an answer which must have been very strongly in the minds of Singleton and Hodson L.JJ., because they had decided *Hartley's* case [20] on that ground only a month before. *Wingrove* v. *Prestige* was not decided on that ground, however, but upon the assumption that the clerk of the works would have fallen within the protection of the regulations but for the construction of the particular regulation relied upon, which, it was held, plainly referred and applied only to the persons employed by the building contractors.

I can see no reason why in the case of regulation 10, which is perfectly general in its terms, I should exclude the plaintiff from the benefit of the regulation on the construction of the regulation itself; nor, on the *Groves* v. *Wimborne* (*Lord*) [21] principle, can I say that the plaintiff fell outside that category of persons to whom Parliament intended to give a right of action for breach of the regulations. It is plain that the restriction of that category of persons to those employed by the contractors is not one which I ought to accept as a matter of construction, and it seems to me that anyone who is employed in a place where the regulations apply—employed in the sense of its being his normal place, the place where it is his duty to work, and certainly to work regularly—is obviously covered by the expression "the persons "employed." I am, of course, fortified in this view by the statutory change which was made in 1948, prior to which the words were "persons employed in connexion therewith." The removal of those last three words "in connexion therewith" must have been intended to extend the scope of the construction, and I am clear that it covers persons such as the plaintiff, a seaman employed upon a ship upon which repairs are taking place and who is as likely as anyone to suffer injury if regulations for the safety of persons there are not observed. It so happens that on the very day I reserved judgment the Divisional Court of the Queen's Bench Division in *Massey-Harris-Ferguson* (*Manufacturing*) *Ltd.* v. *Piper* [22] expressed very similar views as to the scope of the decision in *Hartley* v. *Mayoh & Co.*[23]

I find, therefore, that the plaintiff fell within the category of persons for whose protection the regulations were made. I accordingly find that the regulations apply and that there was a breach of the regulations. I am conscious that any matter which depends upon the construction of the Shipbuilding Regulations is one upon which more than one view may well be held.

Judgment for the plaintiff.

Solicitors: *Silverman & Livermore, Liverpool; Hill, Dickinson & Co., Liverpool.*

[20] [1954] 1 Q.B. 383.
[21] [1898] 2 Q.B. 402.
[22] [1956] 3 W.L.R. 271; [1956] 2 All E.R. 722.
[23] [1954] 1 Q.B. 383.

[CHANCERY DIVISION.]

1956
June 22, 25, 26, 27.

Roxburgh J.

*BRITISH SYPHON CO. LTD. *v.* HOMEWOOD.

[1955 B. 5128.]

Master and Servant — Fiduciary duty — Servant technical adviser — Device invented by servant master's property — Subsequent agreement entitling servant to benefit of all his inventions—Invention before date of subsequent agreement of device relating to master's business on which servant's advice not sought by master—Whether servant entitled to device.

Patent — Master and servant — Benefit of invention — Invention by employee as technical adviser—New agreement entitling employee to all his subsequent inventions—Invention dealing with matter on which employee not asked to advise — Invention before date of new agreement — Application by employee for patent — Action by employer for assignment of benefit of application.

At all material times until May 23, 1955, the defendant was the plaintiff's chief technician in charge of design and development and adviser on all matters relating to their business. In 1953 he evolved a plastic top for soda water syphons. That remained the plaintiffs' property and, as no further problems about such tops arose, the defendant was never again asked for advice about them. Before Easter (April 10), 1955, he invented a low-pressure system of soda water distribution, for which the company had not asked and about which it had not asked his advice. From May 23, 1955, he was employed on new terms entitling him to keep for himself whatever he invented thenceforth. In August, 1955, he applied for letters patent for a "liquid-dispensing device." He did not tell the plaintiffs either the details of the device or that he had invented it. On September 30, 1955, his employment ended and he entered that of a competitor.

In an action by the plaintiffs for, inter alia, an order that he assign to them all his interest in his application for letters patent:—

Held, in making that order, (1) that it was not consistent with good faith as between master and servant that he should be entitled to invent something relating to the plaintiffs' business and withhold it from the plaintiffs and even sell it to a rival; (2) that it was his duty to keep himself free from any personal reason for not giving the plaintiffs, his employers, the best possible advice.

WITNESS ACTION.

British Syphon Co. Ltd. (hereinafter called "the company") were manufacturers of, inter alia, syphons for soda water. George Sidney Homewood (hereinafter called "the defendant") was at all material times until May 3, 1955, employed, under a letter written in 1953, as the company's chief technician to advise them on all matters relating to their business and in charge of design and development. The advent of nylon and the ever-mounting price of tin introduced serious problems for manufacturers of soda water syphons, for it became commercially desirable to substitute, if possible, nylon tops for metal tops for those syphons. The

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defendant, pursuant to his duties, was fully and completely involved in that process on the company's behalf and did in fact evolve, on its behalf, in a plastic top until then unsuccessful, a modification which enabled the company to "turn the corner" in the matter of design of a plastic top. For that contribution, which was quite vital, the defendant was rewarded and he never suggested that it was in any sense his property. That particular piece of work in connexion with soda water containers was completed about the middle of 1953, and thenceforth no particular problem in connexion with such tops arose. Accordingly, the defendant was never specifically asked to give any further advice in relation to them. From May 3, 1955, the company, as the result of an offer in writing, employed the defendant on different terms, which entitled him to keep for himself anything that he invented after that date. At some time before Easter, 1955, he invented a device described in evidence during the hearing of this action as a "low-pressure system of soda water distribution," and, on August 30, 1955, he applied for letters patent No. 24870/55 for an invention entitled "liquid-dispensing device." On September 30, 1955, his employment with the company ceased and he became employed by a rival company. By this action, the writ in which was issued on December 6, 1955, the company claimed: (1) an order that the defendant assign to them all his interest in the application for letters patent; (2) an order that he disclose to them forthwith full information about the invention and application; (3) an injunction restraining the defendant from disclosing any information relating to the invention to any person without the company's consent before the publication of the complete specification of letters patent on the application; (4) an inquiry as to the damages suffered by the company by reason of the defendant's failure to disclose the invention to them and to deal with it as they might direct in breach of his agreement of service with them; and (5) delivery up to the company of all documents relating to the invention and application. The defendant admitted that he filed the application without informing the company that he had made the invention or disclosing to them any details of it; but he denied that they were entitled to the benefit of it or of the application or of any patent granted thereon, and denied that he had ever been under any obligation to disclose the invention to them.

Guy Aldous Q.C. and *Douglas Falconer* for the company.
G. D. Everington for the defendant.

Cases cited in argument not referred to in the judgment: *Sterling Engineering Co. Ltd.* v. *Patchett* [1]; *Worthington Pumping Engine Co. Ltd.* v. *Moore* [2]; *Edisonia Ltd.* v. *Forse* [3]; *British*

[1] [1955] A.C. 534; [1955] 2 W.L.R. 424; [1955] 1 All E.R. 369; sub nom. *Patchett* v. *Sterling Engineering Co.*, 72 R.P.C. 50.

[2] (1902) 19 T.L.R. 84; 20 R.P.C. 41.

[3] (1908) 25 R.P.C. 546.

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Reinforced Concrete Co. Ltd. v. *Lind*[4]; *Adamson* v. *Kenworthy*[5]; *Triplex Safety Glass Co. Ltd.* v. *Scorah*[6]; *Mellor* v. *William Beardmore & Co. Ltd.*[7]; *Badische Anilin und Soda Fabrik* v. *Levinstein.*[8]

ROXBURGH J. stated the facts substantially as set out above, reviewed the evidence, and continued: I am satisfied that the invention was so far advanced before Easter, 1955, that the defendant felt able to say confidently that he intended to take out a patent on an improved syphon.

That, to my mind, leads to a difficult and unexplored point of law. It is common ground that the defendant had not been expressly asked to design any new method of dispensing soda water by a low-pressure system or any other system, and that he had not been asked to give any advice in relation to any such problem. This is the circumstance which, as far as I can see, differentiates this case from all that have gone before. I cannot find even an oblique discussion of this problem anywhere in the many authorities which the industry of counsel has disclosed. I revert, then, to the defendant's position. He was employed to give the plaintiffs technical advice in relation to the design or development of anything connected with any part of the plaintiffs' business. No particular problem had been put before him, but if, and as often as, any problem of that kind was put before him, it was his duty to be ready to tender his advice and to assist in any matter of design or development. He was paid to stand by in that respect. He had other functions, but those are not material to the present case.

Would it be consistent with good faith, as between master and servant, that he should in that position be entitled to make some invention in relation to a matter concerning a part of the plaintiffs' business and either keep it from his employer, if and when asked about the problem, or even sell it to a rival and say: "Well, yes, I know the answer to your problem, but I have "already sold it to your rival"? In my judgment, that cannot be consistent with a relationship of good faith between a master and a technical adviser. It seems to me that he has a duty not to put himself in a position in which he may have personal reasons for not giving his employer the best advice which it is his duty to give if and when asked to give it. What I am saying relates only to matters concerning the business of his employer. That, of course, is quite clear; but, in matters of that type, it seems to me that he has a duty to be free from any personal reason for not giving his employer the best possible advice. A fortiori, it seems to me that he is not entitled to put himself into the position of being able to say: "You retained me to advise you,

[4] (1917) 33 T.L.R. 170; 34 R.P.C. 101.

[5] (1931) 49 R.P.C. 57.

[6] [1938] Ch. 211; 54 T.L.R. 90; 55 R.P.C. 21; [1937] 4 All E.R. 693.

[7] (1927) 44 R.P.C. 175.

[8] (1883) 24 Ch.D. 156.

" and I will tell you what I advise you. Do it this way, but " you will have to buy the method from your rival, because I " have just sold it to him, having invented it yesterday." That seems to me to be reasoning which, in the absence of authority, makes it right and proper for me to decide that this invention (which, in my judgment, plainly relates to and concerns the business of the plaintiffs, namely, the distribution of soda water to the public in containers of a satisfactory character), if made during a time during which the chief technician is standing by under the terms of his employment, must be held to be in equity the property of the employer. Accordingly, my decision is for the plaintiffs.

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BRITISH SYPHON CO. LTD. *v.* HOMEWOOD.

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Judgment for the plaintiffs.
Orders for relief under paragraphs (1), (3) *and* (5) *of the claim.*

Solicitors: *Hopwood, Mote & Leedham-Green; Parlett & Co.*

K. R. A. H.

[COURT OF APPEAL.]

* *Ex parte* BLACKBURN.

C. A.

1956
July 23.

Singleton, Morris and Romer L.JJ.

Criminal Law — Appeal — House of Lords, appeal to — Application to Attorney-General for certificate—Refusal—Renewed application—Mandamus—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 1 (6) *—Criminal Justice Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 16.
Crown Practice—Mandamus—Criminal cause or matter.

The applicant, having been convicted of offences under the Prevention of Fraud (Investments) Act, 1929, and the conviction and sentence of imprisonment having been confirmed by the Court of Criminal Appeal, applied under section 1 (6) of the Criminal Appeal Act, 1907,[1] to the Attorney-General for the grant of a certificate to appeal to the House of Lords. This application was refused by the Attorney-General, and the applicant now moved for an order of mandamus to be issued requiring the Attorney-General to consider further representations involving, according to the applicant, a principle of law of public importance, viz., the onus of proof which rested upon the prosecution in criminal cases:—

Held, that under section 1 (6) of the Criminal Appeal Act, 1907, the Attorney-General was bound to consider a first application (if made within the period of seven days after the date of the dismissal of the appeal by the Court of Criminal Appeal, as

[1] Criminal Appeal Act, 1907, s. 1 (6): " If in any case the . . . " defendant obtains the certificate of " the Attorney General that the " decision of the Court of Criminal " Appeal involves a point of law of " exceptional public importance, and " that it is desirable in the public " interest that a further appeal should " be brought, he may appeal from " that decision to the House of " Lords; . . ."

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prescribed by section 16 of the Criminal Justice Act, 1925 [2]) for the grant of his certificate. But having so considered the application and decided it in his discretion he was under no duty to consider any further representation, whether in respect of the same application or not, made to him after the statutory period had expired; accordingly, the application must be dismissed.

APPEAL from Divisional Court.

The applicant, Albert Raymond Blackburn, having been convicted at the Central Criminal Court of a criminal offence, decided to appeal to the House of Lords from a decision of the Court of Criminal Appeal affirming the conviction and sentence of imprisonment. For that purpose he required the certificate of the Attorney-General under section 1 (1) of the Criminal Appeal Act, 1907.

In April, 1955, within the statutory period of seven days after the decision of the Court of Criminal Appeal, the applicant had made representations to the Attorney-General asking for a certificate, but it had been refused. Since his conviction, according to the applicant, there had been several decisions of the Court of Criminal Appeal which laid down a different principle in relation to the onus of proof which rested upon the prosecution in criminal cases from the principle applied at his trial. He therefore contended before the Divisional Court that the Attorney-General, in the public interest, should be asked to reconsider his (the applicant's) original application for a certificate, and he applied for an order of mandamus to be issued requiring the Attorney-General to consider certain further representations.

The Divisional Court (Pilcher and Ashworth JJ.) dismissed the application, holding that they had no power to compel the Attorney-General by mandamus to reconsider a matter which he had already once considered and rejected.

The applicant appealed and appeared in person.

SINGLETON L.J. The applicant applied to the Divisional Court last week for leave to apply for an order of mandamus directed to Her Majesty's Attorney-General. On January 27, 1955, the applicant was convicted, at the Central Criminal Court, of two offences under the Prevention of Fraud (Investments) Act, 1929, and was sentenced to imprisonment. He appealed in due course to the Court of Criminal Appeal against his conviction. His appeal was dismissed on March 29, 1955. Almost at once he applied to the Attorney-General for the grant by the Attorney-General of a certificate which would enable him to appeal to the House of Lords against his conviction.

[His Lordship read section 1 (6) of the Criminal Appeal Act,

[2] Criminal Justice Act, 1925, s. 16 (1): "An application to the "Attorney-General under s. 1 (6) of "the Criminal Appeal Act, 1907, for "a certificate authorising an appeal "to the House of Lords from the "decision of the Court of Criminal "Appeal, shall be made within a "period of seven days from the date "when the decision of the court was "given."

1907, and continued:] It is to be observed that no time limit for the obtaining of a certificate is laid down by subsection (6). Obviously it was thought desirable that there should be some limit of time; and by section 16 of the Criminal Justice Act, 1925, it is provided that an application to the Attorney-General under subsection (6) of section 1 of the Criminal Appeal Act, 1907, for a certificate shall be made within a period of seven days from the date on which the decision of the court was given. The applicant's application for a certificate was made within that time. Reasons were given a little later.

The statement which the applicant filed in support of his application states: "I made application for the certificate of the "Attorney-General to enable me to appeal to the House of Lords "within the time prescribed by the Criminal Justice Act, 1925"; and, later in the paragraph, "The reasons were submitted three "weeks later and rejected by the Attorney-General, whose legal "secretary wrote me a letter to the effect that the application "was refused."

Before the Attorney-General grants a certificate it is clear from the wording of subsection (6) of section 1 of the Act of 1907 that he must be of opinion "that the decision of the Court of "Criminal Appeal involves a point of law of exceptional public "importance, and that it is desirable in the public interest that a "further appeal should be brought." I feel that no one would doubt that when there is an application, by a person who has been convicted and whose appeal against conviction has been dismissed by the Court of Criminal Appeal, for a certificate from the Attorney-General under that subsection, it is the duty of the Attorney-General to consider the application. Parliament entrusted the granting of or the refusal of a certificate under that subsection to the Attorney-General, and, of course, he would consider it, and consider it in view of the terms of the subsection. That was done by the Attorney-General. The affidavit sets out that the application was refused.

The applicant tells the court of further efforts to get the matter reconsidered, in part in correspondence with the Secretary of State and also by reference to a letter from the Attorney-General to a member of Parliament which is not exhibited, but part of which is set out in the applicant's affidavit. It may be a little unusual that a letter of that kind should be used; but that is no concern of mine. According to the affidavit the Attorney-General wrote to the member of Parliament saying: "I am writing to you about Raymond Blackburn's petition to "the Home Secretary of May 28, in which he asks for permis-"sion (in the light of the decision in the *Murtagh* case [1]) to "apply for my certificate to enable him to appeal to the House "of Lords. I am afraid that there was a certain amount of "misunderstanding in regard to this application, and I think it "is only right that I should let you know that I am quite

[1] (1955) 39 Cr.App.R. 72.

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" satisfied that it is not now open to me to consider this further " application by Blackburn which, as you will know, is not " made within the statutory time limit of seven days laid down " by section 16 (1) of the Criminal Justice Act, 1925. In taking " this view I may say that I am acting fully in accordance with " the precedents."

It all goes to show quite clearly that the Attorney-General had considered what I may speak of as the original application, and he regarded the further application as out of time.

In paragraph 6 of the affidavit it is said that the applicant addressed a further petition to the Home Secretary " which was " answered after three months by the direct statement, on the " advice of the Attorney-General, that the Attorney-General was " functus officio in the matter and would not entertain any " representations with relation to my original application." It is said by the applicant that in the case at the Central Criminal Court in which he was convicted the summing-up by the judge was defective in some respects, though it was approved, or the conviction was held good, by the Court of Criminal Appeal in a judgment delivered by Gorman J. It is said, further, that at some subsequent date there were other cases in the Court of Criminal Appeal which show, or tend to show, that the decision of the Court of Criminal Appeal in the applicant's case was wrong—that it was bad law, and the summing-up was defective.

In this court we have not seen the summing-up of the judge in the applicant's case, though part of it is set out in the report of the case in the Court of Criminal Appeal.[2] Without expressing any opinion, I assume, for the purpose of this appeal, that the applicant's contention is right in regard to that matter. That does not dispose of this application. He, in his submission to this court, said that there was a duty imposed on the Attorney-General to consider representations by any of the parties mentioned in section 1 (6), and that the Attorney-General is charged with a judicial discretion whether he shall grant a certificate or not. He submitted further that the duty is not satisfied by his once considering it, but that there is a duty to reconsider it—though he agreed that there was no duty to consider a second application after the time limit imposed by the Act of 1925 had elapsed. His argument was that he had applied within the time specified and that, there having been an application in time, it was the duty of the Attorney-General to consider any renewal of the application. He went further, and said that if, at any distance of time after the Attorney-General had refused to grant his certificate, a like application was made—not another application, but a like application—it was the duty of the Attorney-General to consider it again.

That appears to me to involve this, that if there was an application in time, year after year it could be said that a like

[2] (1955) 39 Cr.App.R. 84.

application could be made, and that every time it was made it was the duty of the Attorney-General to consider it. I do not think that is the law. If it was, the whole object of section 16 (1) of the Act of 1925 would be defeated. The purpose of the 1925 provision clearly was to bring some finality into applications. Section 16 (1) put on a time limit of "seven days from the "date when the decision of the court"—that is, the Court of Criminal Appeal—"was given." If one who had once made an application could renew the same application time and time again, it would destroy the effect of section 16 (1).

The applicant agrees that there would be no duty upon the Attorney-General to consider an application made out of time. His recent application is either the same application again, or it is a fresh application. If it is a fresh application, it is out of time. If, on the other hand, it is the old application again, I see no reason for reading into section 1 (6) of the Act of 1907 an obligation upon the Attorney-General to consider it, which would be doing no more and no less than considering the same thing again. I assume, for this purpose, that there is, or would be in a proper case, a right to an order of mandamus against the Attorney-General if he refused to consider an application properly made under section 1 (6) of the Act of 1907. I assume it without deciding the matter. But I am satisfied, on the other hand, that there is not cast upon the Attorney-General the duty of considering the same matter again and again.

The Home Secretary, according to an extract from the letter referred to in the affidavit of the applicant, says that the Attorney-General was functus officio in the matter. I am not sure that that is the right way of looking at it. If the Attorney-General had an application made in time and refused it, and if that application was followed by another application setting out new reasons and within the time limit, I should consider that the Attorney-General would be entitled to look at the application and to consider it upon its merits. It has not been suggested to this court that there is any difference in the two applications made. The position may have changed in a sense. There have been one or two other decisions of the Court of Criminal Appeal which, on the argument addressed to us, state the law in a different way from that in which it was stated in the applicant's case. That is as far as the matter goes. The reasons given in his new or more recent application are the same as those in his original application; but they are fortified, he claims, by subsequent decisions.

The real point of this case is, as it seems to me, that the applicant is seeking to reopen his original application, and he is asking the Attorney-General to consider either the old application or a new application in precisely the same terms, or based upon the same reasons. I am wholly satisfied that it would not be right for this court to consider directing the Attorney-General to reconsider a matter which he has already considered: we have

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no right to do it. Even if there is a right to direct him to consider an original application, that is a position which never would arise, for the Attorney-General knows his duty under this subsection, and he would always consider an application made in due time. He is not bound to go on reconsidering the same application again and again.

For those reasons (which are, in effect, the same as those given in the Divisional Court) it seems to me that this application should be dismissed. In the circumstances I do not think it necessary to express any opinion upon a further point which has been raised—that is, whether or not this is an application in a "criminal cause or matter" and should be refused by reason of the decision of the House of Lords in *Amand* v. *Home Secretary*.[3]

MORRIS L.J. I entirely agree. I do not think that I could usefully add to what my Lord has said.

ROMER L.J. I also agree.

Application refused.
Leave to appeal to House of Lords refused.

A. W. G.

[3] [1943] A.C. 147; [1942] 2 All E.R. 381.

[HOUSE OF LORDS.]

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June 26, 27, 28; *July* 25.

* SHELL-MEX AND B.P. LTD . . . APPELLANTS;
AND
CLAYTON (VALUATION OFFICER) AND ANOTHER . . . . . RESPONDENTS.

Rating—Docks—Freight-transport hereditament—"Dock purposes"—"Dock undertaking"—Tanks on hereditament—Oil piped from ships—Use of undertakers—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 5 (1) (*c*).

Costs—Lands Tribunal—Appeal to House of Lords—Apportionment of costs between successful respondents—Valuation officer and council—One set of costs only.

Section 5 (1) (*c*) of the Rating and Valuation (Apportionment) Act, 1928, defines "freight-transport hereditament" as: "A "hereditament occupied and used wholly or partly for dock "purposes as part of a dock undertaking being an undertaking "whereof a substantial proportion of the volume of business is "concerned with the shipping and unshipping of merchandise not "belonging to or intended for the use of the undertakers."

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† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD TUCKER AND LORD KEITH OF AVONHOLM.

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The British Transport Commission leased a hereditament, being waste land adjoining its Hull Docks undertaking, to a company concerned in the import and distribution of oil. Pursuant to the terms of its lease, the company erected on the land storage tanks for oil and the commission constructed two jetties which were owned by them. Incoming tankers unshipped their oil at the jetties, the unshipping being effected through a system of pipes running along the jetties to the storage tanks, whence the company distributed it to customers, retaining only a small proportion itself. The company also owned a barge berth some 1,000 feet from the hereditament and connected with it by pipes. The barge berth was a dock within section 5 (3) of the Act of 1928 and was connected with the hereditament by pipe lines owned, used and occupied exclusively by the company. The whole of the hereditament was a bonded warehouse. Pursuant to an agreement with three oil companies, the company received consignments of oil as their sole agent for sale and distribution, the company being remunerated for its services by a commission. It was common ground that the hereditament was "used . . . for dock purposes."

Held (Lord Oaksey dissenting), that the hereditament was not a "freight-transport hereditament" within the definition.

Per Viscount Simonds, Lord Morton of Henryton, Lord Tucker and Lord Keith of Avonholm: The hereditament was not used and occupied for dock purposes as part of the dock undertaking of the British Transport Commission.

Per Viscount Simonds, Lord Morton of Henryton and Lord Keith of Avonholm: The hereditament was not used and occupied for dock purposes as part of the dock undertaking carried on by the company at the barge berth.

Per Viscount Simonds and Lord Tucker: The oil shipped and unshipped belonged to or was intended for the use of the company.

Per Lord Oaksey: The hereditament was wholly used for dock purposes as part of the dock undertaking of the British Transport Commission, an undertaking whereof a substantial proportion of the volume of business was concerned with the shipping and unshipping of merchandise not belonging to the commission.

Decision of the Court of Appeal [1955] 1 W.L.R. 982; [1955] 3 All E.R. 102 affirmed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Parker L.JJ.).

This was an appeal from an order of the Court of Appeal dated July 22, 1955, whereby an appeal by the appellants, Shell-Mex and B.P. Ltd., on a case stated by the Lands Tribunal pursuant to section 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58B was dismissed and the decision of the Lands Tribunal was affirmed. By its decision the Lands Tribunal had dismissed an appeal by the appellants from the decision of the Kingston-upon-Hull and East Riding (South) Local Valuation Court, which had dismissed an appeal by the appellants and determined that the assessment of a hereditament occupied by them should be confirmed. The hereditament was entered in Part I of the valuation list for the rating area of the Holderness Rural District under the description "tanks, works "and appurtenances" situated at Salt End, at a rateable value

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of £16,986. The respondents were G. Clayton (Valuation Officer) and the Holderness Rural District Council.

The facts are fully stated in the opinion of Viscount Simonds.

Michael Rowe Q.C. and *J. R. Willis Q.C.* for the appellant company.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer.

H. E. Davies Q.C. and *E. P. Wallis-Jones* for the council.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *W. & R. Barnett Ltd.* v. *Valuation Commissioner for Northern Ireland*[1]; *Mersey Docks and Harbour Board* v. *West Derby Assessment Committee*; *Bottomley* v. *Same*[2]; *Homer* v. *Homer*[3]; *Aberdeen Assessor* v. *Shell-Mex and B.P. Ltd.*[4]; *British Motor Syndicate Ltd.* v. *Taylor & Son*[5]; *W. T. Lamb & Sons* v. *Goring Brick Co. Ltd.*[6]; *Billing* v. *Prebble*[7]; *Huntington* v. *Lancashire and Yorkshire Railway Co.*[8]; *Allan* v. *Liverpool Overseers*[9]; *Rochdale Canal Co.* v. *Brewster.*[10]

Their Lordships took time for consideration.

July 25. VISCOUNT SIMONDS. My Lords, this appeal raises a question which I have found great difficulty in deciding. It comes before your Lordships on appeal from the Court of Appeal, which unanimously dismissed an appeal by the appellants, Shell-Mex and B.P. Ltd., upon a case stated by the Lands Tribunal under section 3 (4) and (11) of the Lands Tribunal Act, 1949. By its decision the Lands Tribunal had dismissed an appeal by the appellants from a decision of a local valuation court that the assessment of a certain hereditament occupied by the appellants should be confirmed.

The problem is whether or not the hereditament in question is a "freight-transport hereditament" within the meaning of the Rating and Valuation (Apportionment) Act, 1928, and accordingly entitled to the benefit of derating.

"Freight-transport hereditament" is defined by section 5 (1) of the Act of 1928 to mean (inter alia) "(*c*) A hereditament "occupied and used wholly or partly for dock purposes as part of "a dock undertaking being an undertaking whereof a substantial "proportion of the volume of business is concerned with the

[1] [1942] N.Ir. 20.
[2] [1932] 1 K.B. 40; 47 T.L.R. 468.
[3] (1878) 8 Ch.D. 758.
[4] 1953 S.C. 211.
[5] [1900] 1 Ch. 577; 17 T.L.R. 17.
[6] [1932] 1 K.B. 710; 48 T.L.R. 160.
[7] (1896) 66 L.J.Q.B. 180, 182; 13 T.L.R. 115.
[8] (1901) 17 T.L.R. 458; 11 Ry. & Can.Tr.Cas. 237.
[9] (1874) L.R. 9 Q.B. 180.
[10] [1894] 2 Q.B. 852; 10 T.L.R. 595.

"shipping and unshipping of merchandise not belonging to or "intended for the use of the undertakers." By subsection (2) of the same section "transport purposes" is defined to mean (inter alia): "(c) 'dock purposes,' that is to say, all purposes "connected with the shipping or unshipping at a dock . . . or "merchandise . . .". And by subsection (3) the expression "'Dock' includes any harbour, wharf, pier, jetty or other works "in or at which vessels can ship or un-ship merchandise. . . . "'Dock undertaking' means an undertaking carried on by a dock "authority, but also includes any other undertaking comprising "as part thereof a dock in so far only as its business is carried "on at and in connection with that dock: 'Dock authority' "means any person or body of persons, whether incorporated or "not, who are authorised to construct or are owners or lessees of "any dock authorised by or under any Act." It is necessary also to refer to section 6 of the Act. That section, which provides for entries in the valuation lists of freight-transport hereditaments, enacts by proviso (*a*) to subsection (3) that "no part of a "freight-transport hereditament which is so let out as to be "capable of separate assessment shall be deemed to be occupied "and used for transport purposes unless it is actually so "occupied and used." This proviso is called in aid by the appellants for the purpose of interpreting the expression "freight-"transport hereditament" in the preceding section.

It was common ground between the parties, and has been accepted by the Court of Appeal, that the appellants could only establish that the hereditament in question was a freight-transport hereditament if they satisfied three conditions: (1) that it was occupied wholly or partly for dock purposes, (2) that it was so occupied and used as part of a dock undertaking, and (3) that such dock undertaking was one whereof a substantial proportion of the volume of business was concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers.

I must now state the relevant facts about the hereditament in question. It comprises three parcels of land at Salt End on the banks of the river Humber with an aggregate area of 51½ acres which are held on separate leases from the British Transport Commission or their predecessors in title at a total ground rent of £4,195 per annum. Pursuant to their obligations in the several leases the appellants or their predecessors in title have built and maintained on the land offices, stores, garages, filling sheds, pump houses, a boiler house, tanks, and ancillary buildings. In addition the appellants own and occupy a so-called "barge "berth" which has been erected on part of the foreshore at a distance of about 1,000 feet from the hereditament and is connected with it by means of pipe lines exclusively owned, used and occupied by the appellants. From the south-west corner of the land two jetties, the property of the British Transport Commission, run out into the river. Number 1 jetty is used jointly by

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the appellants and three other companies, but the appellants have their own pipe lines, 12 in number, which run along the jetty and are connected with the pump houses and tanks on the land. Number 2 jetty is used jointly by the appellants and one other company: the pipe lines on this jetty are for a certain distance common to both users.

Oil is brought to the jetties in ocean-going tankers of an average capacity of 10,000 to 12,000 tons and unloaded there, bills of lading being made out in the name of "Shell-Mex and "B.P." or in the name of the consignor. In every case delivery is taken by the appellants at the ship's rail. The tankers are unloaded at the jetties by means of pipes which are coupled to the ends of the pipe lines which I have already mentioned, and the oil is pumped through the pipe lines to tanks on the hereditament. The nature of the appellants' business demands that they should have at a terminal depot, such as that at Salt End, a tankage capacity in excess of what would be required to meet the day-to-day requirements of the subsidiary depots, because it must correlate the intake of oil to the movements of tankers. It is the function of terminal depots to supply the subsidiary internal depots which in turn supply consumers. The total tankage capacity at the hereditament is 211,781 tons and the tanks habitually contain stocks of the order of 100,000 to 150,000 tons. A substantial quantity of oil is also supplied from the tanks to the barge berth, of which I have spoken, where it is used for bunkering ships. Other part of the oil is otherwise disposed of. I take as typical the appellants' operations for the year 1951 which are thus set out in the case stated by the Lands Tribunal:

"21.—During the calendar year 1951 the total tonnage of oil "handled at the hereditament was approximately 1,320,000 tons. "This tonnage was dealt with approximately as follows:—

"540,000 tons	sent to dependent depots of the appellant company.
"160,000 tons	sent to other petrol companies.
"277,000 tons	sold direct to customers from the hereditament.
"290,000 tons	ships bunkering.
"53,000 tons	supplies to Air Ministry and for export, together with a tonnage of approximately "2,250 tons representing fuel for the appellant company's road vehicles and like "purposes used and paid for by the appellant company.

"1,320,000 tons

"The ships bunkered were tankers chartered by the consigning "companies (approximately 105,000 tons) and vessels, such as "trawlers, owned by other persons (approximately 185,000 tons).

"22.—Of the 540,000 tons delivered to the dependent depots "about 316,000 tons were sent on by water. Of this 316,000

" tons 260,000 tons were shipped from the said barge berth. In " addition, 82,000 tons of National Benzole product were also " shipped from the said berth, making a total of 342,000 tons " shipped from the barge berth during 1951."

The whole of the hereditament is a bonded warehouse, about a quarter of the oil which passes through the installation being dutiable.

It is necessary now to refer briefly to the relations between the appellants and the companies from which they receive consignments of oil. This is relevant only to the third of the conditions to which I have referred. These relations are determined by an agreement made on December 31, 1931, between Shell Marketing Co. Ltd. of the first part, Eagle Oil & Shipping Co. Ltd. of the second part, Anglo-Persian Oil Co. Ltd. of the third part and the appellants of the fourth part, the companies of the first three parts being referred to as " the consigning " companies." By clause 5 of this agreement it was provided that each of the consigning companies would during its continuance employ the appellants as its sole and exclusive consignee and agent for the sale and distribution of oil for consumption within the area therein mentioned, and that the appellants would use their best endeavours to promote the interests of the consigning companies and would not knowingly sell oil for resale outside that area; (by clause 7) that the appellants might at any time purchase on their own account any oil for resale on their own account but only for consumption in the said area and subject to the further conditions therein laid down; (by clause 8) that delivery of the oil required by the appellants should be made to the appellants c.i.f. such ports in the area as the appellants might direct; (by clause 9) that the appellants as agents for sale should have the fullest liberty in respect of the sale of oil delivered to them and might sell the same in their own name or otherwise and in such manner and at such prices and on such terms and conditions as they might think advisable; (by clause 11) that the commission payable to the appellants for their services should be such as might from time to time be agreed between the parties or determined as therein mentioned; (by clause 15) that each of the consigning companies should bear its due proportion of all shortages or losses by leakage or otherwise as therein mentioned, and (by clause 19) that the stocks left at the end of each year should be ascertained and allocated to the respective parties who had delivered them to the appellants in the proportions therein mentioned.

The commission payable under this agreement was fixed at 8 per cent. except in respect of a small quantity (·17 per cent.) used by the appellants themselves for which they paid an agreed price.

I have now stated what appear to be the relevant facts, which can be supplemented if necessary by reference to the case

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stated, and return to the three conditions which the appellants must satisfy.

First, is the hereditament "used wholly or partly for dock "purposes"? Your Lordships are relieved of the necessity of discussing this. The Court of Appeal has answered the question in the affirmative and learned counsel for the respondents have been content to accept their decision, but have properly reserved their right to claim an apportionment if the other conditions should be held to be satisfied.

Secondly, is the hereditament used and occupied "for dock "purposes as part of a dock undertaking"? I find this a very difficult question to answer. The appellants' contention is two-fold: originally it had a third limb but that has been broken off. Now they say, first that the hereditament is so used as part of a dock undertaking carried on by the British Transport Commission at the Port of Hull: but, if that fails them, they turn to the second part of the definition of "dock undertaking" and say that the hereditament is so used by them as part of the dock undertaking carried on by them at their own dock, namely, the barge berth. It is clearly more advantageous to them to succeed on the first alternative claim, for thus they avoid any difficulty upon the third condition, since it could not be contended that their merchandise, the oil, belongs to or is intended for the use of the undertakers, namely, the British Transport Commission.

I ask first, then, whether the hereditament is used and occupied for dock purposes by the appellants as part of the dock undertaking carried on by the Transport Commission. This question has been answered in the negative by the Court of Appeal. "To hold the contrary," they say,[1] "would involve the "conclusion that the tenants of every industrial site let by the "Transport Commission in the vicinity of the Port of Hull would "be occupying and using their respective sites as part of the "Transport Commission's dock undertaking, if their leases or "tenancy agreements allowed them the use for their own private "purposes of the dock facilities provided by the commission." I agree that this conclusion would be involved, and I do not think that learned counsel for the appellants shrank from it. Relying on the terms of the leases to which I have referred, he said that the development of the dock undertaking was effected by just such agreements as these, whereby dock facilities were created for the benefit of individual tenants or lessees and that it was immaterial that in regard to any particular site those facilities were private and exclusive. The dock undertaking of the commission, he said, was as truly "carried on" by these means as it would be if they themselves provided the installation and all the machinery of shipment and unshipment. To this the answer given by the respondents and accepted by the Court of Appeal is that as soon as the hereditament is leased to and

[1] [1955] 1 W.L.R. 982, 1002; [1955] 3 All E.R. 102.

exclusively occupied by the appellants for the purpose of its own business of importing and distributing oil it is segregated from and no longer forms part of the commission's dock undertaking. The point is a narrow one, but I have come to the conclusion that the decision of the Court of Appeal should be affirmed. The present interest of the commission in the hereditament is to receive the rent reserved by the leases and to enforce, so far as necessary, the lessees' obligations therein contained. I do not think that it can fairly be said that it is the consequence or corollary of this that the appellants occupy and use the hereditament as part of a dock undertaking carried on by the commission. It might well be otherwise if the appellants could themselves be said to be dock undertakers in the sense that they provided docking facilities for others, but it is clear that they do not do so. Their undertaking is the importation and distribution of oil, and for its purposes they need docking facilities. The use of those facilities does not appear to me to convert their undertaking into part of a dock undertaking carried on by the Transport Commission.

I have so far ignored the proviso (*a*) to section 6 (3) upon which the appellants rely as an aid to the interpretation of section 5. It is a proviso to a subsection dealing with a hereditament which is assumed to be a freight-transport hereditament. It can, I think, throw little light upon the question what constitutes such a hereditament. Two Scottish cases have been referred to in which the matter has been discussed, namely, *Clyde Navigation Trustees* v. *Inland Revenue Officer*[2] and *Clyde Navigation Trustees* v. *Assessor for Glasgow*.[3] In these cases different conclusions were reached. I would, with respect, adopt the view expressed by Lord Fleming in the second of the two cases,[4] which was cited by the Court of Appeal, that the proviso "seems to me "to imply that subjects which would otherwise be entitled to be "regarded as freight-transport lands and heritages are not to be "deprived of the benefits of derating merely because they have "been let to and are occupied by some person other than the "dock authority." I do not doubt that a dock authority may let a hereditament which forms part of its undertaking without its losing its character as a feright-transport hereditament. But it must have that character before it can lose it.

I turn, then, to the alternative contention of the appellants in regard to the second condition. As I have pointed out, "dock "undertaking" includes any other undertaking comprising as part thereof a dock in so far only as its business is carried on at and in connexion with that dock. The appellants operate an undertaking and they own a dock, the barge berth which is connected with the hereditament by the pipe lines which I have mentioned. From these premises the conclusion is drawn that the appellants occupy and use the hereditament as part of a

[2] 1930 S.C. 454.
[3] 1931 S.C. 400.
[4] Ibid. 406.

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dock undertaking. This contention also has been rejected by the Court of Appeal and, as I think, rightly. For it appears to me a plain misuse of language to say that in respect of the barge berth the appellants are carrying on a dock undertaking of which the hereditament forms part, and this misuse is expressly averted by the qualifying words "in so far only as its "business is carried on at and in connexion with that dock." In my opinion the use and occupation of the hereditament is not "business carried on at and in connexion with" the barge berth. Your Lordships were invited to consider the use and occupation of the hereditament in what were called their geographical and functional aspects. These are refinements which I do not find it easy to follow. It is enough for me to say that in any aspect the limitation in the definition is fatal to the appellants' contention.

There remains the third condition, and, as I have pointed out, this is clearly satisfied if the appellants succeed in their contention that the hereditament is occupied and used as part of the Transport Commission undertaking. But, if they succeed, not on this, but on their alternative contention, then they must establish that the dock undertaking carried on by them at the barge berth is one whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to them or intended for their use. In my opinion, they do not satisfy this condition. The merchandise, the oil, which is unloaded at the ship's rail, is from the moment of unloading in their possession. No one, not even the consigning companies, can dispute it, for they have an uncontrolled power of disposition. They are under a contractual obligation to account for the proceeds of sale and they might, no doubt, be liable in damages if they broke other terms of the contract. But neither this fact nor the fact that the property in the oil is not in the full legal sense vested in them makes it inapposite to describe the oil as "belonging to them." If it does not "belong to them" it is at least intended for their use. It would, in my opinion, be in its context placing too narrow a meaning on "use" to confine it to use by consumption. It may, and, I think, does, include such use as a trader makes of his stock in trade, that is, by selling it. In this sense the oil is intended for the use of the appellants and is in fact so used by them.

On the whole case, therefore, I am of opinion that the appellants fail to satisfy two of the three prescribed conditions, and their appeal must be dismissed.

LORD OAKSEY. My Lords, I have the misfortune to differ from your Lordships and from the Court of Appeal.

In my opinion, the appellant company's hereditament is wholly used for dock purposes as part of the dock undertaking of the British Transport Commission's undertaking at Hull, which is an undertaking whereof a substantial proportion of the volume

of business is concerned with the shipping of merchandise not belonging to or intended for the use of the British Transport Commission. The hereditament is, therefore, a "freight-transport hereditament" within the meaning of section 5 (1) (*c*) of the Act of 1928, and its net annual value must be apportioned between the occupation and user for transport purposes and for other purposes in accordance with section 6 (1) of that Act.

If the hereditament were not used as a part of the dock undertaking of the British Transport Commission it would not, in my opinion, be a freight-transport hereditament because a substantial proportion of the volume of its business as a dock undertaking is not concerned with the shipping of merchandise not belonging to the appellants. In my opinion, the words "merchandise . . . belonging to or intended for the use of the undertakers" are intended to apply to merchandise belonging to or used by the undertakers in their capacity as a dock undertaking and not as merchants for the sale of the merchandise. That the appellants' hereditament is occupied and used partly for dock purposes is clear, and it appears to me also clear that it is occupied and used as part of the dock undertaking of the British Transport Commission at Hull. That undertaking by its two jetties enables the appellants to import oil into works leased to the appellants by the undertaking and transport the oil from those works to the barge berth, from which it is transported to purchasers in other parts of the country. Proviso (*a*) to section 6 (3) contemplates that hereditaments can be let out for transport purposes, and if occupied and used for such purposes are to be regarded as freight-transport hereditaments, and it seems to me therefore that the lease by the British Transport Commission to the appellants of the hereditament which is capable of separate assessment and is actually occupied and used for transport purposes creates a freight-transport hereditament. The broad distinction which the statute appears to me to make is between transporting and warehousing. If a hereditament is let out as a freight-transport hereditament and so as to be capable of separate assessment and is actually used for transportation and not for warehousing, it was not, in my opinion, intended to be rateable.

LORD MORTON OF HENRYTON. My Lords, the appellant company claims that certain land, fully described in the case stated by the Lands Tribunal, is a "freight-transport hereditament" within the meaning of the Rating and Valuation (Apportionment) Act, 1928. To succeed in this claim the appellant company must satisfy your Lordships that this land is (to quote section 5 (1) (*c*) of the Act): "A hereditament occupied and used wholly or partly "for dock purposes as part of a dock undertaking being an "undertaking whereof a substantial proportion of the volume of "business is concerned with the shipping and unshipping of "merchandise not belonging to or intended for the use of the

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"undertakers." It will be seen that the burden lies upon the appellant to show that the land satisfies three conditions, namely: (1) that it is occupied and used wholly or partly for dock purposes; (2) that it is so occupied and used as part of a dock undertaking; and (3) that such dock undertaking is one whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers.

In the Court of Appeal counsel for the respondents contended that no one of these three conditions was satisfied, but in this House they conceded, for the purposes of the present appeal, that the first condition was satisfied, since the land was occupied and used "partly for dock purposes." I turn, therefore, to the question whether it is so used "as part of a dock undertaking." Counsel for the appellant put their argument under this head in two alternative ways. First, they submit that the land is occupied and used as part of the "dock undertaking" of the Port of Hull, carried on by the British Transport Commission. Alternatively they submit that the appellant's own undertaking is a "dock "undertaking" and the land is occupied and used as part of it.

My Lords, I cannot accept the first of these submissions. There can be no doubt that the undertaking carried on by the British Transport Commission at Hull is a "dock undertaking" as defined by section 5 (3) of the Act of 1928. Nor can it be doubted that that undertaking satisfies condition (3) already stated. But a statement of these facts supplies no answer to the relevant question: is the land in question occupied and used as part of the undertaking of the British Transport Commission? To my mind it is not so used or occupied. It is used and occupied as part of the wholly separate undertaking of the appellant company. As the Court of Appeal put it,[5] the land is "in "lease to and exclusively occupied by the appellant company for "the purposes of its own business of importing and distributing "oil and is thus excluded and segregated from the Transport "Commission's dock undertaking." That court later observed, in regard to an argument by leading counsel for the appellant company[6]: "Mr. Rowe relies strongly on the terms of the leases "under which the various parts of the hereditaments are held by "the appellant company. He says these leases show that the "ground was let with a view to the erection and operation there-"on of a terminal oil depot for the unshipping, storage and "distribution of oil, in connection with which the lessees were "to have unshipping facilities in the shape of the pipes running "out along the jetties. There was thus, he argues, something in "the nature of an arrangement between the dock undertakers and "the lessees under which the lessees were to extend the activities "of the dock undertaking to the importation of oil. Therefore, "says Mr. Rowe, the installation should be regarded as con-"structed and operated as part of the dock undertaking. We

[5] [1955] 1 W.L.R. 982, 1000. [6] Ibid. 1001–1002.

" cannot accept this argument. We would be disposed to agree " with Mr. Rowe if what the appellant company did was to " provide unshipping and storage facilities for anyone having " occasion to import oil. But the appellant company does " nothing of the sort. It uses the hereditament and the pipe " lines on the jetties simply and solely for the purposes of its " own individual business, and not by way of performing the " functions properly within the province of the dock undertakers " as such . . . we find it impossible to hold that, in occupying " and using the hereditament for its own private purposes, the " appellant company is occupying and using the hereditament as " part of the dock undertaking carried on by the Transport Com- " mission. To hold the contrary would involve the conclusion " that the tenants of every industrial site let by the Transport " Commission in the vicinity of the Port of Hull would be " occupying and using their respective sites as part of the Trans- " port Commission's dock undertaking, if their leases or tenancy " agreements allowed them the use for their own private purposes " of the dock facilities provided by the Commission." My Lords, I agree entirely with this reasoning, and I also agree with the reasoning which led the Court of Appeal to reject the appellant company's alternative submission under this head, which I have already stated.

The result is, in my view, that the appellant company has failed to satisfy the second condition laid down in section 5 (1) (*c*) of the Act of 1928. If I am right so far, the appellant company's claim fails, and the question whether the third condition is satisfied does not arise, but I shall express my views on this question, as the Court of Appeal answered it " No " and I do not agree with that answer.

In my view, almost all the oil which is unshipped by the appellant company and distributed by it is " merchandise not " belonging to or intended for the use of " the company, within the meaning of section 5 (1) (*c*). The only exception is the oil which the company retains for its own use, and this is a trifling part of the whole. I think that the subsection is directed to the case of merchandise in the hands of agents for sale such as the appellant company, or forwarding agents, as contrasted with merchandise which has reached the end of its journey when it is unshipped, either by reaching the hands of an absolute owner, or by delivery to a person who intends to put it to the use for which it was manufactured. As appears from the case stated, the whole, or substantially the whole, of the oil unshipped at the jetties is oil consigned by three companies to the appellant company as their sole agent for the sale and distribution of oil for consumption in the United Kingdom, under an agreement made between these three consigning companies of the one part and the appellant company of the other part and dated December 31, 1931. Substantially the whole of the appellant

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company's business consists of the sale and distribution of this oil, and it is remunerated for its services by the three consigning companies on a commission basis. The appellant company is given wide powers under the agreement in regard to prices, terms and conditions of sale and so forth.

These being the facts, does the oil which the company unships and passes on to purchasers "belong to" the company, within the meaning of section 5 (1) (*c*), while it is in the company's possession? My Lords, I think not.

It is true that the appellant company has some of the rights of an owner while the oil is in its possession, but in other material respects its position differs from that of owner. For instance, (a) the company is under a duty to the consigning companies to endeavour to sell the oil; (b) the company is not bound to pay for oil which it unships but fails to sell; (c) the agreement with the consigning companies is terminable on notice; and any oil which is in the tanks when the agreement is terminated belongs to the consigning companies—see clause 19 of the agreement of December 31, 1931, set out in the case stated; (d) if the oil in tanks had been requisitioned when war broke out, the compensation money would have been payable to the consigning companies and not to the appellant company. Having regard to these facts, and to the general intention of section 5 of the Act of 1928, read as a whole, I am of opinion that of all the oil unshipped by the appellant company only the small quantity which the company keeps and consumes "belongs to" it, within the meaning of section 5 (1) (*c*). The rest of the oil "belongs to" the consigning companies.

Is the oil "intended for the use of" the appellant company, within the meaning of section 5 (1) (*c*)? Again, my Lords, I would answer "No." Here again I rely on the general intention of section 5, as I read it, and also on the ordinary meaning of the word "use," in the case of merchandise, such as oil, which is consumed by being used; that is, to put it to the use for which it was manfactured or otherwise brought into being. If a visitor to the storage tanks on the land in question were to ask one of the company's officials: "Is this oil intended for the "use of the company?", I feel confident that the answer would be: "Oh, no, we can only use a very small part of it. All the "rest is intended for sale by the company." And, in my opinion, that would be a natural and correct use of words by the official.

The result is that, in my opinion, the land in question satisfies the third of the three conditions laid down by section 5 (1) (*c*) of the Act of 1928; but I would dismiss the appeal because, and only because, the appellant company has not shown that the land in question satisfies the second of these three conditions.

LORD TUCKER. My Lords, it was conceded by counsel on behalf of the respondents in the course of the hearing that they could not contest the decision of the Court of Appeal that the

appellants had established that the hereditament in question satisfied the first of the three necessary conditions prescribed in section 5 (1) (*c*) of the Rating and Valuation (Apportionment) Act, 1928, namely, that it was used wholly or partly for dock purposes. They reserved, however, their rights with regard to apportionment under section 6 if the occasion should arise.

It remains, therefore, to decide whether the hereditament also satisfies the two remaining further conditions, namely, (b) that it is part of a dock undertaking, and (c) that such undertaking is one whereof a substantial proportion of the volume of business was concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers.

As to (a), it was contended for the appellants that the hereditament is occupied and used as part of the dock undertaking carried on by the British Transport Commission in the port of Hull. And, alternatively, that it is so occupied and used as part of the dock undertaking carried on by the appellants at their own dock, that is, the barge berth. If they are right in their submission that it is part of the undertaking of the port of Hull, it is admitted that they would in that event satisfy the third condition with regard to the volume of business concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers.

On the first of these two alternatives, I feel unable to accept the contention of the appellants. I think the decision turns largely upon the particular facts of each case. It is quite possible for a dock authority to let off part of their premises on terms and in circumstances in which the demised premises will remain part of the dock undertaking subject to the regulations of the authority with regard to user and so forth. But in the present case the authority merely granted long leases of vacant land adjacent to their undertaking to the appellants for their own purposes and free from any regulation or supervision by the authority. There is nothing which, to my mind, would justify a finding that by the grant of these leases the dock authority had incorporated in their existing undertaking the new installations and equipment which the appellants were to erect for the purposes of their business. I think the finding of the Lands Tribunal on this issue was justified by the facts proved and should not be disturbed.

I pass, therefore, to the alternative submission. This depends upon the definition of "dock undertaking" in section 5 (3). It is as follows: "'Dock undertaking' means an undertaking "carried on by a dock authority, but also includes any other "undertaking comprising as part thereof a dock in so far only "as its business is carried on at and in connection with that "dock." I find the latter part of this definition very puzzling, but it would seem to me difficult to say on the facts of the present case that if the undertaking is limited to the business carried on *at* and in connexion with the dock, that is, the barge berth, the

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hereditament in question, which is physically separated from the dock, could be said to be part of the limited undertaking. But, however this may be, I have reached the conclusion that, assuming the appellants qualify as undertakers under the second limb of the definition, the substantial proportion of the volume of their business is not concerned with the shipping and unshipping of merchandise not belonging to or intended for their use.

I do not think the words "belonging to" and "use of" in this context are equivalent to "the property of" and "personal "use." I think they have a wider meaning. The property in the oil in the strict legal sense of the word did not pass to the appellants from the consigning companies on delivery, but the appellants had a good possessory title to it as against everyone. The consignors had no more than a contractual right to an account and payment. When delivered it was put in a common tank and mixed with other oil. For all practical purposes the oil was at the disposal of the appellants subject only to the consignors' rights referred to above. I think, therefore, it "belonged "to" the appellants within the meaning of those words in the present context. I also agree with the Court of Appeal that the oil was intended for their "use" in the sense of being used in their business. If a garage proprietor carries on a business which includes a hire car service as well as an installation of petrol pumps for the supply of petrol to his customers and for these purposes buys petrol from the distributing companies, I think the petrol is supplied to him to be "used" in his business irrespective of whether it is put in the tanks of his own hire cars or those of his customers. This, in my opinion, is the sense in which the word is used in the present context.

For these reasons I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, it is conceded that the hereditament here (which I shall call the "oil depot") is occupied and used partly for "dock purposes" in respect that it contains pumping apparatus which is used in unshipping oil from ocean-going tankers which berth at two jetties belonging to the British Transport Commission as dock authority at the port of Hull. To that extent it satisfies the first of the requirements of section 5 (1) (*c*) of the Act of 1928. Delivery of the oil is taken at ship's rail and is pumped direct from the ship by means of pipes to the oil depot.

The first question which arises is whether the oil depot is occupied and used as part of what I shall call the Hull dock undertaking so as to satisfy the second requirement of section 5 (1) (*c*). "Dock undertaking" here means "an undertaking "carried on by a dock authority," being so defined in section 5 (3). Now, such an undertaking includes much more than the mere physical structure of the dock. The dock is only part of the undertaking, just as a railway is part of a railway undertaking and a canal a part of a canal undertaking as stated in terms

by the Act when referring to these types of freight-transport hereditament under section 5 (1) (*a*) and (*b*). A dock undertaking includes the whole business and activities of a dock authority. I should require clear evidence, which is entirely lacking here, that the Hull dock authority had statutory power to carry on the business of an oil depot as carried on by the appellants, that is, as oil merchants and distributors, before I could regard an hereditament occupied and used for such a business as part of their undertaking. If the authority cannot so use their land, the appellants cannot be occupying and using the oil depot as part of a dock undertaking. A further difficulty is this. The land leased to the appellants or their predecessors in title belonged to the Hull dock undertaking and, I will assume, was part of the dock undertaking though it may not have been used at all for dock purposes. But when it was let out it would, according to ordinary conceptions, cease to be part of the dock undertaking. It would be put, for the time being, beyond the operations and control of the dock undertakers. But counsel for the appellants point to proviso (*a*) of section 6 (3) as showing that though a part of the hereditament of a dock authority was let out it might still, in the conception of the legislature, remain a part of the dock undertaking. The proviso is as follows: "no part of a freight-"transport hereditament which is so let out as to be capable of "separate assessment shall be deemed to be occupied and used "for transport purposes unless it is actually so occupied and "used." The proviso refers to occupation and use for transport purposes. In the case of a dock this means dock purposes under the definition of "transport purposes" in section 5 (2). But this does not necessarily mean that every part of a dock undertaking which is let out and is used to some extent for dock purposes continues to be part of the dock undertaking. If it were open to a dock authority to let out the whole of its docks for dock purposes to serve the public as before, the undertaking would doubtless continue to be a freight-transport hereditament, and if the authority had power to let out part of its docks or quays to be used for the berthing of ships and the loading and unloading of merchandise, it might, I think, be said that the part let out remained part of the dock undertaking. The dock authority would be securing for the public through a lessee the same services as it could have performed itself. But where all that the authority does is to let out some waste or vacant land in order that the lessee may erect works and plant such as we have here, it is impossible, in my opinion, to say that the land with the works on it is occupied and used as part of the dock undertaking, even if, as incidental to the operations carried on, it is used also for the shipping or unshipping of goods for the purposes of the occupier's business.

On this part of the case counsel for the appellants referred to and relied on the Scottish decisions in *Clyde Navigation Trustees*

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v. *Inland Revenue* [7] and *Clyde Navigation Trustees* v. *Assessor for Glasgow*.[8] The last of these cases alone need be noticed as illustrative of the point made by the appellants' counsel. In that case the Lands Valuation Appeal Court held, inter alia, that offices built by a dock authority upon ground within the precincts of their dock and let to a firm of shipowners and a firm of stevedores respectively were occupied and used for "dock purposes as "part of a dock undertaking" within the meaning of section 5 (1), and were accordingly freight-transport lands and heritages. It may be observed that one of the facts found in the case was that the buildings had been constructed by the trustees (the dock authority) expressly for the purpose of leasing them to the shipowners and stevedores engaged at the dock in loading and unloading merchandise.

Referring to section 6 (3) (*a*) of the Act, Lord Hunter said [9]: "That means, I think, that, where one finds subjects, capable of "separate assessment and leased to tenants, which are so used "and occupied as to fall within the definition of freight transport, "one must treat the subjects, although let, as part of the dock "undertaking for purposes of derating." That decision cannot, in my opinion, be pressed beyond the particular circumstances with which it dealt. The buildings in that case were being used for precisely the same purpose of loading and unloading merchandise as the dock authority would have used them if they had kept the buildings in their own hands. They were being used for no other purposes. For their own convenience or for the convenience of the shipowners and stevedores using the docks they chose instead to let them. Where similar buildings were erected by the lessees on land leased to them by the dock authority a different rule was applied, as the cases cited show. In such a case the court held that the buildings were not part of the dock undertaking and so not entitled to derating. But as this distinction may depend on specialties of Scottish valuation law and procedure I do not seek to apply it to this case, though it shows how narrow the decisions in these cases were. The cases are, in my opinion, distinguishable from this case, where the operations carried on by the lessees extend far beyond the business and activities of a dock authority.

It is said, however, that if the oil depot is not part of the Hull dock undertaking, it is a dock undertaking in its own right by virtue of the second limb of the definition of "dock under-"taking," namely, "any other undertaking comprising as part "thereof a dock in so far only as its business is carried on at and "in connexion with that dock." The appellants here rely on their barge berth at Hedon Haven, from which some of the oil in their oil depot is shipped. The barge berth is not part of the oil depot, though it is connected with the oil depot by pipes

[7] 1930 S.C. 454.
[8] 1931 S.C. 400.
[9] Ibid. 405.

through which the oil is pumped for shipment. It is 300 yards from the nearest part of the oil depot and is a separate hereditament, separately assessed, and as such does not come into this case. But it is used by the appellants to attract to their oil depot the character of a dock undertaking. Part at least of the business of the oil depot, it is said, is carried on at or in connexion with the barge berth.

I cannot apply the definition to the facts of this case in the way contended for by the appellants. No doubt the business done at the barge berth is associated with the business done at the oil depot. But the intention of the definition, in my opinion, is to effect a separation between the dock and the rest of the undertaking. The undertaking is carrying on business at the dock. It is also carrying on business at the rest of its premises. The two must be treated separately. No difficulty really arises, in my opinion, when the dock and the other premises are separated as here. The dock is clearly identified from the rest. But the dock and the other premises may be within one curtilage where separation is not clearly defined. There it would be necessary, I think, to look at what would normally be regarded as dock activities, these being, ex hypothesi, part of the business of the undertaking, and the area within which these are carried on, or necessary for them to be carried on, would be marked by the definition as the dock undertaking. The rest would be excluded from being a dock undertaking. In my opinion, the definition is of no avail to the appellants in the circumstances of this case.

On the views which I have expressed it is unnecessary to consider the application of the third requirement of section 5 (1) (*c*) to the facts of this case. If the oil depot were part of the Hull dock undertaking, that undertaking clearly satisfies the requirement. But if the oil depot were to be treated as a dock undertaking in its own right I should have had great difficulty in holding that the oil did not belong to or was not intended for the use of the appellants. But I need not elaborate this point.

I would dismiss the appeal.

VISCOUNT SIMONDS. I understand learned counsel want to say something about costs.

J. R. Willis Q.C. for the appellants. The appellants cannot resist an order to pay the costs of the appeal, but ask that they should pay only one set of costs. That would follow the practice of the Lands Tribunal where there are two respondents and one unsuccessful appellant.

Patrick Browne for the valuation officer. The first respondent accepts that there should be only one set of costs, but invites a direction as to how they are to go between the two respondents. The whole should go to the valuation officer because (1) the responsibility for the valuation list and, therefore, of resistance

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to this appeal was placed on him to the exclusion of the rating authority, and (2) as the case has been conducted, the burden has in fact fallen on him. The relevant provision is section 3 of the Local Government Act, 1948. Before the Lands Tribunal the costs were awarded to the valuation officer. In the Court of Appeal Lord Evershed M.R. said: "We think it would be only "right to impose on the appellant one set of costs. We are far "from saying that the rating authority has not acted rightly "in attending in court but, on the other hand, we do not think "ourselves we should give any direction. It is obvious, in the "light of the statutory provisions, that the burden and task of "resisting the appeal would fall on the valuation officer, but we "think that the taxing master might, on looking at the corre-"spondence and other matters that have been referred to, think "it proper to apportion some part of the costs to the rating "authority." The order made was: "Appeal be dismissed with "costs to be paid by the said appellants to the said respondent "valuation officer . . . such costs to be taxed by a taxing master "and to be subject to such apportionment as between the valua-"tion officer and the Holderness Rural District Council as the "taxing master thinks proper." If the House thought that there should be a division it would be easier to work in practice to say, for example, that the valuation officer should get four-fifths, and the rating authority one-fifth, or whatever proportion the House thought was right.

E. P. Wallis-Jones for the council. It is agreed that if the House thought it would be proper not to order more than one set of costs it would be better if a proportion or fraction were fixed by the House rather than that the matter should be left indefinite and open to argument on taxation. But on the general matter, though the responsibility for the valuation list is in the hands of the Inland Revenue, acting through the valuation officer, the rating authority is primarily interested in the list and the rates. The Inland Revenue holds the balance between the ratepayer and the rating authority. The rating authority does not necessarily view the matter from the same angle, and it should be able to appear through solicitors whom it instructs and counsel of its own choice. Although there is no conflict of interests, the interests are not the same. The interest of the rating authority is not passive but is special and particular. Up to the Court of Appeal, the Inland Revenue might compromise an appeal or make some arrangement which was unsatisfactory to the rating authority. The appellants should pay the costs of both respondents, but if the House felt that that was too much to impose on them, the one set of costs should be shared equally between the respondents.

The HOUSE ordered that one set of costs only be paid by the

appellants to the respondents, and that those costs be apportioned as to two-thirds to the valuation officer and one-third to the local authority.

Appeal dismissed.

Solicitors: *Sydney Morse & Co.; Solicitor of Inland Revenue; Smith & Hudson for Mainprize, Rignall & Whitworth, Hull.*

F. C.

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[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* LOVELOCK.

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July 24.
Lord Goddard C.J., Ormerod and Ashworth JJ.

Criminal Law—Court of Criminal Appeal—Substitution of sentence—Conviction on two counts—Appeal against conviction on one count only—Conviction quashed—Increased sentence substituted for the sentence on the count on which the appellant was properly convicted—Application of the Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (1).

The appellant was indicted on two counts charging him with attempted rape and indecent assault on a girl under the age of 13. He was convicted on both counts and sentenced to six years' imprisonment on the first count and two years' concurrently on the second. He appealed against his conviction for attempted rape:—

Held, (1) that there was no evidence to support the conviction of attempted rape, and that it ought to be quashed.

(2) That section 5 (1) of the Criminal Appeal Act, 1907, applied to the case, and gave the court a power to substitute an increased sentence (of preventive detention) for the sentence on the count on which the appellant had been properly convicted.

APPEAL against conviction.

The appellant was indicted before Stable J. at Leicester Assizes on two counts charging him with attempted rape and indecent assault on a girl under the age of 13. He pleaded not guilty to the charge of attempted rape, but guilty to the charge of indecent assault. The trial judge insisted on having him tried for attempted rape. He was found guilty on both counts, convicted, and sentenced to six years' imprisonment on the first count and two years' imprisonment on the second, the sentences to run concurrently.

He appealed against his conviction for attempted rape.

B. D. Bush for the appellant.
James Ross for the Crown.

LORD GODDARD C.J., delivering the judgment of the court, stated the facts and continued: This is one of those cases that

[Reported by D. TRAFFORD OWEN, Esq., Barrister-at-Law.]

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calls loudly for the intervention of the legislature with regard to increasing the sentences for this class of offence upon children.

In this case the appellant pleaded guilty to an indecent assault, but the judge insisted on having him tried for attempted rape. Then, in his direction to the jury, the judge omitted to refer them to the vital point, namely—did the man attempt to rape the girl. Everything here points to the conclusion that he did not. Then again the judge forgot to put to the jury the appellant's defence. We cannot possibly say here that there was any evidence of an intended rape, though there was clearly an indecent assault. We cannot uphold the conviction of attempted rape and it must be quashed.

Ross. Will your Lordships consider the application of section 5 (1) of the Criminal Appeal Act, 1907 [1]? The appellant is eligible for preventive detention.

LORD GODDARD C.J. Mr. Ross has very properly called the attention of the court to section 5 (1) of the Criminal Appeal Act, 1907. That is a subsection which, so far as my experience goes, has never been put into force before.[2] In all the years I have sat in this court either as a puisne judge or as chief justice I have never known it applied, but it is a section which appears to me to apply in the clearest possible manner to this case.

Probably the reason why that subsection was put in was this: You get an indictment containing three counts. On the first count there is a conviction and the court passes a sentence of, for example, five years. They should then go on and pass some sentences, which may be concurrent or consecutive, but are generally concurrent, upon the other counts on which there have also been convictions; and the court may very easily think: "We have passed a sentence of five years on count 1, so it will "be enough on counts 2 and 3 if we pass a sentence of three or "five years to run concurrent on each of these counts." Then the case comes before the Court of Criminal Appeal and the court might say: "What has happened here obliges us to quash "the conviction on count 1, which carries the sentence of five "years, but we affirm the conviction on counts 2 and 3." It may be that there is very little difference, if any, between the merits of counts 1, 2 and 3. The subsection will then give the Court of Criminal Appeal, upon quashing the conviction on count 1, power to pass an adequate sentence for the convictions on

[1] Criminal Appeal Act, 1907, s. 5 (1): "If it appears to the Court of "Criminal Appeal that an appellant, "though not properly convicted on "some count or part of the indict- "ment, has been properly convicted "on some other count or part of the "indictment, the court may either "affirm the sentence passed on the "appellant at the trial, or pass such "sentence in substitution therefor as "they think proper, and as may be "warranted in law by the verdict on "the count or part of the indictment "on which the court consider that the "appellant has been properly con- "victed."

[2] It appears that s. 5 (1) of the Criminal Appeal Act, 1907, though not specifically referred to, was applied in *Rex* v. *O'Grady* (1941) 28 Cr.App.R. 33—D.T.O.

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counts 2 and 3. That subsection seems quite clearly to apply to this case. We have found that the appellant was not properly convicted on the first count which carried the sentence, which Stable J. passed, of six years, but he was properly convicted on the second count, which carried a maximum sentence of only two years. However, as the necessary notices were served and convictions proved, it would have been possible for the appellant to have been sentenced to preventive detention. A sentence of two years for a horrible offence of this sort was quite inadequate. It is the fourth time he has been convicted of these assaults on little girls. He is, therefore, not safe to be at large with children, and the court considers, therefore, that it is right that they should put into force the provisions of section 5 (1) of the Criminal Appeal Act, 1907, and we shall pass the sentence which could have been passed, and lawfully passed, on the count of indecent assault, and that is, the sentence of preventive detention. The period of preventive detention might have been a very long one, and I am not sure that it would not be right to pass a long sentence; but considering that it is the first time that this section has been invoked we will only pass a sentence of preventive detention of the same length as the judge did of imprisonment on the first count. The sentence upon the appellant is that he should go to preventive detention for six years.

Appeal allowed.
Sentence varied.

Solicitors: *Kingsford, Dorman & Co.; Registrar, The Court of Criminal Appeal.*

[CHANCERY DIVISION.]

* *In re* HOUGHTON MAIN COLLIERY CO. LTD.

[No. 00445 of 1954.]

1956
May 30;
July 30.

Wynn-Parry J.

Company—Winding up—Liabilities—Pensions to company's servants—Capitalization of pensions owing to liquidation—Tax to be taken into account—Principles applicable to assessment.
Damages—Tax element.

A company which went into voluntary liquidation on June 30, 1953, had agreed to pay annual pensions to two of its employees. Owing to the liquidation it became necessary to capitalize these pensions, and the question was whether deduction should be made in respect of income tax and surtax in fixing the sum payable by the liquidator of the company:—

Held, (1) that the principle of *British Transport Commission* v. *Gourley* [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796 applied, and tax had to be taken into account in the quantification of the pensions.

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(2) That the parties should initially endeavour, with the help of their accountants, to agree on broad lines their notional liability to tax, including the actual extent to which regard should be had to any investment income.

Dicta of Lord Goddard and Lord Jowitt in *British Transport Commission* v. *Gourley* [1956] A.C. 185 at pp. 209 and 203 applied.

(3) That the notional income in respect of pensions brought into account should not be regarded as the top slice—or the bottom slice—of the incomes of the former employees.

ADJOURNED SUMMONS.

The present summons was taken out by the liquidator of the Houghton Main Colliery Co. Ltd., which went into voluntary liquidation on June 30, 1953. The question for the determination of the court was the admissibility of claims of the respondents, John Brass, managing director of the company, and Albert Francis, secretary, to rank as creditors in the winding up for the capitalized value of pensions, which were payable to them respectively, under an agreement made in the one case between Brass and the company in 1953, and in the other between Francis and the company in 1947; and further, whether in fixing that figure regard should or should not be had to income tax or surtax on the principle of *British Transport Commission* v. *Gourley*.[1]

R. B. S. Instone for the liquidator.

T. D. D. Divine for Brass and Francis.

J. G. Monroe for J. W. Baird & Co. Ltd., a shareholder.

Cases cited in argument not referred to in the judgment: *Ex parte Bates, In re Pannell*[2]; *In re Rothermere*[3]; *In re Law Car & General Insurance Corporation*[4]; *In re Dodds*[5]; *Hall & Co. Ltd.* v. *Pearlberg*[6]; *Beach* v. *Reed Corrugated Cases Ltd.*[7]

Cur. adv. vult.

July 30. WYNN-PARRY J. read the following judgment. This company was a successful colliery company which went into members' voluntary liquidation on June 30, 1953. At that date the company was under obligation to pay to the respondents, Brass and Francis, pensions at the respective rates of £166 13s. 4d. and £75 per month. The supervention of the liquidation made it necessary to quantify the claims of those two respondents, and, after a hearing in October, 1954, I laid down a formula which, when worked out by an actuary in accordance with actuarial principles, resulted in this, that the capital sums for which the respondents should be admitted to proof in respect of their

[1] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

[2] (1879) 11 Ch.D. 914.

[3] [1945] 1 Ch. 72; 61 T.L.R. 69; [1944] 2 All E.R. 593.

[4] [1913] 2 Ch. 103; 29 T.L.R. 532.

[5] (1890) 25 Q.B.D. 529; 6 T.L.R. 293.

[6] [1956] 1 W.L.R. 244; [1956] 1 All E.R. 297n.

[7] [1956] 1 W.L.R. 807; [1956] 2 All E.R. 652.

pension expectations were found to be respectively £14,140 and £10,238.

At that time there was a case on its way to the House of Lords, which came before the House on October 4, 1955, and is reported under the name of *British Transport Commission* v. *Gourley*.[1] This case raised the question whether, in the case of an award to a plaintiff of damages in respect of loss of earnings actual and prospective, regard should or should not be had to the income tax and surtax which he would have had to pay on the amount of such earnings had he not been injured. In that case, of course, the cause of action lay in tort; but, although the rights of the two respondents in question arose here out of contract, it seemed convenient to adjourn until after the decision of the House of Lords had been given the question whether any, and, if so, what, deduction should be made from the respective sums on account of the income tax and surtax which the two respondents in question, Brass and Francis, would have had to pay on their respective pensions, had those pensions continued to be paid.

This course appears to me to have been fully justified, because in my view a perusal of the opinions delivered in the House of Lords in *British Transport Commission* v. *Gourley*[2] leads inevitably to the conclusion that the opinions expressed by the majority of their Lordships govern this case, and that some deduction must be made as regards each pension on account of such income tax and surtax.

It is true that Earl Jowitt, in the course of his speech, said[3]: "There may well be a difference between actions for personal "injuries and actions for wrongful dismissal in regard to the "obligation of the plaintiff to pay tax on the amount of damages "received, and cases on the one topic may therefore be a "dangerous guide to follow on the other."

On the other hand, Lord Goddard, with whose opinion Lord Radcliffe and Lord Somervell agreed, said[4]: "In this opinion I "am dealing solely with damages in personal injury and wrongful "dismissal cases." Clearly, therefore, he put personal injury cases, which arise out of tort, and wrongful dismissal cases, which arise out of contract, on the same footing.

This also appears to be the view of Lord Reid, who said[5]: "In a case where the wrongdoer is the plaintiff's employer it "has sometimes been said that he would have had to continue "to pay the plaintiff's full wages or salary if there had been no "accident or wrongful dismissal, so why should he take advantage "of his own wrong to diminish his liability? That argument has "lost some of its force since the introduction of the system of "P.A.Y.E., but it would be strange if the introduction of a new "method of collecting tax altered the legal position and, in any

[1] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.
[2] [1956] A.C. 185.
[3] Ibid. 199.
[4] Ibid. 210.
[5] Ibid. 213.

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" event, the argument would remain for surtax. The real answer " is, I think, that before the wrong the employer was paying for " the plaintiff's services, whereas now he is paying the plaintiff's " loss and he will have to pay someone else to perform the " services. And this argument would also go too far if valid, for " it would seem to involve the proposition that, if a dismissed " employee gets other work, the employer ought not to be able " to take advantage of that."

Finally, I would refer to a passage in the opinion of Lord Tucker, who said [6]: " I agree that the phrase res inter alios acta " does not assist in the solution of the problem, but the difficulty " is, I feel, in deciding what items of expenditure following the " earning of profits are to be taken into consideration and which " are to be ignored. Such items are clearly distinguishable from " those which are incurred in the process of earning the profits " and which have to be deducted in the computation thereof. I " think the true answer is that expenditure which—although not " actually a charge on earnings—is imposed by law as a necessary " consequence of their receipt, is relevant to the ascertainment " of the loss suffered by the party injured."

The nature of the payment which is made is compensation, whether the payment is made as damages for personal injuries or damages for breach of contract. Lord Goddard, in *British Transport Commission* v. *Gourley*,[7] is reported as saying [8]: " Damages which have to be paid for personal injuries are not " punitive, still less are they a reward. They are simply com- " pensation, and this is as true with regard to special damage " as it is with general damage."

In *In re R. S. Newman Ltd.*[9] Lord Cozens-Hardy M.R. said: " The contract between the company and Mr. Raphael " was broken when the winding-up order was made. This is " quite plain. There is no doubt that he is entitled to claim " compensation by way of damages for the breach."

I therefore come to the conclusion that *British Transport Commission* v. *Gourley* [10] covers the present case and the main question to which I have referred above must be answered in the affirmative. I think that this conclusion is supported by the decision of Pilcher J. in *Beach* v. *Reed Corrugated Cases Ltd.*[11] That case involved a claim for damages for wrongful dismissal, and Pilcher J. held that *British Transport Commission* v. *Gourley* [12] applied.

On this basis a number of subsidiary questions fall to be considered. The first arises as a result of an observation in the opinion of Lord Goddard in *British Transport Commission* v. *Gourley*.[12] He is reported as saying [13]: " In cases where surtax

[6] [1956] A.C. 215.
[7] Ibid. 185.
[8] Ibid. 208.
[9] [1916] 2 Ch. 309, 322.
[10] [1956] A.C. 185.
[11] [1956] 1 W.L.R. 807; [1956] 2 All E.R. 652.
[12] [1956] A.C. 185.
[13] Ibid. 209.

" is payable and the rate has been affected by private income, " the nature of that private income will be relevant. If it is a " life annuity under a will or settlement it may well be expected " to continue. If it is disposable investments which might be " sold at any time or transferred to a child, less, perhaps little, " regard should be had to it."

In *Beach* v. *Reed Corrugated Cases Ltd.*[14] Pilcher J. had to consider and apply that passage, but he was able to apply it because he had detailed evidence as to the nature of the private income of the plaintiff and of his intentions in dealing with it. In the present case I have no evidence at all as to the nature or amount of the private income of either Mr. Brass or Mr. Francis, or whether or not they propose to deal with it or the capital from which it is derived in any particular way. In these circumstances it appears to me that at the present time I can do no more than express the view that full effect must be given to the passage from the opinion of Lord Goddard which I have read[15]; and that the parties with the aid of their accountants should endeavour to agree the actual extent to which regard should be had to the investment income of Mr. Brass and Mr. Francis respectively. If they should unfortunately fail to come to an agreement, the matter must be brought back and the necessary evidence placed before the court to enable it to pronounce on this point.

The next question debated was: what is the relevant fiscal year to be taken for the purposes of calculating the amount of the deductions. I have no evidence as to the basis on which the actuary proceeded so far as concerns the number of years which he took into account in each case; but it appears that in each case his calculations were made on the basis of a pension beginning on June 30, 1953, the date of the liquidation. It was therefore agreed that, in so far as a calculation over a number of years was concerned, the first fiscal year involved in that calculation should be the fiscal year in which the liquidation occurred, namely, the fiscal year ending April 5, 1954.

There remains the difficult question: how is the notional liability to income tax and surtax to be calculated in each case? Certain guidance is to be obtained from the opinions of the House of Lords in *British Transport Commission* v. *Gourley.*[16] Earl Jowitt said[17]: " It would, I think, be unfortunate if, as the result " of our decision, the fixation of damages in a running-down case " were to involve an elaborate assessment of tax liability. It " will no doubt become necessary for the tribunal assessing " damages to form an estimate of what the tax would have been " if the money had been earned, but such an estimate will be " none the worse if it is formed on broad lines, even though it " may be described as rough and ready. It is impossible to

[14] [1956] 1 W.L.R. 807.
[15] [1956] A.C. 209.
[16] [1956] A.C. 185.
[17] Ibid. 203.

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" assess with mathematical accuracy what reduction should be " made by reason of the tax position, just as it is impossible to " assess with mathematical accuracy the amount of damages " which should be awarded for the injury itself and for the pain " and suffering endured."

It is true, as I have pointed out, that Earl Jowitt was confining his opinion to cases of claims for damages for personal injury; but I cannot help feeling that this language is as applicable to cases of claims for damages for wrongful dismissal and other breaches of contract as it is to claims for damages for personal injury. It is, therefore, in my view, a principle which ought to be taken into consideration in estimating the deductions proper to be made in this case.

Again, Lord Goddard in his opinion says [18]: " But in con- " sidering special damage in these cases the rate of tax to be " taken must, as it seems to me, be the effective rate of income " tax, and, if necessary, surtax, which would have been applicable " to the sums in question if they had been earned. The rate " depends on the combination of a number of factors that may " vary with each case—allowances, reduced rates, surtax rates, " other income of the claimant or his wife, charges or reliefs. " The task of determining it may not always be an easy one, " but in complicated cases it is to be hoped that the parties, " with the help of accountants, will be able to agree figures. If " not, the court must do its best to arrive at a reasonable figure, " even though it cannot be said to be an exact one."

The suggestion which emerges from that last passage, that in the first place the parties should endeavour to agree the figures with the help of their accountants, appears to me, if I may say so with respect, an eminently common sense suggestion. In my view it is only in the last resort that a judge should assume the task of fixing the figures, and he should not do so without all the available help. Obviously if an attempt, even though unsuccessful, has been made by the parties' accountants to arrive at a figure, the judge cannot but be helped by having the views of those skilled professional gentlemen.

Bearing those considerations in mind, I do not propose to attempt to fix figures today. What I propose is to allow the parties and their accountants an opportunity to agree the figures, giving them such guidance as I can. This guidance will consist, first of all, of drawing their attention to the last two passages which I have read from the opinions of Earl Jowitt and Lord Goddard. Secondly, I express the view that I can find no good reason for the suggestion that the notional amounts which as a result of the calculations are to be added to the actual incomes of Mr. Brass and Mr. Francis should be regarded in either case as representing the top slice of those incomes. To my mind, the proper way of looking at the matter is to say that, if, taking the

[18] [1956] A.C. 208.

case of Mr. Brass, the company had continued to function, his income would have been greater by the amount which will emerge from the calculations to be performed, but it cannot be said that it represents the top slice, or for that matter the bottom slice, of his income; the only effect of making the calculation for the purposes of applying *British Transport Commission* v. *Gourley* [19] will be that his income for the relevant period must be treated as larger than in fact it was.

In the third place, I would observe that the basis of the majority opinions in *British Transport Commission* v. *Gourley* [19] is that to "ignore the tax element at the present day would be "to act in a manner which is out of touch with reality": *per* Earl Jowitt.

Bearing that consideration in mind, it would, to my mind, amount to ignoring the realities if the whole of these two sums were brought into account in the fiscal year ending April 5, 1954. In the calculations, which will have to be made, they must be spread over a period of years, and the proper period appears to me to be the number of years which in each case the actuary took into his calculations in arriving at the respective capital sums.

Having given these points of guidance, I propose to stand the summons over, in order to give the parties opportunity, with the aid of their accountants, of arriving at agreed figures. If their efforts are unsuccessful the matter will have to be restored, when I should desire to have the benefit of the views of the respective accountants. I hope, however, that this will not be found necessary. It is eminently a case for agreement, because there is no hostile element involved; the real necessity for the summons very properly issued is to provide protection for the liquidator.

Summons stood over with liberty to restore.

Solicitors: *Johnson Weatherall & Sturt for Parker, Rhodes & Co.; Stafford Clark & Co. for Simpson, Curtis & Co., Leeds; Middleton, Lewis & Co. for Alex I. Braid & Co., West Hartlepool.*

I. G. R. M.

[19] [1956] A.C. 185, 203.

[COURT OF APPEAL.]

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June 26, 27, 28; *July* 13.

Lord Evershed M.R., Jenkins and Hodson L.JJ.

* *In re* A DEBTOR (No. 66 OF 1955). *Ex parte* THE DEBTOR *v.* THE TRUSTEE OF THE PROPERTY OF WAITE (A BANKRUPT).

Bankruptcy — Set off — Mutual dealings — Sale of goods on credit by debtor to purchaser—Guarantee by purchaser of debtor's overdraft secured by deposit of title deeds—Debt due to debtor from purchaser — Receiving order made against purchaser — Discharge by purchaser's trustee of overdraft to obtain release of title deeds — Judgment for trustee against debtor to recover amount paid to bank —Receiving order against debtor on petition of trustee—Claim for set off by debtor—Whether mutual dealings—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 31.

In January, 1952, the debtor agreed to sell to W. on credit goods for which the debtor had to pay in cash. In order to pay for the goods the debtor found it necessary to borrow money from his bank, and W. in consideration of the credit which he thus received agreed to guarantee the debtor's overdraft to an extent not exceeding £200, the guarantee being secured by a deposit of title deeds, of certain property owned by W. During 1952 the debtor supplied goods to W. to the value of £201 14s. 6d. and W. paid £100 into the debtor's bank, which left a balance due of £101 14s. 6d. On October 1, 1954, a receiving order was made against W. and W.'s trustee in bankruptcy, in the course of realizing the assets and in order to complete a sale by him of the property secured by the deposit of title deeds, paid in July, 1955, to the debtor's bank the sum of £133 14s., the amount (with interest) of the debtor's overdraft, and obtained the release of the deeds.

On September 9, 1955, W.'s trustee commenced an action in the Brighton District Registry against the debtor to recover the sum of £133 14s. "paid for the defendant as his surety." The debtor appeared and claimed to set off the sum of £101 14s. 6d. for the goods supplied to W. and in addition interest on the overdraft, but on October 6, 1955, the district registrar gave leave to W.'s trustee to sign judgment for the sum of £133 14s. and £16 16s. 6d. costs, a total of £150 10s. 6d. On October 15, 1955, W.'s trustee in bankruptcy obtained the issue of a bankruptcy notice to the debtor in which was claimed payment of the sum of £150 10s. 6d. This bankruptcy notice was not complied with and on December 22, 1955, W.'s trustee filed a petition in bankruptcy against the debtor based on the judgment debt.

On February 2, 1956, the registrar (who was the same person as the registrar of the Brighton District Registry) was asked on behalf of the debtor to go behind his decision as district registrar in his judgment of October 6, 1955, and allow the set off claimed by the debtor. On February 6, 1956, the registrar, in a judgment, refused to go behind his previous judgment. On February 9, 1956, a receiving order was made against the debtor. The debtor appealed:—

Held, (1) that the amount due to the debtor from W. in 1954 (£101 14s. 6d.) was not automatically discharged by payment by W.'s trustee in bankruptcy to the debtor's bank in July, 1955, of the amount then outstanding on the overdraft (£133 14s.).

(2) That at the relevant date for the application of section 31 of the Bankruptcy Act, which it was conceded was the date of the

receiving order in W.'s bankruptcy, there was no debt due from the debtor to W. capable of forming the subject-matter of a set off under the section against a debt due from W. The rights of W. against the debtor were the special but contingent rights of a surety who had not been called upon to make any payment by the principal creditor and had not exercised the protective right of a surety to require the principal debtor to relieve him of his liability by paying the debt owed to the principal creditor. Nor was all that remained to be done the quantification of the extent of an obligation already incurred.

In re Daintrey [1900] 1 Q.B. 546 distinguished.

(3) That the claim subsequently created by W.'s trustee in bankruptcy, although in consequence of the mutual dealings between W. and the debtor before the start of proceedings in W.'s bankruptcy, could not be related back to the date of the receiving order in W.'s bankruptcy.

Ex parte Barrett (1865) 12 L.T. 193 distinguished.

In re Fenton [1931] 1 Ch. 85; 46 T.L.R. 478 distinguished but reasoning applied.

(4) That it was open to the court to go behind the judgment of the registrar refusing the set off, although that judgment had not been appealed against, because for bankruptcy purposes a judgment is not conclusive evidence of a petitioning creditor's debt.

Decision of Divisional Court (Harman and Danckwerts JJ.) [1956] 1 W.L.R. 480; [1956] 2 All E.R. 94 affirmed.

Appeal from the Divisional Court (Harman and Danckwerts JJ.).[1]

The debtor appealed against a receiving order made against him by the registrar of the Brighton County Court on February 9, 1956. The principal ground of appeal was the refusal of the registrar to give effect to a set off claimed to be effective under the provisions of section 31 of the Bankruptcy Act, 1914.[2] The following statement of the circumstances in which the alleged set off arose is taken substantially from the judgment of Hodson L.J.

In January, 1952, the debtor had agreed to supply one Ernest Edward Waite with goods which were to be paid for by the debtor with cash but to be sold to Waite, who was to pay in due course. Waite agreed to guarantee the debtor's banking account and deposited the title deeds of his house to secure an overdraft up to £200. In 1952 the debtor supplied goods to Waite of the value of £201 14s. 6d. and Waite paid £100 into

[1] [1956] 1 W.L.R. 480; [1956] 2 All E.R. 94.

[2] Bankruptcy Act, 1914, s. 31: "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him."

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the debtor's bank, leaving a balance due of £101 14s. 6d. On October 1, 1954, a receiving order was made in Waite's bankruptcy and the debtor had a right of proof in respect of the £101 14s 6d. said to be due, but the amount of Waite's indebtedness was not proved or agreed at the time of the present proceedings. Waite's trustee, in the course of realizing the assets, had to pay off the debtor's overdraft in order to obtain release of the title deeds of the house. This he did on July 20, 1955, when the debtor's overdraft amounted to £133 14s.

On September 9, 1955, Waite's trustee started an action in the Brighton District Registry of the High Court of Justice against the debtor to recover the sum of £133 14s. "paid for "the defendant" [the debtor] "as his surety." The debtor appeared and claimed to set off the sum of £101 14s. 6d. for the goods supplied to Waite and in addition the interest on the overdraft, but on October 6, 1955, the district registrar gave leave to Waite's trustee to sign judgment for the full amount of £133 14s. and £16 16s. 6d. costs (a total of £150 10s. 6d.). On October 15, 1955, Waite's trustee in bankruptcy obtained the issue of a bankruptcy notice, which was not complied with, and on December 22, 1955, the trustee filed a petition in bankruptcy against the debtor based on the judgment debt of £150 10s. 6d.

On February 2, 1956, the registrar (who was the same person as the district registrar) was asked on behalf of the debtor to go behind his decision as district registrar in his judgment of October 6, 1955, and to allow the set off claimed by the debtor. On February 6, 1956, the registrar, in a judgment, refused to go behind his previous judgment and on February 9, 1956, a receiving order was made against the debtor. The debtor appealed against that order. The Divisional Court (Harman and Danckwerts JJ.) held that although the registrar was in error in refusing to go behind his previous judgment in a bankruptcy matter, he was correct in refusing to allow the set off, since there was at the date of Waite's bankruptcy nothing presently due from the debtor to Waite.

The debtor appealed.

Muir Hunter for the appellant (the debtor).

J. K. Wood for the respondent (the petitioning creditor and trustee in the bankruptcy of Waite).

The following cases, not referred to in the judgment, were cited in argument: *Bradley-Hole* v. *Cusen*[3]; *Peat* v. *Jones & Co.*[4]; *In re Fenton (No. 2)*[5]; *Ascherson* v. *Tredegar Dry Dock and Wharf Co. Ltd.*[6]; *Kitchen's Trustee* v. *Madders*[7]; *Bendall*

[3] [1953] 1 Q.B. 300; [1953] 2 W.L.R. 193; sub nom. *Hole* v. *Cuzen* [1953] 1 All E.R. 87.

[4] (1881) 8 Q.B.D. 147.

[5] [1932] 1 Ch. 178.

[6] [1909] 2 Ch. 401.

[7] [1950] Ch. 134; [1949] 2 All E.R. 1079.

v. *McWhirter* [8]; *In re Flatau* [9]; *In re Fraser* [10]; *Alloway* v. *Steere*.[11]

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July 13, 1956. Jenkins L.J. The judgment I am about to read is the judgment of Lord Evershed M.R.

[His Lordship referred to the facts and continued:] The real question argued in this court arises out of the provisions as to mutual credits and set off in section 31 of the Bankruptcy Act, 1914. It appears that certain business dealings took place between the appellant and the bankrupt about the end of the year 1951 or early in 1952, some two and three-quarter years before the receiving order made in the case of Waite. The effect of these transactions was that goods were sold by the appellant to the bankrupt (Waite) but the latter being unable then to pay for the goods, credit was given to him by the appellant upon the terms that he should guarantee the appellant's bank overdraft up to an amount of £200. It was argued by Mr. Muir Hunter that the arrangement then made between the appellant and the bankrupt was of a much more complex and precise character, and was to the effect that since the overdraft had (as was suggested) been created exclusively for the purpose of enabling the appellant to acquire the goods sold by him to the bankrupt, the latter should discharge his indebtedness to the appellant by paying off the appellant's debt to the bank. At the date relevant for the purposes of this appeal, the amount of the price of the goods sold to the bankrupt by the appellant remaining undischarged was said to be £101 14s. 6d.: and it was contended by Mr. Muir Hunter that, according to the terms of the agreement made between the appellant and the bankrupt, the payment by the latter's trustee of the amount then remaining due to the appellant's bankers operated automatically to discharge the debt of £101 14s. 6d. so that the right of the respondent trustee arising from the suretyship to recover from the appellant was limited to the balance of £31 19s. 6d., a sum even with the figure of £16 16s. 6d. added for costs insufficient to support a bankruptcy petition.

In my judgment it is clear that the appellant has failed to prove an agreement having the terms alleged by Mr. Muir Hunter, and such as to result in the automatic discharge of the appellant's outstanding claim for the sale of the goods. I add that he also failed to prove that in fact the bank overdraft was exclusively referable to the purchase of the goods by the appellant.

There remains, however, Mr. Muir Hunter's alternative submission founded on section 31 of the Act. Assuming (he says)

[8] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[9] (1888) 22 Q.B.D. 83; 5 T.L.R. 5.

[10] [1892] 2 Q.B. 633.

[11] (1882) 10 Q.B.D. 22.

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that the appellant's claim for £101 14s. 6d. or whatever be the correct figure (for the amount I have stated has only been conceded for the purposes of the present argument), remains undischarged, still the sum of £133 14s. paid by the respondent trustee in discharge of the appellant's bank overdraft together with the sum for costs, making in all £150 10s. 6d., gives rise to a " contra money claim " (to use the phrase of Lord Hanworth M.R. in *In re Fenton's* case [1], hereafter mentioned) arising out of the mutual dealings of 1951–1952 which must, by the imperative terms of section 31, be set off the one against the other; and so a balance is left in favour of the respondent trustee 24s. short of the sum required to support a petition in bankruptcy.

[His Lordship read section 31 and went on:] It is conceded (and the concession is of the first importance in the case) that the relevant date for the application of the section is that of the receiving order made against Waite on October 1, 1954. If, then, it is necessary to apply the terms of section 31 to the state of affairs as they existed on that date, the question would be: what on that day (viz. October 1, 1954) was due from the one party to the other, that is, the appellant and the bankrupt, in respect of their mutual dealings? On that day there was indubitably due from the bankrupt to the appellant (for which he was entitled to prove, as I understand he has in fact done) the sum of £101 14s. 6d., or whatever was the proper amount outstanding in respect of the goods sold to the bankrupt. But was there on that date anything " due " from the appellant to the bankrupt? In my judgment there was not. The rights of the bankrupt against the appellant were the special but contingent rights of a surety who had not been called upon to make any payment by the principal creditor, and had not exercised what has been called the protective right of a surety to require the principal debtor to relieve him of his liability by paying the debt owed to the principal creditor. Nor was the case one in which all that remained to be done was to quantify the extent of an obligation already incurred, the amount of the indebtedness when finally ascertained being exclusively referable to an obligation to pay that sum entered into prior to the relevant date; such as was the case in *In re Daintrey* [2] (see *per* Romer L.J.[3]). If and when a sum certain became due from the appellant to the bankrupt or his trustee that debt would be referable to the contract of guarantee with the bank or to the rights flowing from such contract, entered into by the bankrupt with the bank subsequently to and independently (albeit in consequence) of the mutual dealings between himself and the appellant. Moreover, the sum payable would depend on the state of the appellant's account with the bankers on the date when payment to the bankers was made.

But Mr. Muir Hunter relied before us and in the Divisional

[1] [1931] 1 Ch. 85; 46 T.L.R. 478.
[2] [1900] 1 Q.B. 546.
[3] Ibid. 573.

Court upon a number of decisions which (as he submitted) entitled him to say that although in truth on October 1, 1954, there was nothing " due " from the appellant to the bankrupt, nevertheless the claim subsequently created by the respondent trustee's payment to the appellant's bankers could be related back, as it were, to October 1, 1954, so as to entitle him to treat that claim as if it had been then a claim for payment of a sum certain from the appellant to the bankrupt. I should state that the bankrupt, at the time when he entered into his contract of guarantee with the appellant's bankers, had deposited with the bank by way of security the deeds of certain property belonging to him and that the respondent trustee paid off the sum owing to the bankers in order to obtain a release of such deeds and to allow him, accordingly, to sell the property free from the bankers' charge and to the best advantage. It follows that the facts in the present case are somewhat special: for in the ordinary case the trustee of a surety who had become bankrupt would be likely to await a proof by the principal creditor in the surety's bankruptcy and would not take the unusual step (as has been observed, with the assets of the surety's creditors) of paying off in full and before any demand made, the amount due by the principal debtor to the principal creditor.

The cases relied upon by Mr. Muir Hunter were fully considered by the Divisional Court and I find it necessary to refer to two only of them. The first is *Ex parte Barrett*,[4] which undoubtedly at first sight lends support to Mr. Muir Hunter's submission. The case is reported, though nowhere very fully.[5] The facts, so far as relevant, are briefly these. Barrett was a contributor, as the registered holder of shares not fully paid, of a company the predecessor in title of which had mortgaged its principal asset, namely certain mines. On the occasion of the mortgage Barrett had entered into a guarantee of the mortgagor's indebtedness to the mortgagee. After the transfer of the mines to the company and in consideration of indulgence on the part of the mortgagee, the company by way of collateral security for its obligations to the mortgagee executed a promissory note in favour of the mortgagee for the amount of the mortgage debt; but the promissory note was not by its terms payable until a date later than that of the company's liquidation. After the company's liquidation the mortgagee had been paid off by Barrett's sister who had accordingly taken a transfer of (inter alia) the company's promissory note. Later Barrett had obtained—but, as was held, in all good faith—the transfer to himself from his sister of the company's promissory note (though not, as I understand, of the mortgage debt) giving to her in exchange a promissory note of his own for a like amount. A claim was then made in the liquidation of the company against Barrett for the amount of his unpaid calls on the company's share capital.

[4] (1865) 12 L.T. 193.

[5] 12 L.T. 193; 13 W.R. 559; 34 L.J.Bk. 41.

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Barrett claimed to set off against such claim the amount due to him, as holder, by the company on the promissory note which had then matured (and not, as appears to be stated by Lord Hanworth M.R. in his judgment in *Fenton's* case [6] already mentioned, the mortgage debt itself). Lord Westbury L.C. held that Barrett was entitled to such set off. Lord Westbury L.C. is reported as saying [7]: "I think he (i.e., Barrett) must be held "to be precisely in the same state in which the creditor (i.e., the "mortgagee) stood at the time when the note was made; and "if I remit him back to the right which his principal had, then "I refer his right to set-off to the state of things which existed "at the time of the winding-up order. . . ."

And later (after further argument) he said [8]: "Does the "contract of suretyship, incurred as it was by Barrett anterior "to the winding-up order, with its attendant rights, give such "retroactive force to Barrett's possession and ownership of the "note as to enable him to refer it back to that contract or "relation, before the winding-up order was made? My present "impression is that it will; that he is a *bona fide* possessor of the "note, and therefore that he has a right to a set-off." Lord Westbury L.C. is reported as having later expressed his adherence to this impression.

It is to be noted that the fact of the promissory note not having matured until after the date of liquidation—which was for the purposes of set off the relevant date—does not appear to have been referred to in the argument as reported or in the judgment.

On a later date another case of a claim to set off by Barrett in the liquidation of the same company came before Lord Cranworth L.C.[9] Mr. Muir Hunter conceded that Lord Cranworth L.C. appeared to have entertained some doubt of Lord Westbury L.C.'s decision. Whether that was so or not, he disallowed Barrett's claim in the case before him, stating that the matter seemed to him to stand on exactly the same principles as in bankruptcy.

In my judgment, whatever be the view taken as to Lord Westbury L.C.'s decision or the grounds upon which it proceeded, the case of *Ex parte Barrett* [10] was one depending upon its own special facts and the conclusion that upon those special facts Barrett's claim against the company upon its promissory note could be related back to the date of the company's liquidation. Such claim at all events arose exclusively out of the note itself which had been given for a sum certain and at a date prior to the liquidation; and Barrett as surety for the mortgagor's obligation under the original mortgage had been as such entitled to the benefit of the company's securities for payment of the principal debt. In other words, I think that

[6] [1931] 1 Ch. 85, 106.
[7] 12 L.T. 194.
[8] Ibid. 195.
[9] 34 L.J.Bk. 44.
[10] 12 L.T. 193.

Danckwerts J. was entitled, as he did, to treat the case as dependent upon its own special circumstances and distinguishable accordingly from the present.

The second case is that, to which I have already alluded, of *In re Fenton*,[11] before Luxmoore J. and in this court. The relevant facts were that Fenton was indebted in a very large sum to the association but had guaranteed certain bank accounts of the association, the total amount so guaranteed being also large but less than the sum of Fenton's debt. Fenton had entered into deeds of arrangement with his creditors and, later, a winding-up order had been made with respect to the association. The banks (or some of them) had proved in the winding-up of the association and also in Fenton's estate; but neither Fenton nor his trustee had made any payment under the guarantees. The question, which this court answered negatively, was whether Fenton's trustee was entitled to set off against the claim of the liquidator the amount of Fenton's liability under the guarantees.

It will be observed that the case is in certain respects analogous to that now before us, where the parts of Fenton and the association are, as it were, taken by Waite and the appellant respectively. It is, however, to be noted that in *Fenton's* case (unlike the present one) the relevant date was treated as that of the association's liquidation. Moreover, as already noticed, nothing had been paid to the bankers by Fenton or his trustee. The question with which we are now concerned, the question what the situation would have been had Fenton's trustee paid off the sums due to the association's bankers which Fenton had guaranteed, did not therefore directly arise for the determination of the court. The decision turned primarily on the court's view that to allow the set off would, in effect, be to allow a double proof in respect of the same debt in the association's winding-up. But the reasoning of the judgments is clear authority for the proposition which I have earlier invoked—that, if at the relevant date a guarantor has not paid the principal creditor (and has not taken any other step to enforce his rights against the principal debtor), and so long, at least, thereafter as that situation continues, there is no "debt due" to the guarantor from the principal debtor capable of forming the subject of a set off under section 31 of the Bankruptcy Act against a debt due from him to the principal debtor.

It was, however, submitted by Mr. Muir Hunter that the view for which he has contended (viz., that payment by the guarantor's trustee subsequently to the relevant date should be related back to that date so as to give rise to an application of section 31 of the Act) is implicit in the judgment particularly of Lord Hanworth M.R.[12] and Lawrence L.J.[13]

It must be confessed that some colour is lent to this view by the terms of the headnote[14]: "*Held*, . . . that inasmuch as

[11] [1931] 1 Ch. 85.
[12] Ibid. 101.
[13] Ibid. 110.
[14] Ibid. 85.

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"none of these sums had in fact been paid by (Fenton) or his "trustee to the banks the trustee was not entitled . . . to set "off. . . ." Moreover, counsel for the liquidator of the association is reported as conceding (in general terms) that [15] "if the "surety had paid the sums due under the guarantees . . . the "surety would have been entitled to set off the amount so paid." His case was that neither Fenton nor his trustee had ever paid anything at all under the guarantees.

So Lord Hanworth M.R. observed [16]: "Neither Fenton nor "his trustee has yet paid anything to the banks on behalf of "the association." And again [17]: "Thus, so far as the cases "go, it had been decided that a surety is entitled to a right to "prove if (*a*) his liability arose under a guarantee given before "the date of the receiving order or winding-up order, and (*b*) he "has in fact paid to the creditors the sum that he seeks to set "off. No case has decided that he can set off his contingent "liability before he has changed that, by payment to the "creditor, into an actual debt due to himself. Several cases "have indicated a doubt whether there could be a right to prove "before such a payment."

In the same way Lawrence L.J. states, in general terms, the point to be decided thus [18]: "The claim on behalf of Fenton's "estate to the right of set off is made under section 31 of the "Bankruptcy Act, 1914, and the question is whether that section "enables the trustee of the estate of a bankrupt surety (in whose "bankruptcy a proof has been lodged by the principal creditor) "to set off the liability of the surety under his guarantee against "a debt presently due from him to the trustee of the estate of "the bankrupt principal debtor, although nothing has been paid "to the principal creditor either by the surety or by his trustee." But there are, in my judgment, passages in all three judgments pointing in a different direction. Thus, Lord Hanworth M.R. refers to *In re Daintrey* [19] as authority for the proposition that [20] "If the contra right were one which was effective before the "receiving order, though its quantum was measured afterwards, "the system of set-off would apply." More important, he says [21]: "In the present case, as I have pointed out, the liability "of Fenton at the date of the receiving order was uncertain, "though he might have made his position certain by payment. "The words of the section seem clearly to connote an account "capable of ascertainment on either side if not immediately, yet "based upon authority or liability definitely undertaken. I find "it difficult to construe those words or adapt that system to "dealings in which there was a debt on one side due to the "other, and per contra there was not a debt or a certain liability, "but one in respect of which there was a right of protection and

[15] [1931] 1 Ch. 97.
[16] Ibid. 104.
[17] Ibid. 107.
[18] Ibid. 111.
[19] [1900] 1 Q.B. 546.
[20] [1931] 1 Ch. 85, 108.
[21] Ibid. 109.

"no more; a liability which could not be turned into a direct "contra money claim, unless and until the debt had been paid "by the surety, who then, and not till then, would become "entitled to give a discharge for the sum paid to him. This he "had not done at the date of the liquidation when his rights "became determined."

I do not desire to multiply citations; but Lawrence L.J.[22] makes a similar reference to *In re Daintrey*[23] and later uses the phrase "The question . . . is, whether . . . there was any sum "due from the estate of the principal debtor . . . at the time "when the right to set off was claimed . . . regard being had to "the fact that at that time nothing had been paid by or on "behalf of the surety . . ." The language last cited may no doubt for present purposes be equivocal. But Romer L.J. considers the hypothesis that Fenton had become bankrupt, the association remaining solvent, and poses the question: could Fenton's trustee have set off his liability to the banks against a proof by the association against Fenton's estate? "That there "were mutual dealings," he says,[24] "between the association "and Fenton resulting in the debt due to the association on the "one hand and the liability of the association to indemnify "Fenton against his liability to the banks on the other may be "conceded. But there was nothing 'due' from the association "to Fenton which could have been placed to Fenton's credit in "the account that would have had to be taken under section 31 "of the Bankruptcy Act."

Danckwerts J., in his judgment, cited[25] and applied to the analogous circumstances of the present case the passage which I have quoted from Romer L.J.; and he treated the word "was" in Romer L.J.'s second sentence as meaning "was at the date "of (Fenton's) receiving order." I think that the judge was entitled so to do, for the date of that order was, on the hypothesis on which Romer L.J. was proceeding, the relevant date, just as in the present case Waite's receiving order is conceded to be the relevant date.

I am, therefore, on the whole, of the opinion that the language and reasoning of the three judgments in this court, in *Fenton's* case,[26] are more consonant with Mr. Wood's argument than with Mr. Muir Hunter's. None the less, the precise point with which we are concerned was not raised in *Fenton's* case[26] and not determined in that case by this court. If that is so, then I am thrown back upon the terms of section 31; for the right of set off claimed is a special right, defined and ordained by the statute. I have already expressed my view that, as I read the language of the section, and upon the footing which Mr. Muir Hunter has conceded that the relevant date for the application of the section is October 1, 1954, the date of Waite's receiving order, there was

[22] [1931] 1 Ch. 113.
[23] [1900] 1 Q.B. 546.
[24] [1931] 1 Ch. 85, 117.
[25] [1956] 1 W.L.R. 480, 486.
[26] [1931] 1 Ch. 85.

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then nothing "due" from the appellant to the bankrupt; and that the sum paid nearly ten months later by the respondent trustee to discharge the sum then due to the appellant's bankers (which may well have been quite different from the sum due on October 1, 1954) cannot be treated as a mere quantification of an obligation in the nature of a debt already existing on the last-mentioned date.

The registrar in the county court had held that the appellant's claim was concluded against him by the judgment of October 6, 1955, against which the appellant had not appealed. But as the Divisional Court pointed out, it has been long established by authority that for bankruptcy purposes a judgment is not conclusive evidence of a petitioning creditor's debt. I have therefore dealt with the appellant's claim without regard to the judgment. On the view which I have formed of the effect of section 31 of the Act it is unnecessary to consider further for this purpose the effect of the judgment.

But Mr. Muir Hunter also contended, as I understood him, that there was some equity which was available to the appellant and which entitled him to require the respondent trustee to reduce his claim against the appellant by setting off the sum due by the bankrupt to the appellant. I cannot agree. As I have observed, the set off enjoined by section 31 of the Bankruptcy Act is a special statutory right or requirement. I do not think that there is any room for any such "equity" as Mr. Muir Hunter sought. But if there were, then it is to my mind clear that it is now too late for the appellant to invoke it; for in that respect the judgment of October, 1955, is conclusive against him.

I return once again to the vital matter of the relevant date, admitted to be, for present purposes, October 1, 1954. Upon that date the circumstances of the present case were precisely analogous to the facts which Romer L.J. was assuming at the date of Fenton's bankruptcy in the passage from his judgment to which I have referred [27]—with a result, as I hold, similar to that intimated by Romer L.J. The consequence is that, in my judgment, the receiving order of February 9, 1956, was rightly made against the appellant. What will be the position if in the appellant's bankruptcy the respondent trustee claims to prove for the full amount of the judgment debt and costs, £150 10s. 6d.? Will the appellant's trustee then be able under section 31 to set off the "contra money claim" of £101 14s. 6d.—or whatever other sum is the proper figure—withdrawing his proof for the like sum against Waite's estate? It may be that he will; for, in this event, the relevant date will be February 9, 1956, and on that date there would appear undoubtedly to be debts "due from "one party to the other in respect of (their) mutual dealings." If that were right, then it might appear that the result in the

[27] [1931] 1 Ch. 85, 117.

present case would in the end of all be academic. But in truth this is not so. The whole aim and object of Mr. Muir Hunter in the present case has been to compel the respondent trustee, by virtue of an application of section 31 of the Act to the date of the receiving order against Waite, to reduce his claim against the appellant to a figure incapable of supporting a bankruptcy petition and thereby to challenge the validity of the receiving order made against the appellant. In this Mr. Muir Hunter has, in my opinion, failed, whatever turns out to be the situation in Waite's bankruptcy. I think, accordingly, that his appeal must be dismissed.

Jenkins L.J. For my own part I am in complete agreement with the judgment I have just read, and I am also in complete agreement with the judgment about to be delivered by my brother, Hodson L.J., which I have had an opportunity of considering in advance, and I find nothing that I can usefully add to the reasons given in those judgments for holding that this appeal fails and should be dismissed.

Hodson L.J. This is an appeal against a receiving order made by the registrar of the Brighton County Court (sitting in bankruptcy) on February 9, 1956, and confirmed by the Divisional Court on March 26, 1956. The main ground of appeal is the refusal of the registrar to give effect to a set off claimed under section 31 of the Bankruptcy Act, 1914.

[His Lordship stated the facts and continued:] The appellant complains that he was not allowed to reduce the debt upon which the petitioning creditor relied below the sum of £50 required to support the petition by setting off the £101 14s. 6d., the debt due from Waite to himself, against the total of £150 10s. 6d. due from him as a judgment debt.

The question turns on the effect of section 31 of the Bankruptcy Act, 1914. [His Lordship read the section and continued:] That there were mutual dealings between the appellant and Waite there is no doubt, but was there anything due from the appellant to Waite at the material date, namely, the date of the receiving order?

It is true that Waite had guaranteed the appellant's overdraft and although he had not been called upon to pay under his guarantee, he had a contingent claim against the principal debtor for the amount he might ultimately be required to pay and is a creditor within the meaning of the Bankruptcy Act: see *In re Blackpool Motor Car Co. Ltd.*[28] That a surety with a contingent liability is a creditor was conceded in *In re Fenton*[29] (hereinafter referred to), but a distinction was there drawn between the contingent liability of a surety and an amount actually due in respect of mutual dealings. There is no reported case of a set off

[28] [1901] 1 Ch. 77.

[29] [1931] 1 Ch. 85.

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being allowed under the section except where a debt was due at the date of the receiving order.

In re Daintrey [30] was a case of a debt actually due. Lord Lindley M.R. there pointed out [31] that considerable sums would become payable under the agreement entered into between the parties before the date of the receiving order if they carried the agreement into effect. The amount was thus due at the date of the receiving order although it had to be calculated at a subsequent date. Romer L.J. said [32]: "whatever sum eventu- "ally became payable, became payable to Daintrey by virtue of "this agreement and nothing else."

Ex parte Barrett [33] seems at first sight to lend support to the view that in a case such as the present the appellant would be entitled to a set off, for Barrett, being surety to a mortgage, took an assignment of a promissory note after the liquidation of the company which had given the note, but it was there held that his right as surety had arisen before the liquidation and that he was entitled to use as a set off the securities for the mortgage debt which came to him after the liquidation.

Lord Westbury L.C. referred [34] to the mischief which would arise in winding up or in bankruptcy if a debtor was permitted to buy up counterclaims subsequently to the winding-up order for the purpose of making a case of set off, but held that the contract of suretyship incurred by Barrett anterior to the winding-up order with its attendant rights gave such retroactive force to his possession and ownership of the note as to enable him to refer it back to that contract or relation before the winding-up order was made.

Fenton's case [35] was relied on by Mr. Muir Hunter as supporting his claim, on behalf of the appellant, to a set off. The headnote reads as follows: "Fenton having guaranteed advances "by certain banks to the Textile Association in which he was "interested, subsequently executed two deeds of arrangement "in favour of his creditors. The association having gone into "liquidation the liquidator lodged a proof against Fenton's estate "in respect of sums due by Fenton to the association. The "trustee of Fenton's estate rejected the proof and claimed to "set off the various sums which had been advanced by the banks "to the association for which Fenton had given his personal "guarantee. The banks had proved against Fenton's estate "under the guarantees but nothing had been paid to them:— "*Held* (reversing the decision of Luxmoore J.), that inasmuch "as none of these sums had in fact been paid by Fenton or his "trustee to the banks the trustee was not entitled, under section "31 of the Bankruptcy Act, 1914, to set off Fenton's contingent "liability under the guarantees against the sums due by him to "the association."

[30] [1900] 1 Q.B. 546.
[31] Ibid. 572.
[32] Ibid. 573.
[33] 12 L.T. 193.
[34] Ibid. 195.
[35] [1931] 1 Ch. 85.

Luxmoore J. had held that Fenton's contingent liability was available to his trustee as a set off.

Mr. Muir Hunter argued that if Fenton or his trustee had paid these sums to the banks the trustee would have been held by the Court of Appeal entitled, under section 31 of the Bankruptcy Act, 1914, to set off payments under the guarantee against the sums due by him to the association, and it was the fact that Fenton had paid nothing under his guarantee which led the Court of Appeal to take a different view from Luxmoore J. He claimed that Waite's liability under his guarantee although not ascertained at the date of the receiving order was capable of ascertainment at a later date and so was reducible to a certainty and within the principle established by *In re Daintrey*,[36] so that section 31 applied and the appellant was entitled to a set off.

This is, in my opinion, inconsistent with the views expressed by the court in *Fenton's* case.[37] The decision there turned mainly on the point that to allow the set off would be to allow a double proof in respect of the same debt in the winding up of the association and the question now at issue whether a surety who has paid the debt he has guaranteed can relate that payment back to a date before the liquidation or bankruptcy in question was not decided. It is true that the members of the court emphasized that Fenton had paid nothing under his guarantee, but they must have had in mind payment or non-payment before the date of the liquidation.

The passage cited by Lord Evershed M.R. from Lord Hanworth M.R.'s judgment[38] shows his view of the effect of section 31. I refer in particular to the passage[39] where he said that he found it difficult to adapt the words of the section to dealings in which there was a debt on one side due to the other and per contra there was not a debt or certain liability but one in respect of which there was a right of protection and no more; a liability which could not be turned into a direct money claim unless and until the debt had been paid by the surety who then, and not till then, would be entitled to give a discharge for the sum paid to him. This, he added, was not done by Fenton at the date of the liquidation when his rights became determined.

Applying that language to this case—Waite had not paid the debt at the date of the receiving order in his case when his rights became determined. Consequently there is no right to set off.

Lord Hanworth M.R. had earlier[40] pointed out that a surety's right to be protected against the liability that may fall upon him by the failure of the principal debtor to liquidate his debt is of a distinctive character. In summarizing the authorities he said[41]: "Thus, so far as the cases go, it had been decided that a surety "is entitled to a right to prove if (*a*) his liability arose under a "guarantee given before the date of the receiving order . . . and

[36] [1900] 1 Q.B. 546.
[37] [1931] 1 Ch. 85.
[38] [1931] 1 Ch. 85, 108.
[39] Ibid. 109.
[40] Ibid. 104.
[41] Ibid. 107.

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"(*b*) he has in fact paid to the creditors the sum that he seeks "to set off. No case has decided that he can set off his contingent "liability before he has changed that, by payment to the creditor, "into an actual debt due to himself." I emphasize the words "changed that, by payment to the creditor, into an actual debt "due to himself."

In order to bring the case within section 31 the change must take place before the date of the receiving order, when the rights of the parties must be determined. In this case no change took place at that time. It was not until years after the date of the receiving order that Waite's trustee changed the contingent liability originally incurred by Waite into a debt due to himself when he paid off the overdraft outstanding on the appellant's banking account which then stood at £113 14s. in order to redeem the title deeds of Waite's house pledged to the bank as security.

In my opinion the reasoning in *Fenton's* case [42] is against the contention that there can be a set off within the meaning of section 31 of the Bankruptcy Act, 1914.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Nye & Donne, Brighton; Haslewood, Hare, Shirley Woolmer & Co. for Bosley & Co., Brighton.*

E. D.

[42] [1931] 1 Ch. 85.

[COURT OF APPEAL.]

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July 26, 27.
Singleton, Morris and Romer L.JJ.

* REGINA *v.* AGRICULTURAL LAND TRIBUNAL FOR EASTERN PROVINCE OF ENGLAND. *Ex parte* GRANT.

Agriculture—Agricultural holding—Notice to quit—Interests of efficient farming — Landlord proposing to cultivate holding together with other extensive land—Duty of tribunal to determine, first, whether increased production from holding will result from notice—Exercise of discretion, if necessary, to follow—Agricultural Holdings Act, 1948 (11 & 12 *Geo.* 6, *c.* 63), *s.* 25 (1) (*a*).

The landlord of a farm of 63 acres gave notice under the Agricultural Holdings Act, 1948, to terminate the tenancy, and the tenants thereupon gave a counter-notice. The question whether the consent of the Minister of Agriculture and Fisheries should be given to the operation of the notice to quit was delegated to the County Agricultural Executive Committee, who decided that the Minister's consent should be given. On appeal to the agricultural land tribunal, that tribunal decided that, although the standard of management of the tenants did not reach the exceptionally high standard of that of the landlord, they were farming reasonably well, and that the taking over by the landlord of the 63 acres might

depreciate the production of the tenants' other land and would not appreciably increase the overall production; accordingly, they reversed the decision of the executive committee. On an application by the landlord for an order of mandamus directing the tribunal to determine whether, in the interest of farming efficiency, consent should be given to the notice to quit:—

Held, that the first question for the tribunal's determination was whether, under section 25 (1) (*a*) of the Act of 1948,[1] the landlord had satisfied them that the purpose which he had in mind in the union of the 63 acres with his other land, namely, more efficient farming as respects good estate management or good husbandry, would result from the operation of the notice to quit; that the effect, if any, of the separation of the 63 acres from other land farmed by the tenants was only to be considered if the question of discretion arose; and that the tribunal, having made an erroneous approach to the case, should rehear it and determine it according to law.

Regina v. *Agricultural Land Tribunal for the Wales and Monmouth Area, Ex parte Davies* [1953] 1 W.L.R. 722; [1953] 1 All E.R. 1182 applied.

Decision of Divisional Court (Lord Goddard C.J., Hilbery and Byrne JJ.) affirmed.

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REGINA *v.* AGRICULTURAL LAND TRIBUNAL FOR EASTERN PROVINCE OF ENGLAND. *Ex parte* GRANT.

APPEAL from the Divisional Court (Lord Goddard C.J., Hilbery and Byrne JJ.).

The appellants, W. E. Pearson & Son, were the tenants of Caythorpe Farm, at Freiston, in Lincolnshire, consisting of 63 acres of agricultural land owned by one Grant. The farm was almost surrounded by other farming land of about 1,100 acres, occupied by the landlord. The tenants also farmed other land some distance away from Caythorpe Farm, but having access to it. On March 31, 1955, the landlord served notice under the Agricultural Holdings Act, 1948, on the tenants to terminate the tenancy of Caythorpe Farm as from April 6, 1956. On April 16, 1955, a counter-notice under section 24 (1) of the Act was given on behalf of the tenants. On May 9, 1955, application was made by the landlord for the consent of the Minister of Agriculture and Fisheries to the operation of the notice to quit, under sections 24 and 25 of the Act of 1948.

The matter then came before the Lincolnshire (Holland) County Agricultural Executive Committee to whom the powers of the Minister were delegated by the Act. On July 14, 1955, the committee gave on behalf of the Minister consent to the operation of the notice to quit on grounds sets out in section 25 (1) (*a*) of the Act.

The executive committee found "that both the landlord and

[1] Agricultural Holdings Act, 1948, s. 25 (1): "Without prejudice to the "discretion of the Minister in a case "falling within paragraphs (*a*) to (*e*) "of this subsection, the Minister shall "withhold his consent under the last "foregoing section to the operation "of a notice to quit an agricultural "holding or part of an agricultural "holding unless he is satisfied—(*a*) "that the carrying out of the purpose "for which the landlord proposes to "terminate the tenancy is desirable "in the interests of efficient farming, "whether as respects good estate "management or good husbandry or "otherwise."

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"the tenant were farming their land satisfactorily, but had "formed the opinion that the all-round level of production and "standard of farming of the landlord was slightly higher and "also, from the information put before them at the hearing and "the situation of the land in question in relation to the other "land occupied by the parties, it was in the interests of farming "efficiency to grant consent to the operation of the notice to "quit."

The tenants appealed to the Agricultural Lands Tribunal for the Eastern Province of England, and the tribunal reversed the decision of the executive committee. The statement of the reasons for their decision contained the following paragraphs: "(2) They [the tribunal] were very much impressed with the "extremely high standard of management and farming attained "by the landlord as shown by his records at the hearing and as "was evident on the tribunal's subsequent inspection on Decem- "ber 30. (3) They were bound, however, to have regard to "two main purposes for which the Agriculture Act, 1947, was "designed, namely, to ensure not only efficient production but "protection to tenants, who were maintaining a reasonable stan- "dard of efficient production. (4) They considered that although "the standard of management of [the tenants] did not reach the "exceptionally high standard of that of [the landlord], never- "theless the tenants were farming reasonably well, having regard "to the character and situation of the unit and, accordingly, were "entitled to the protection afforded by the Act to reasonably "efficient tenants. (5) With regard to the landlord's contention "that Caythorpe Farm would be better farmed if worked as one "unit with Coupledyke Hall Farm [the landlord's land] the "tribunal formed the opinion that any increase in production "resulting therefrom would not offset the adverse effect the loss "of these 63 acres would have on [the tenants'] total holding "of 280 acres and, therefore, from the point of view of overall "production it was desirable that Caythorpe Farm should remain "part of [the tenants'] unit. (6) The tribunal, having given "careful consideration to the arguments of counsel and to "all the evidence tendered at the hearing, and from their "inspection, did not consider that the difference in the overall "production of the units . . . resulting from the giving of "consent to the notice to quit would be such as to justify "terminating the tenants' occupation of Caythorpe Farm, which "had been in the possession of the tenants' family for a long "time. (7) Having regard to that determination, therefore, the "tribunal came to the conclusion that the conditions contained "in paragraph (*a*) of section 25 (1) of the Agricultural Holdings "Act, 1948, were not fulfilled and, accordingly, withhold their "consent to the operation of this notice to quit and direct "accordingly."

On March 20, 1956, the landlord applied to the Divisional Court for an order of certiorari to bring up and quash the order

of the tribunal and for an order of mandamus. The Divisional Court directed that the order be quashed and that the tribunal should hear the reference and determine it according to law. From that decision the tenants now appealed, contending that the finding of the tribunal was final and could not be successfully attacked.

Richard Elwes Q.C. and *Geoffrey Lane* for the tenants.
Melford Stevenson Q.C. and *John Hobson* for the landlord.

SINGLETON L.J. stated the facts and continued: Both before the County Agricultural Executive Committee and the Agricultural Land Tribunal questions were raised whether or not the tenants were farming the land which they had, including the 63 acres, efficiently. That was considered by both bodies. The finding of the tribunal and of the Agricultural Executive Committee was that the landlord was an exceptionally good farmer of the land which he had. They did not find, as the landlord asked they should find, that the tenants were farming the piece of land in question inefficiently. The tribunal "considered that "although the standard of management of [the tenants] did not "reach the exceptionally high standard of [the landlord], never- "theless [the tenants] were farming reasonably well, having "regard to the character and situation of the unit, and "accordingly were entitled to the protection afforded by the Act "to reasonably efficient tenants." Thus, in so far as we are concerned, no attack can be made upon the farming efficiency of the tenants. That is no longer a matter for consideration. But there are other questions which arise almost wholly under sections 24 and 25 of the Agricultural Holdings Act, 1948.

The Act of 1948 is a consolidation Act. It followed closely upon the Agriculture Act, 1947, which was an Act "to make "further provision for agriculture," and one of its purposes is to encourage good estate management and good husbandry. The provisions in regard to those matters are found in Part II of the Act of 1947; there is no doubt that the Act was intended to encourage good farming, and at the same time to give protection to tenants. Section 24 of the Act of 1948, as far as is material, provides: "(1) Where notice to quit an agricultural holding "or part of an agricultural holding is given to the tenant "thereof, and not later than one month from the giving of the "notice to quit the tenant serves on the landlord a counter- "notice in writing requiring that this subsection shall apply to "the notice to quit, then, subject to the provisions of the next "following subsection, the notice to quit shall not have effect "unless the Minister consents to the operation thereof." The Minister may consent. He is not bound to consent.

Section 25 (1) provides: "Without prejudice to the discretion "of the Minister in a case falling within paragraphs (*a*) to (*e*) "of this subsection, the Minister shall withhold his consent

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"under the last foregoing section to the operation of a notice "to quit an agricultural holding or part of an agricultural hold- "ing unless he is satisfied—(*a*) that the carrying out of the "purpose for which the landlord proposes to terminate the "tenancy is desirable in the interests of efficient farming, "whether as respect good estate management or good husbandry "or otherwise. . . ."

The first thing I would point out is that there appears, in the first line of the subsection, a reference to the discretion of the Minister, and it appears to me to be clear that there is a discretion of the Minister to be exercised as he thinks fit if the provisions of section 25 (1) (*a*) are found to be satisfied. Before any question of discretion arises, the Minister, or the tribunal, must be satisfied "that the carrying out of the purpose for "which the landlord proposes to terminate the tenancy is desir- "able in the interests of efficient farming," and those words are followed by "whether as respects good estate management or "good husbandry or otherwise." Thus, if the landlord serves a notice to quit and a counter-notice is served by or on behalf of the tenant, and the matter comes to be considered either by the County Agricultural Executive Committee or by the Agricultural Land Tribunal, the first question which arises is: Is the tribunal satisfied that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming? If the tribunal is not satisfied, the question of discretion does not arise. If the tribunal is satisfied that that which is set out in (1) (*a*) is fulfilled, thereafter the tribunal has to consider whether or not, in its discretion, it should consent to the notice. I believe it would help those who have to consider such matters if it was borne in mind throughout that the two questions are separate and should be considered separately.

The most difficult question which arises in the case comes from the words "the interests of efficient farming." One of the matters raised upon the different hearings is this: It was said that if the landlord, whose other land is practically all around this particular piece of land, was allowed to farm it, he (with his greater skill in farming and with his farm buildings and other land close to this particular piece of land) would be able to produce better results than the tenants could; and thus it was said that it was in the interests of efficient farming that the landlord should have this piece of land of which he is the owner. Against that it was said: If the 63 acres of land are taken away from the tenants they will be confronted with some difficulty, because it will be taking away from them part of the holding which they are administering as one—though in fact there is about half a mile between this piece of land and the rest of their holding. The question which arises is: How far is that question, which might mean that the tenants would produce less

proportionately on the rest of their holding, relevant to the immediate question under section 25 (1) (*a*) of the Act of 1948?

That question was considered two years ago in *Regina* v. *Agricultural Land Tribunal for the Wales and Monmouth Area, Ex parte Davies.*[1] In dealing with the question which arose there Lord Goddard C.J. said[2]: "The tribunal apparently "thought that the words 'in the interests of efficient farming' "in section 25 (1) (*a*) entitled them to consider, not the efficient "farming of the holding to which the notice to quit related but "the farming of the property which the landlord himself was "occupying at the time when he gave the notice to quit, and if "the landlord could not farm his own property efficiently, that "was a ground for giving notice to his tenant, who was farming "efficiently, to vacate his (the tenant's) farm. That interpreta-"tion is contrary to the intention of section 25 (1). The "words 'the carrying out of the purpose for which the landlord "'proposes to terminate the tenancy is desirable in the "'interests of efficient farming,' must mean the efficient farm-"ing of the holding to which the notice to quit applies, and it "seems very extraordinary that anybody should have thought "the contrary." I do not regard it as a very easy question. Still, I am of opinion, that the words "in the interests of "efficient farming" should be read as meaning "the efficient "farming of the land in respect of which the notice is given."

I should have had more difficulty in coming to this conclusion except for two considerations. The first is that I think extraordinary difficulties would be encountered if one had to consider by way of comparison other pieces of land held by the tenant in various parts, perhaps a little distance away. There would be no end to the inquiry. The second reason which makes me the more ready to adopt that reading is that it does not mean that the tribunal would of necessity give its consent if it would mean a considerable loss in the way of production on some holding of the tenant a little distance away. That could be considered, and would be considered, on the issue as to discretion. I do not think it is likely that a tribunal would give consent in a case if it found that the land in question would be more productive or more efficiently farmed if consent was given when the giving of consent would result in great loss of production elsewhere. I am satisfied that the sensible way and the true way to read the words is that they should be confined to the land in respect of which the notice is given.

In order to make the position a little clearer, let me add that when the landlord's position is being considered it is important to bear in mind the words "whether as respects good estate "management or good husbandry or otherwise." If you have, as in this case, a piece of land which is almost surrounded by other land of the landlord, and which is close to his farm

[1] [1953] 1 W.L.R. 722; [1953] 1 All E.R. 1182.

[2] [1953] 1 W.L.R. 722, 724.

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buildings, questions of good estate management and of good husbandry are of importance and they can properly be considered by the tribunal. I do not disguise from myself the fact that the position as shown by the plan is of importance. Every farmer would like to have his land close together in a kind of ring fence. It gives him a better opportunity of managing it; it enables him to keep an eye on his workmen the more easily; and it makes the whole task of farming easier than it otherwise would be. If those conditions exist, they of themselves would appear to point towards increased farming efficiency if all other things were equal. Therefore, I think, from the point of view of the landlord, there is importance in the words "as respects good estate "management or good husbandry or otherwise."

Lord Goddard C.J., in the case to which I have referred, continued his judgment: "With regard to the discretion conferred "on the Minister by section 25 (1), the opening words of the sub-"section are: 'Without prejudice to the discretion of the Minister "'in a case falling within paragraphs (*a*) to (*e*) of this subsection.' "When one reads the subsection with care, it is clear what those "words mean. The subsection provides that, before giving his "consent, under section 24 (1), to the operation of a notice to "quit, the Minister must be satisfied that the case falls within "paragraph (*a*) to paragraph (*e*) of section 25 (1), but, even if the "case does fall within one of those paragraphs, he is given a "discretion to withhold his consent. In other words, even if the "Minister finds certain facts, for example, bad farming on the "part of the tenant, which would entitle him to give his consent "to the operation of the notice, he may, in the exercise of his "discretion, determine not to do so. He has not got a discretion "to give his consent to the operation of the notice to quit if "none of the circumstances set out in paragraph (*a*) to para-"graph (*e*) exists." That is the position as I understand it, and as I think I have expressed it.

Reference was made in the course of the hearing to section 76 (1) of the Act of 1948: "In any case where by any of the "provisions of this Act a person is empowered to require that a "proposal of the Minister to take any action shall be referred "to the Agricultural Land Tribunal, then, if within the pre-"scribed time and in the prescribed manner the said person so "requires, the proposal shall be referred accordingly. (2) On "any such reference the Tribunal shall determine—(*a*) whether "the conditions as to which the Minister must be satisfied before "taking the action are fulfilled; and (*b*) whether, having regard "to their determination under the foregoing paragraph and to all "the circumstances of the case, the Minister should or should "not take the action proposed, and shall report to the Minister "accordingly . . ." It was thought at one time that subsection (2) of that section was a guide to the tribunal in dealing with a case under section 25. I am not sure that that is so, strictly, for I doubt whether this is here a proposal such as is mentioned in

section 76 (1); but it does not matter, for if there is a discretion in the tribunal—and I am clear that there was—the first thing that the tribunal has to do is to consider whether or not the condition laid down in section 25 (1) is fulfilled, and, if it is, thereafter the tribunal has to consider whether or not, in its discretion, it shall grant consent to the notice. The provisions of section 76 really are the same as would apply to section 25 (1), if there was not a section 76; and section 76 may in fact be brought in by subsection (4) of section 25 itself.

Let me go back to the facts of the case. I do not say more about the decision of the County Agricultural Executive Committee, which body, considering its duty under section 24 and section 25, thought that it was right that consent to the operation of the notice should be given. Those who went into the matter and who viewed the land at that time were of opinion that it would be in the interests of efficient farming that the notice to quit should run.

It was on the statement of reasons given by the tribunal that the Divisional Court decided that the tribunal's decision should be quashed. Paragraph 2 reads: "They [the tribunal] were "very much impressed with the extremely high standard of "management and farming attained by the landlord as shown "by his records at the hearing and as was evident on the "tribunal's subsequent inspection on December 30." The tribunal appreciated that the landlord was a very efficient farmer of a large unit comprising land of the highest quality and that the level of production was probably the maximum that could be reached. That is a very fine tribute to the landlord's farming ability and practice, and it was in accordance with the finding of the County Agricultural Executive Committee. When that is borne in mind, and when it is coupled with the situation of the tenants' land, almost surrounded by the landlord's other land, it is clear that a strong case was put forward on behalf of the landlord. The Lord Chief Justice in the present case so said. I recognize that the facts are to be found by the tribunal and that we are bound by the facts they find, but I should think it is seldom that one will find a case so strong in two ways, the first in the tribute to the landlord's farming and the second in regard to the location of the piece of land, almost surrounded (as it is) by the landlord's other land. It cannot often happen that one will find so strong a case in these two respects. It is not conclusive, but I agree with the Lord Chief Justice that this is a strong case for the landlord.

Paragraph 3 of the statement of the tribunal reads: "They "were bound, however, to have regard to two main purposes for "which the Agriculture Act, 1947, was designed, namely, to "ensure not only efficient production but protection to tenants, "who were maintaining a reasonable standard of efficient "production." Paragraph 4: "They considered that although "the standard of management of [the tenants] did not reach

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"the exceptionally high standard of that of [the landlord], "nevertheless the tenants were farming reasonably well, having "regard to the character and situation of the unit and, "accordingly, were entitled to the protection afforded by the "Act to reasonably efficient tenants." I am not sure that that can be regarded as a finding as to whether the requirements of section 25 (1) (*a*) of the Act were satisfied by the landlord. It seems to me to go rather to the question of discretion. Paragraph 5: "With regard to the landlord's contention that "Caythorpe Farm would be better farmed if worked as one unit "with Coupledyke Hall Farm"—that is, with the landlord's land—"the tribunal formed the opinion that any increase in "production resulting therefrom would not offset the adverse "effect the loss of these 63 acres would have on [the tenants'] "total holding of 280 acres and, therefore, from the point of "view of overall production it was desirable that Caythorpe "Farm should remain part of Messrs. Pearsons' unit." That paragraph again seems to me to go to the question of discretion rather than to a consideration of the position under the main part of section 25 (1). The next paragraph, paragraph 6, is not quite in accord with paragraph 5: "The tribunal, having given "careful consideration to the arguments of counsel and to all "the evidence tendered at the hearing, and from their inspec- "tion, did not consider that the difference in the overall produc- "tion of the units, namely, those both of the landlord and of "the tenants, resulting from the giving of consent to the notice "to quit, would be such as to justify terminating the tenants' "occupation of Caythorpe Farm, which had been in the posses- "sion of the tenants' family for a long time." That again, as paragraph 5 did, contrasts two things—the position of this land as it would be under the landlord, on the one hand, and the position of the tenants, on the other hand, if they were deprived of this land and so had to run their holding without it. That, for the reasons given by the Lord Chief Justice in the *Wales and Monmouth Area* case,[3] seems to be out of order. The position on section 25 (1) (*a*) should be considered apart from that, though, as I have said, those questions which are mentioned in the two paragraphs 5 and 6 may well be relevant to the question of the exercise of discretion. In passing I would say that I find it difficult to see that there would be much effect on the rest of the tenants' holding if they lost the 63 acres half a mile away from the rest of their holding—though I recognize that that is not a question for me.

The last paragraph in the statement of the tribunal is: "Having regard to that determination, therefore, the tribunal "came to the conclusion that the conditions contained in para- "graph (*a*) of section 25 (1) of the Agricultural Holdings Act, "1948, were not fulfilled and, accordingly, withhold their consent

[3] [1953] 1 W.L.R. 722.

" to the operation of this notice to quit and direct accordingly." I think the submission on behalf of the landlord is right that that is not a determination of the first question under section 25, for it begins " Having regard to that determination "; that is, to that which has gone before. Nowhere is there found the answer to the question arising upon the words in section 25 (1), " unless he is satisfied—(*a*) that the carrying out of the purpose " for which the landlord proposes to terminate the tenancy is " desirable in the interests of efficient farming, whether as " respects good estate management or good husbandry or other- " wise." There is no finding either way, unless the last paragraph can be read as amounting to that; and I do not think, for the reasons I have given, that it can.

Thus, it appears to me that the decision of the Divisional Court was right and should be supported by this court. That means that the case must be reheard. It will then be the duty of the tribunal to consider the words which I have just read. They will be entitled to bear in mind the quality of the farming of the landlord. They will ask themselves whether they are satisfied that it is desirable that consent should be given in the interests of efficient farming, and they will be entitled to bear in mind the position of the landlord's present holding and farm buildings in relation to this land, which must, I think, have a bearing on the efficient farming of this piece of land. If they come to the conclusion that they are satisfied that the requirements of paragraph (*a*) of subsection (1) are fulfilled, they will ask themselves whether or not, in their discretion, they should give their consent to the notice. Upon the question of discretion —and I say this only for the purpose of giving such help as I can in this matter—it appears to me that the first question really is the public welfare. It is for that reason that I have said I do not think any tribunal would consent to an order if it appeared that in the result there would be loss of production rather than gain in production. If, by reason of the place at which this land is situate, it can be more efficiently farmed by the landlord, and if the landlord's skill and management is so great that he, by that alone, can get increased production, and if in the result there would be a gain to the community as well as to the landlord in this case, then they might well think fit to refuse to exercise a discretion in favour of the tenants. That is a matter for them and not for us.

I appreciate the difficulties of any tribunal upon a matter of this kind. That is shown, indeed, by the difference in the view of the tribunal from that of the County Agricultural Executive Committee. They were all trying to do their best. I do not know what the result of this case will be. Many of the matters mentioned in the different paragraphs in the statement of the tribunal are matters for consideration if the question of their discretion arises, and I am not saying that they ought not to consider any of them then. There are many factors which they will have to

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consider. I share the difficulties which Hilbery J., a member of the Divisional Court, felt. The landlord is entitled to have a determination in the first place whether the conditions set out in section 25 (1) (*a*) of the Act of 1948 have been satisfied by him. If that stage is reached the question of discretion arises, and those who have to determine this matter finally will bring their minds to bear upon it, remembering that the object of the Act is twofold at least: (1) to protect the efficient farmer; (2), and, very important, to promote the efficient farming of land, for which purpose the State provides subsidies. In my judgment the appeal should be dismissed.

MORRIS L.J. I have reached the same conclusions. After the landlord had served his notice to quit and the tenant had served his counter-notice the matter went first before the Agricultural Executive Committee. The result of the appearance before them was that the Minister, by notice in writing on July 14, gave his consent to the operation of the notice to quit. That made it possible for subsection (4) of section 25 to come into operation. That subsection reads as follows: "If the landlord "or the tenant is dissatisfied with the Minister's decision to with- "hold or to give his consent as aforesaid, the landlord or tenant "may within the prescribed time and in the prescribed manner "require that the matter shall be referred to the Agricultural "Land Tribunal and, where a reference to the tribunal under this "subsection is duly required, subsection (1), and paragraph (*a*) "of subsection (2), of the last foregoing section and subsection (1) "of this section shall have effect with the substitution (except "in so much of paragraph (*d*) of subsection (1) of this section "as relates to the application for the Minister's consent) for "references to the Minister of references to the tribunal."

The result of the operation of that subsection was that section 24 provided that the notice to quit did not have effect unless the tribunal consented to its operation; so the notice to quit was once more inoperative. A further result of the subsection was that section 25 (1) had effect, so that it would provide, with an exception not material to this case, rather as follows: "Without "prejudice to the discretion of the tribunal in a case falling within "paragraphs (*a*) to (*e*) of this subsection, the tribunal shall with- "hold its consent under section 24 to the operation of a notice "to quit an agricultural holding or part of an agricultural holding "unless it is satisfied of one or other of the matters provided in "paragraphs (*a*) to (*e*)."

The only paragraph which is relevant in this case is paragraph (*a*). The position, therefore, was that the tribunal were under compulsion to withhold its consent unless it was satisfied as to paragraph (*a*). If so satisfied, then (and only then) would the tribunal consider whether, in the exercise of its discretion, a discretion to be exercised in a judicial spirit, having regard to all the circumstances of the case, it would or would not consent to

the operation of the notice to quit. I desire to express my concurrence with the way in which this approach is dealt with by Lord Goddard C.J. in his judgment in *Reg.* v. *Agricultural Land Tribunal for the Wales and Monmouth Area, Ex parte Davies.*[4]

Paragraph (*a*) begins with the words "that the carrying out "of the purpose for which the landlord proposes to terminate the "tenancy is desirable." I think in the present case it is clear what was the purpose for which the landlord proposed to terminate the tenancy. Shortly stated, it was so that the landlord, rather than the existing tenant, should farm those 63 acres. It seems to me, therefore, that the question under paragraph (*a*) was whether a change which would bring it about that the landlord rather than the tenant would be farming these 63 acres was desirable in the interests of farming efficiency; that is to say, the efficient farming of the 63 acres considered from the point of view of good estate management or good husbandry or otherwise.

In my judgment the question to be considered was the efficient farming of the 63 acres; or, stated otherwise, whether it was desirable, in the interests of the efficient farming of the 63 acres, that there should be a change. The position of the unit of 63 acres in relation to other land of the landlord would, in my judgment, be a relevant circumstance. So also it would be relevant to consider how the landlord was farming his other land. Those considerations would be relevant to the extent to which they affected or threw light on the question whether it was desirable, in the interests of efficient farming, that these 63 acres should be farmed by the landlord rather than by the tenant. So it seems to me that the tribunal had first to approach that question. If the tribunal decided that, in the interests of efficient farming, so judged, it was desirable that the landlord rather than the tenant should farm the 63 acres, then the tribunal would be empowered to give consent to the operation of the notice to quit. Whether they would or would not give consent would be for them to decide, upon a fair and impartial consideration of all the relevant circumstances.

I do not propose to say any more in regard to the actual statement of reasons for the decision of the tribunal, to which my Lord has fully referred. With every respect, it seems to me that the statement sets out a mixture of considerations, some of which are clearly not relevant when deciding the first issue; that is to say, the issue as to whether the conditions of paragraph (*a*) were or were not fulfilled. The last paragraph of all I can only read as being a conclusion in regard to paragraph (*a*), for the paragraph reads: "Having regard to that determination, therefore, the "tribunal came to the conclusion that the conditions contained "in paragraph (*a*) of section 25 (1) of the Agricultural Holdings "Act, 1948, were not fulfilled and, accordingly, withhold their "consent to the operation of this notice to quit and direct

[4] [1953] 1 W.L.R. 724.

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"accordingly." The decision appears, therefore, to be a decision that paragraph (*a*) is not fulfilled. But the mere fact that the tenants have been there for a long time cannot, by itself, be relevant to that issue. It seems to me that on the face of this document the tribunal show an erroneous approach in law and it seems to me, therefore, that it was right to quash their decision and to order that the matter be decided again and be determined according to law. How the tribunal will decide I do not know, and it is entirely a matter for them. They must decide, first, the question under paragraph (*a*). If they are not satisfied that (*a*) is fulfilled, that is an end of the matter. If they are satisfied, then they will proceed to consider whether, in their discretion, they will or will not give their consent. For those reasons, I agree that this appeal fails.

ROMER L.J. I also agree. The Lord Chief Justice expressed the view in the course of his judgment that the key, if one may so describe it, to the tribunal's decision was to be found in paragraphs 3 and 4 (and particularly, I think, paragraph 4) of the statement of reasons for the decision. Hilbery J. felt some doubt about that and thought that some, at all events, of the grounds for the decision of the tribunal appeared from other parts of the statement. For my part I am inclined to think that paragraphs 3 and 4 did not in themselves constitute the foundation of the tribunal's decision. The question of the tenants' efficiency had been put in issue by the landlord. The tribunal accordingly had to deal with it, and they decided it in favour of the tenants. Their reference in paragraph 4 to the tenants being entitled to the protection afforded by the Act of 1947 was, I think, rather unfortunate and misleading; but, nevertheless, it was, I think, made either by way of introduction to the substantive matter which was before the tribunal (namely, whether or not the landlord had satisfied them in the terms of section 25 (1) (*a*) of the Act of 1948) or was related to the question of discretion.

It seems to me, on the whole, that the real grounds for the tribunal's decision on the section 25 point appear from paragraphs 5 and 6 of the statement. These paragraphs are ambiguous and are to some extent in conflict with each other. I am not altogether sure that the tribunal were not intending to say by these paragraphs that the landlord had not satisfied them that the 63 acres would be more efficiently farmed if effect were given to the proposals. If the tribunal had clearly said that, then the landlord would not have discharged the onus of showing that the Minister should be satisfied within section 25 (1) (*a*). On the other hand, it may be—and I think this is probably the true view of the matter—that the tribunal were intending to say that the proposals would result in more efficient farming of the 63 acres, but in less efficient farming of the tenants' other land. If that was the tribunal's view, it would seem that the landlord had brought himself within section 25 (1) (*a*), in which case the effect

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on the tenants' other land if consent to the proposal were given would be a matter relevant to the exercise by the tribunal of the discretion which is vested in them by sections 24 and 25 of the Act, but irrelevant, in my judgment, to the applicability to the case of section 25 (1) (*a*). Having regard to the doubt as to the precise grounds on which the tribunal came to their decision and to what I think is an obvious fact, that they founded it to some extent at least on invalid grounds—and I refer in that connexion, amongst other things, to the length of the possession of the tenants' family—I agree that it is better that the matter should be reconsidered.

The one question for the tribunal's decision, as I see it, so far as section 25 (1) (*a*) is concerned, is whether the landlord has satisfied them—that is the tribunal—that the purpose which the landlord has in mind, viz., the union of the 63 acres with his other land, will result in the 63 acres being so much more efficiently farmed than they are being farmed at present by the tenants that it is desirable that the proposal should receive the Minister's consent. It is only if the tribunal are so satisfied that they should turn to the other and wider aspects of the position to which my brethren have referred and which are relevant to the exercise of the discretion which the tribunal possess. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co. for Dyer, Marris & Frost, Boston; Lee, Bolton & Lee for Roythorne & Co., Spalding.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

* PRICE AND OTHERS *v.* SUNDERLAND CORPORATION.

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Barry J.

[1956 P. No. 798.]

Education — Teacher — Duties — School meals service — Refusal by members of teachers' association to collect money for school meals— Resolution by local education authority that members of association refusing to collect money be dismissed—"Duties in respect of meals "other than the supervision of pupils"—Education Act, 1944 (7 *& 8 Geo.* 6, *c.* 31), *s.* 49—*The Provision of Milk and Meals Regulations,* 1945 (*S.R. & O.* 1945, *No.* 698), *regs.* 13, 14.
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Section 49 of the Education Act, 1944, provides that regulations shall be made by the Minister imposing upon local education authorities "the duty of providing milk, meals and other refresh- "ment . . . and such regulations shall make provision as to . . . "the services to be rendered by managers governors and teachers "with respect to the provision of such milk, meals or refreshment ". . . so, however, that such regulations shall not impose upon

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"teachers . . . duties upon days on which the school . . . is not "open for instruction, or duties in respect of meals other than the "supervision of pupils. . . ." Such regulations, the Provision of Milk and Meals Regulations, 1945, having been made by the Minister, the Sunderland Corporation, a local education authority, instituted a scheme for the provision of school meals for children, and for a number of years school teachers employed by the corporation had co-operated in the scheme by the collection and recording of the money paid by the schoolchildren for the meals. On March 23, 1956, the local secretary of the Sunderland and District Branch of the Association of Schoolmasters informed the director of education that members of his association had decided, in accordance with the wishes of the National Association of School Masters, not to receive school meals money from the beginning of the next term, April 9, 1956. On April 4 the director of education sent a circular letter to all the members of the association referring to that letter and stating that the collection of money for school dinners was a clearly recognized and accepted term of employment of all teachers, and urging them to carry out the recognized arrangements. On April 11, 1956, the corporation passed a resolution ". . . that those teachers . . . who are members of the "Sunderland and District Association of Schoolmasters and who "refuse to collect money for school meals in school hours be given "notice to terminate their engagements on August 31, 1956." On April 13, 1956, the director of education wrote to all the members of the association informing them of the resolution and requesting them to answer the following questions by April 18 "(i) Do you "normally collect dinner money in school during normal school "hours? (ii) Are you prepared to carry out this collection of "dinner money?"

The plaintiffs, six members of the association employed by the corporation, sought a declaration to the effect (1) that the resolution of April 11, 1956, was ultra vires the corporation, and (2) that the corporation was not entitled to impose upon teachers in their employ duties in respect of school meals other than the supervision of pupils, namely, the duties of clerks and cashiers:—

Held, (1) that on the true construction of section 49 of the Education Act, 1944, and the regulations made thereunder, any services rendered by teachers in connexion with the school meals service, other than that of supervision of pupils, was a voluntary service. The collection of money for school meals, therefore, was a "duty in respect of meals" within the meaning of section 49 and, accordingly, although teachers might voluntarily assist local education authorities by the collection and recording of money for the meals, that was not a duty which the education authority might require them to undertake as a condition of their employment.

(2) That it was clear from the wording of the resolution, either read alone or in conjunction with the preceding and following letters, that the corporation had not intended to dismiss those teachers who were members of the association because they were unsatisfactory employees, but because they had refused to continue to collect the money for meals, and that the corporation by the resolution were requiring the teachers to collect the money on pain of dismissal. The resolution, therefore, inasmuch as it was a resolution to take an action expressly prohibited by the Act of Parliament under which their powers were derived, was outside the statutory powers of the corporation and was ultra vires.

ACTION.

The plaintiffs, Philip Preston Price, James Taylor Robson,

George Adamson Stafford, Ralph Forster, James Cathcart Hamilton Cowen, and Frederick Carr, six schoolmasters and teachers (members of the Sunderland and District Association of Schoolmasters), were in the employment of the Sunderland Corporation, a local education authority. On April 9, 1956, the plaintiffs refused to collect or receive money for school meals and on April 11, 1956, the corporation passed the following resolution: "That "those teachers employed by the Sunderland Education Autho- "rity who are members of the Sunderland and District Associa- "tion of Schoolmasters and who refuse to collect money for school "meals in school hours be given notice to terminate their engage- "ment on August 31, 1956."

The plaintiffs, alleging that the corporation was a local education authority empowered to conduct schools for children by virtue of the Education Act, 1944, other statutes in that behalf and regulations made thereunder and not otherwise, and that section 49 of the Education Act, 1944,[1] which empowered the Minister to make regulations imposing on local education authorities the duty of providing milk, meals and other refreshment for schoolchildren and as to the services to be rendered by managers, governors and teachers with respect thereto provided expressly that such regulations "shall not impose upon teachers at any "school . . . duties in respect of meals other than the supervision "of pupils," sued the corporation for a declaration (a) that the resolution of April 11, 1956, was ultra vires the corporation and in breach of its statutory duty to the plaintiffs, and (b) that the corporation was not entitled to impose upon teachers in its employ at any school duties in respect of meals other than the supervision of pupils, namely the duties of clerks and cashiers.

By their defence, the corporation alleged, inter alia, that in the circumstances they were entitled to dismiss the plaintiffs on notice expiring on August 31, 1956, provided that such notice was of the length provided for in their terms of employment. They further alleged that the duties which the plaintiffs refused

[1] Education Act, 1944, s. 49: "Regulations made by the Minister "shall impose upon local education "authorities the duty of providing "milk, meals and other refreshment "for pupils in attendance at schools "... maintained by them; and "such regulations shall make pro- "vision ... as to the services to "be rendered by managers governors "and teachers with respect to the "provision of such milk, meals or "refreshment ... so, however, that "such regulations shall not impose "upon teachers at any school ... "duties upon days on which the "school ... is not open for instruc- "tion, or duties in respect of meals "other than the supervision of "pupils ..."

Provision of Milk and Meals Regulations, 1945, reg. 14: "The "authority shall ensure that suitable "arrangements are made for the "supervision and social training of "pupils during meals and may "require teachers of any school to "supervise pupils partaking of "dinners upon days on which the "school is open for instruction: pro- "vided that:—(*c*) no service by way "of supervision shall be required of "any teacher, and no voluntary "assistance to the school meals "service shall be given by any "teacher, if in the opinion of the "authority it would adversely affect "the quality of the teaching given "by that teacher."

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to perform were not duties in respect of meals within the meaning of section 49 of the Education Act, 1944, and were in any event duties which the plaintiffs had for years past performed without question or complaint.

The facts are fully stated in the judgment.

Gerald Gardiner Q.C. and *Neil McKinnon* for the plaintiffs.
Charles Russell Q.C. and *R. J. Parker* for the corporation.

The following cases were cited in argument: *Short* v. *Poole Corporation* [2]; *Roberts* v. *Hopwood*.[3]

BARRY J. This is an action by six members of the Sunderland and District Association of Schoolmasters against the Sunderland County Borough Council in whose employment all six plaintiffs were at the time of the matters complained of, and still are. By their statement of claim they ask the court to make two declarations, first that a certain resolution under which notices of dismissal have subsequently been given to five out of the six plaintiffs was ultra vires, and, secondly, that the corporation is not entitled to impose generally upon teachers in its employment at any school duties in respect of meals, other than the supervision of pupils, in particular duties connected with the collection of money from schoolchildren for meals.

The history of the matter can be stated quite shortly. In 1906 Parliament, by the Education (Provision of Meals) Act, 1906, first enabled local education authorities to provide meals for schoolchildren, but section 6 of that Act expressly provided that no teacher was to be required to take any part in connexion with the provision of those meals. All the existing Education Acts and Acts connected with education were revised in 1921, and section 85 of the Education Act of that year dealt with the topic of school meals. That section re-enacts section 6 of the earlier Act of 1906, and provides: "No teacher seeking employ-"ment or employed in a public elementary school shall be "required as part of his duties to supervise or assist, or to "abstain from supervising or assisting, in the provision of meals, "or in the collection of the cost thereof."

Despite the enabling powers contained in those two statutes, the provision of meals for schoolchildren remained, as I understand the position, upon a relatively small scale until after the outbreak of the last war. After the outbreak of war local education authorities, for various obvious reasons, were encouraged by the Government to provide meals on a very much wider scale but, so far as the legislative position was concerned, the position of teachers remained unaltered and continued to be governed by section 85 of the Education Act, 1921. However, as part of their war effort the teachers throughout the country did in fact

[2] [1926] Ch. 66; 42 T.L.R. 107. [3] [1925] A.C. 578; 41 T.L.R. 436.

co-operate, and whole-heartedly co-operate, in the work of providing meals for schoolchildren during the war. They did not, of course, actually prepare the meals, but they supervised the children while they were partaking of the meals provided by the education authority, and they collected the money which the children or their parents were required to pay for the meals which were provided.

It was made abundantly clear throughout the whole of the war period that the duties which the teachers were undertaking in connexion with the provision of meals for the pupils under their care were purely voluntary duties, and that the teachers expected that the whole situation would be reviewed and, if necessary, revised after the termination of hostilities.

The Sunderland and District Branch of the Association of Schoolmasters is a branch of one of the four major associations into which the teaching profession is organized. In 1943 a joint consultative committee was formed in Sunderland, on which were represented the director of education and his staff and delegates from the various associations of teachers, including the association to whom the plaintiffs belong. According to one of the minutes—or rather notes—of this consultative committee, which I am satisfied give accurate accounts of what occurred at the meetings, at a meeting of the joint committee on April 13, 1943, the question of school meals was under discussion; the director of education referred to "reports received in respect of school "feeding, and said the reports could be divided into six parts: "(1) General attitude, (2) place, (3) time, (4) paid staff, "(5) supervision and (6) odd items. Under (1) the director said "it appeared that every association was willing to co-operate "and that every association wished the arrangements made to "be for hostilities only. The director agreed that the scheme "should be carried out under the conditions agreed upon until "the end of the war, and then as soon as possible after the war "proper plans should be made. Nothing the associations "acquiesce in now should prejudice the position, when the "permanent position was considered."

Throughout the war period the views of the plaintiffs' association were from time to time put before the director of education and the defendant council, and so the matter stood when the new Education Act was passed in 1944. That Act repealed the earlier Acts to which I have referred, and by section 49 provided: "Regulations made by the Minister shall impose upon local "education authorities the duty of providing milk, meals and "other refreshment for pupils in attendance at schools and "county colleges maintained by them; and such regulations shall "make provision as to the manner in which and the persons by "whom the expense of providing such milk, meals or refreshment "is to be defrayed, as to the facilities to be afforded (including "any buildings or equipment to be provided) and as to the "services to be rendered by managers governors and teachers

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"with respect to the provision of such milk, meals or refreshment, and as to such other consequential matters as the Minister considers expedient, so, however, that such regulations shall not impose upon teachers at any school or college duties upon days on which the school or college is not open for instruction, or"—and these are the material words—"duties in respect of meals other than the supervision of pupils, and shall not require the managers or governors of a voluntary school to incur expenditure."

Very shortly after the Act came into force the Provision of Milk and Meals Regulations, 1945, to which it will be necessary for me to refer in greater detail, were made, and imposed upon local education authorities the duty of providing milk, meals and other refreshment for their children, and under the regulations the local education authorities were entitled to require teachers to supervise the children at meals. So much is not in dispute, but whether other requirements could be placed on teachers forms the subject-matter of the present dispute.

The teaching profession, or I should perhaps more accurately say the Association of Schoolmasters, did not take altogether kindly to the change in the law, nor did they think it proper that their members should be required during their spare time to supervise the children at meals without some additional remuneration. From 1945 onwards there was a considerable amount of dissatisfaction amongst the members of that association with regard to the part which, by law, they were then compelled to play in the service of providing meals for school children.

Various circulars were issued by the Minister of Education concerning the meal situation created by the Act of 1944, and the very much wider extent to which meals were then being provided did considerably increase the amount of clerical and other work required in connexion with the collection of the moneys which many of the children have to contribute towards the cost of the meals. Children were not bound to take their meals at school, but if the parents wished them to do so the education authority was under an obligation to provide the meals, and, except in the case of necessitous children, were also under an obligation to collect a contribution from the parents towards their cost.

As time went on the administration of the scheme received further consideration and, no doubt quite properly from the accountancy point of view, the teachers were asked (I will not say "required") to make a number of somewhat complicated returns showing the number of meals served, the number of payments made, and covering other matters which were required to enable the accounts of the meals service to be kept in proper order.

In later days these accounts became fairly complicated, and

it is clear that the members of the plaintiffs' association did continue to collect the money and did fill up the various forms which the education authority considered were necessary; but they did so, I am satisfied, as a voluntary service. No specific complaints were made between 1944 and up to the date of the matters now in dispute as to the actual collection of the money from children. The complaints which were made related to the part which teachers were required to play as a whole in the provision of meals for children, including in particular the supervision of the children during the midday luncheon hour.

I do not think it is necessary for me to go into the various documents which illustrate the position as it existed during this later period. It is, I think, sufficient for me to say that it is clear that the teachers, knowing, of course, that they were required to supervise, did feel that they were being somewhat ill-used in having that duty imposed upon them, and also were dissatisfied with the amount of other work in which they were involved in connexion with the meals service.

A number of witnesses were called, and from their evidence, which was not disputed, it became abundantly clear that at least one teacher, either the headmaster or some other teacher to whom the duty of correlating the accounts was delegated, did have to occupy a substantial amount of time—certainly an hour or more a week during school hours—in correlating the various accounts and in preparing the returns which had to be made presumably to the borough treasurer or to the local education authority (I know not which) at the end of each week.

The system adopted by the defendant corporation (no doubt a very convenient one) was that the children were required to bring to the school on, I think, a Thursday, payment in advance for the meals which they would receive at school during the following week. That system of prepayment was, as I have said, obviously a convenient one from the point of view of the corporation and of the borough treasurer, but it did involve certain complications in the accounts. Quite apart from the difficulty of collecting the money from children whose parents might have forgotten to send it, or who might have lost it en route, or who could not produce the correct sum in the way of change, or of change not being available, there was the actual form on which masters had to compile returns each day, which they submitted to the headmaster or the teacher in charge of the accounts for that particular school. On this form the masters were required to provide for credits to be given to children who had paid in advance and then for some reason had not attended school on one or more days in the ensuing week and consequently did not consume the meals for which they had paid, and the amount credited to such children had to be carried forward into the ensuing week.

All this did involve a considerable amount of bookkeeping and the compilation of a considerable number of returns. The time

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occupied, of course, varied. If everything went smoothly and all the accounts could be reconciled the headmaster or the teacher in charge of the scheme might finish his work within about an hour or a little more in any one week. If things went wrong he would take a good deal longer to get his returns into presentable shape.

The form master also had to spend an appreciable time which otherwise would have been spent in teaching during each week in compiling the returns for which he was responsible. As there was no real dispute about the matter I should be occupying time unnecessarily if I described in detail the accounting system adopted by the corporation; it was no doubt a very admirable one, and certainly obviated any bad debts, but it did impose a considerable amount of work on the teachers.

Not very long ago a Superannuation Bill was introduced into Parliament and, rightly or wrongly, the members of the Association of Schoolmasters considered that its terms were unfair to the teaching profession. Although there has been no evidence to this effect, I think that I am entitled to take judicial notice of the fact that for some time past teachers have, rightly or wrongly, considered that their remuneration was inadequate having regard to their responsibilities and to the important part which they play in the life of the country. The immediate effect of the Superannuation Bill appeared not to increase their net remuneration but to reduce it, and this fact caused a considerable amount of dissatisfaction. Dissatisfaction was at the time expressed by all the associations into which the teaching profession is organized, but the steps taken by the Association of Schoolmasters went a little further than those adopted by any of the other associations. Indeed, the defendant corporation considered that they went a great deal further, and unjustifiably further, than was warranted by the existing situation.

As a result of a decision made by the association as a whole, certain local branches took drastic action as to the part which they were in future prepared to play in the administration of the meals service. On March 23, 1956, the local secretary of the Sunderland and District branch of the Association wrote to the corporation's director of education: "At a meeting held tonight "it was decided that members of my association, in accordance "with the wishes of the National Association of Schoolmasters, "will not be able to receive school meals money from the com- "mencement of next term, i.e., Monday, 9th April." Therefore, a reasonable notice, namely, from March 23 to April 9, of the intention of the members of the association was given to the corporation. The letter went on: "We shall continue to super- "vise school meals as at present and shall carry out other duties "connected with the service but we shall not handle money. "This ban does not apply to special schools at this stage. For "your convenience I enclose a list of our members and the "schools in which they serve. This course of action has been

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" decided upon to show our opposition to the Teachers Super-
" annuation Bill which was given its third reading in the House
" yesterday. We regret having to take this step and hope that
" we shall be able to resume normal working very soon."

The defendants reacted somewhat sharply to that letter, and on March 26, 1956, the director of education wrote to Mr. Hannington, the secretary of the local branch of the association: " Your letter of the 23rd March, 1956, was this evening reported " to the School Health and Welfare Sub-Committee of the Educa-
" tion Committee. It was pointed out that the collection of
" payments for school meals is carried out in school hours and
" has been done in this manner for many years. Similar collec-
" tions, as you know, have been made in connexion with the sales
" of needlework, etc. In these circumstances the committee took
" the view that your proposed action is quite unwarrantable
" having regard to the terms of your employment, and would
" take a very serious view of the position if such action is carried
" into effect. I am, therefore, instructed to request you to consult
" your members immediately with a view to the withdrawal of
" your letter. I must ask for your reply by Thursday morning,
" the 29th March, 1956."

There was a reply dated March 28 in which Mr. Hannington referred to the letter which I have just read, and said that it " was considered by a general meeting of my association held " this evening, and I am instructed to state that as the action " we have taken has been in accordance with the wishes expressed " by the National Association of Schoolmasters, after thorough " investigation of the situation, we must abide by the terms of " our letter of the 23rd March."

In response to that letter the director of education, as he was quite entitled to do, directed a circular letter to all the members of the Sunderland and District Association of Schoolmasters. That letter, dated April 4, after referring to the letters of March 23, March 26 and March 28 which I have just read, said: " As you know, money for school meals is always collected " during normal school hours, as moneys for other purposes are " collected, this being done in pursuance of arrangements made " by the authority after full consideration with (inter alia) the " representatives of your association. This practice has been " pursued for some years now and is a clearly recognised and " accepted term of employment of all teachers. Because of this, " the authority take a most serious view of the proposal of your " association not to collect money for school meals from the " school children. This would appear to be quite contrary to " your terms of employment. The fact that only seven county " boroughs out of the many local education authorities throughout " the country have been selected for this action, adds greatly to " the seriousness of the matter. There can be no justification " whatsoever for your taking such action against schoolchildren " or indeed the local education authority, who have taken no part

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" in the present superannuation dispute between the teachers and " the Government. Under these circumstances, therefore, the " committee expect you to carry out the recognized arrangements " and to refrain from following a course of action which might " prove detrimental to all concerned."

I should point out that the defendants persisted in their contention that the action proposed by the Sunderland branch was contrary to the terms of the teachers' employment until this case had been proceeding for some time, and one of the principal grounds upon which the corporation based their answer to the plaintiffs' claim was that in truth and in fact it was a contractual obligation on the part of every schoolteacher to collect moneys from schoolchildren and to carry out the other work, in addition to supervision, which had in fact been carried out by them during the years subsequent to the passing of the Act of 1944. Mr. Russell, on behalf of the corporation, expressly withdrew that defence during the present proceedings and did not seek to establish that at any time the plaintiffs, or indeed any other schoolmasters, were, as part of the terms of their employment, under an obligation to collect money from schoolchildren in payment for meals provided at the schools by the education authority.

The next incident to which I need refer occurred on April 11, 1956, when the corporation passed the resolution which the plaintiffs now ask the court to declare invalid on the ground that it was outside their powers. The resolution sets out that " the Education Committee reported and recommended (inter " alia): That having been informed by the Sunderland Associa- " tion of Schoolmasters that in order to show their opposition " to the Teachers' Superannuation Bill, the association members " employed in the borough schools proposed to cease collecting " moneys for school meals as from the beginning of the new school " term (April 9) similar action having been taken in six other " county boroughs, and as the local education authority have " had no part in the drawing up of the terms of the Bill, the " committee recommend the council to register their objection " to such action by the said schoolmasters and adopt the following " recommendations: That those teachers employed by the Sunder- " land Education Authority who are members of the Sunderland " and District Association of Schoolmasters and who refuse " to collect money for school meals in school hours, be given " notice to terminate their engagements on the 31st August, " 1956 "; and the council resolved that that report be approved and adopted.

The news of the passing of that resolution was conveyed to members of the local branch of the association by the director of education on April 13, when he wrote to all the members the following letter: " Dear Sir, In my letter to you dated the " 4th April, 1956, I informed you that I had received a letter " from the honorary secretary of the Sunderland and District " Association of Schoolmasters stating that members of the

" Association would cease to collect dinner money from school-
" children as from the 9th April, 1956," and then underlined are the following words, " to show their opposition to the " Teachers' Superannuation Bill." The letter goes on: " The " majority of the members of the association who normally " collect dinner money accordingly refused to collect this money, " and the council have therefore passed unanimously the following " resolution ": and the resolution adopted by the corporation is set out. The letter continues: " I am instructed to ascertain " the position with regard to each member of the association and " to request you to answer the following two questions: (i) Do " you normally collect dinner money in school during normal " school hours? (ii) Are you prepared to carry out this collection " of dinner money? I enclose a stamped addressed envelope and " shall be pleased if you will let me have your reply by " Wednesday, 18th instant."

A letter in somewhat similar terms, except as to the concluding paragraphs, was sent to a certain number of selected members of the association who the local education authority thought might respond favourably to its contents. The earlier part of the letter is substantially the same, but the letter concludes with the following paragraphs: " I am given to under-
" stand that in spite of the ban imposed by the association you " are still prepared to collect this dinner money in school hours, " and I am instructed to write and ask if you will confirm this." A stamped addressed envelope was also enclosed in that letter and a reply by the same date was requested.

On April 14, the general secretary of the National Association of Schoolmasters wrote to the director of education a letter in which he referred to the previous correspondence with the Sunderland and District Association, and went on to say that he was instructed to inform the director " that each member of the " association who has hitherto been voluntarily collecting money " for school meals has been asked to do so no longer pursuant " to the notice to you of the 23rd March, 1956. We have taken " the opinion of leading counsel upon your letter of the 13th " April, 1956, which in his view constituted an imposition upon " teachers of duties in respect of meals other than the super-
" vision of pupils inasmuch as it publishes to each member a " resolution of the council that schoolmasters who refuse to " collect money for school meals will be dismissed; such an " imposition is directly contrary to the terms of section 49 of the " Education Act, 1944. As this is a pure question of law upon " which a decision of the court would alone be binding, our " members propose to apply to the court without further notice " to you for such a decision. In the event of such a decision being " adverse to our members they will of course loyally accept it, " and we assume that in the contrary event you will do the " same. Since therefore the court's decision as to the respective " rights of the parties to this unfortunate dispute is to be taken

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"without delay, you will doubtless agree that no precipitate "action in the form of dismissal or otherwise should be lodged "whilst the matter is sub judice. The reference in your letter "dated the 4th April, 1956, to the collection of money for school "meals as a clearly recognized and accepted form of employment "of all teachers is disquieting because it suggests that every "voluntary service undertaken by schoolteachers becomes for "the local education authority a contractual obligation upon "teachers. It is true that during their normal working teachers "do voluntarily undertake many extra duties but there is no "contractual obligation upon them to continue to perform such "duties. However, no useful service would be performed by "arguing the teachers' case to you now beyond informing you of "the nature of that case, and I should be obliged for your kind "confirmation that you will take no further action until the "court's decision be announced, and I on my part undertake that "my members will apply for an early trial."

Further correspondence ensued and, in the result, the corporation did in fact issue notices of dismissal to five out of the six plaintiffs. They were unable to dismiss the sixth plaintiff, because he was a headmaster and required a longer period of notice than could be given to him after the correspondence to which I have referred had passed.

I do not attribute any importance to that action taken by the corporation. I am satisfied that it was not done in order to prejudice the issue or to punish the six plaintiffs who brought this action in order to obtain the ruling of the court on the extent of their obligations, but that it was done in order to ensure that, while the resolution of the council was operative, those notices were given. The resolution provided that the teachers should be given notice to terminate their engagements on August 31 of this year and, in the view of the corporation, it might have been contended that if notice were not given (and, of course, the appropriate length of notice was required), the resolution might be said to have lapsed and to have no further operative effect. It was therefore feared that the court might regard the questions still outstanding as purely academic ones and refuse to rule upon them. It was for this reason only that the notices of dismissal were issued: I completely accept the assurance given by Mr. Russell on behalf of the corporation that the six plaintiffs will not be singled out for any more unfavourable treatment than any other members of this association merely because they are plaintiffs in the present action and merely because the notice of dismissal has been sent to them and not to the other members of the association, who will presumably comply with the recommendation of the association and refuse to collect this money from the children.

The first question for consideration is whether, on the true construction of section 49 of the Education Act, 1944, the plaintiffs

could be required by the corporation, as a term of their employment, to carry out the duty of collecting money from the children when brought to the school as payment for meals. If section 49 of the Act does not prohibit the corporation from making any such requirement, then clearly the resolution of the corporation was warranted by the facts and is a valid resolution. Mr. Gardiner did not seek to argue to the contrary. If in truth by taking this action and by refusing to collect the school meal moneys the six plaintiffs and the other members of the Association of Schoolmasters were in breach of one of the terms of their employment, then without any question the corporation were entitled to pass this resolution and to dismiss them if they saw fit.

If, on the other hand, the correct interpretation of section 49 is that it prohibits education authorities from requiring their teachers to take any part in the administration of the school meals service other than the mere supervision of the children at the time when they are having their meals, then there arises the second question: that being the true state of the law, was the resolution of the corporation intra vires or was it ultra vires?

Mr. Russell, on behalf of the corporation, contends that, even if he is wrong in his submission as to the true effect of section 49, none the less the corporation were perfectly entitled to dispense with the services of these six teachers by giving them the appropriate period of notice in accordance with their contract of service.

As Mr. Gardiner pointed out, section 49 of the Act of 1944 does not of itself impose any obligations upon local education authorities to provide school meals, nor does it empower them to do so. It is a section which requires the Minister to make regulations imposing upon local education authorities such a duty, and clothing them with the necessary powers to carry it out, and in that respect it is different from the sections in the earlier Acts to which I have referred.

As I have already indicated, regulations entitled "The Pro- "vision of Milk and Meals Regulations, 1945," were made by the Minister under section 49 on June 6, 1945. The regulations require local authorities to establish what is termed "the school meals "service," and provide that a school meals service shall be available for the benefit of day pupils in attendance at all schools maintained by the authority. Various provisions as to the nature and quality of the meals to be provided are laid down, and regulation 10, in its original form, provides that where milk, meals or other refreshment are provided for any pupil, the parent of the pupil shall defray such part of the expense of providing the benefits as may be charged upon under this regulation, "provided that "if, in the opinion of the authority, a parent is unable without "financial hardship to pay the whole or part of any sum payable "by him the authority may remit that sum or part thereof as "the case may be."

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That regulation has been amended by subsequent orders made in 1949 and 1951, but for present purposes I do not think that it is necessary for me to refer to the amending orders, and the regulation, both in its original and in its amended form, provides that any sums payable by a parent by virtue of this regulation may be recovered summarily as a civil debt.

Of the two regulations applicable to the present dispute, I think that there is some virtue in reading regulation 14 first, and thereafter the only other relevant regulation, namely, regulation 13. Regulation 14 provides that "The authority shall ensure that "suitable arrangements are made for the supervision and social "training of pupils during meals and may require teachers of any "school to supervise pupils partaking of dinners upon days on "which the school is open for instruction." So that regulation clearly empowers the authority to require their teachers to supervise pupils while taking dinners, but only on days on which the school is open for instruction, thereby, of course, following the terms of section 49 of the Act.

Then there are two provisos (*a*) and (*b*) which are immaterial for present purposes, and a third proviso (*c*) which reads: "no "service by way of supervision shall be required of any teacher, "and no voluntary assistance to the school meals service shall be "given by any teacher, if in the opinion of the authority it would "adversely affect the quality of the teaching given by that "teacher." There again, that proviso refers to a requirement of supervision, and, in contradistinction to that, refers to voluntary assistance to the school meals service which may be given by a teacher.

Regulation 13 reads: "(1) The authority shall employ an "officer as organiser of school meals and such other officers as "are necessary for the efficient conduct of the school meals "service; the organiser of school meals shall, subject to any "directions of the Minister, possess suitable qualifications in "dietetics and cookery and adequate experience in the planning, "preparation and service of meals on a large scale. (2) The "authority shall employ a suitable and adequate staff other than "teachers—(*a*) for the preparation, cooking, service and, where "necessary, transport of meals and for washing up and other "incidental matters; and (*b*) to such extent as may be needed, "having regard to the power given to the authority by the next "following regulation"—that is regulation 14—"to require "teachers to supervise pupils, for supervising pupils at meals."

As I see it, that means that, in addition to the services of teachers which the local authority can require in relation to supervision, other persons may be employed at the discretion of the authority to assist the teachers in the supervision of the children or to supervise the children in place of the teachers if the authority thinks fit not to require the teachers to supervise.

That being the statutory position, Mr. Gardiner puts his case very simply. He submits that section 49 means what it says,

namely, that a local education authority or borough council may not impose upon teachers at any school duties in respect of meals other than the supervision of pupils. According to Mr. Gardiner's argument, the collection of money paid by parents for meals provided is quite clearly a duty in respect of meals and, on the clear wording of the section, no teacher can be required, as part of his conditions of service, to undertake that duty. That is how the plaintiffs put their case; and I am bound to say that it has a simplicity and a clarity which, at first sight at least, lends it considerable conviction.

Mr. Russell's argument, as I understood it, was based on a submission that the words "duties in respect of meals" mean merely duties in respect of meals understood in the narrowest sense, that is to say, duties in respect of the period during which the children are actually consuming the food which is placed before them by the local authority. He referred to the wording of the earlier Acts, particularly section 85 of the Education Act of 1921, and pointed to the phrase contained in that section "supervising "or assisting, in the provision of meals, or in the collection of "the cost thereof." He submits that the expression "duties in "respect of meals" in the Act of 1944 means something different from duties connected with the provision of meals, and that, on the true construction of section 49, such duties as the collection of the cost of the meal, which was separately dealt with by section 85 of the Act of 1921, can still be imposed upon the teachers as not being a duty in respect of a meal in the narrow sense for which he contends, but possibly a duty in connexion with the service of the meal or the provision of the meal. He points out, with some force, that it is, on the face of it, strange that the section does not place any similar limitation upon the powers of the authority in relation to the teachers' duties connected with the provision of milk or other refreshments and is confined to the question of meals alone. His argument is reinforced by the fact that, at the time when the Act was passed (and incidentally at the time when the regulations under section 49 were made) a charge was made for the provision of milk, and the regulations do in fact deal with the charges to be made both for milk and for other refreshments.

It is not for me to explore the motives which may have actuated the legislature in framing the Act in its present terms, but I am bound to say that I find it quite impossible to place such a narrow construction upon the words "in respect of meals." If section 49 of the Act of 1944 had repeated the words "assisting "in the provision of meals" I think it might well have been contended that those words would not cover the work of collecting the cost of the meals, which was treated by the Act of 1921 as an entirely separate duty and not as part of the service of assisting in the provision of meals.

But section 49 of the later Act did not repeat the words of section 85 of the Act of 1921, and it is on that account that

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in my judgment the words "duties in respect of meals" used in the later Act are very much wider, and I do not think that I can cut down the meaning of those words so as to exclude the collection of money in respect of meals. I feel bound to accept the plaintiffs' submission that the collection of that money is beyond argument a duty in respect of meals. The money is payable for the meals. It would not be payable if the meals were not provided or if the children did not partake of them, and I think that any reasonable construction of the words "duties in respect "of meals" must include the collection of money payable for the meals.

In those circumstances I have come to the conclusion—not without some hesitation in view of the very clear argument submitted to me by Mr. Russell—that the plaintiffs' contention as to the interpretation of section 49 is the correct one, and that under that section the local authority may only require their teachers to supervise the pupils during meals and not to perform any other duties connected with those meals.

That does not, of course, mean that, with the teachers' consent, an education authority cannot carry out a scheme such as at present carried out by the corporation; but it does mean that the services, other than supervision, rendered by teachers in connexion with it are voluntary, and that the corporation cannot require the teachers, as a condition of their employment, to undertake them.

Teachers, as everyone knows, do undertake a number of voluntary services, and I for one sincerely hope that nothing in the present decision of the court will prevent that happy state of affairs from continuing. None the less, in essence I am satisfied that under the clear provisions of section 49 of the Act of 1944, any service rendered by teachers in connexion with what the Minister in the 1945 regulations described as "the school meals "service," other than that of supervision, is a voluntary service undertaken by the teacher. That is the view of the Act for which the plaintiffs and their association have always contended, and I think that it is a correct view.

Having reached that conclusion, I now have to consider the second and equally important question: in view of the fact that, on the true construction of section 49 of the Act and of the regulations made under it, teachers cannot be required to give services to the school meals service other than the work of supervision of the pupils during meal time, had the corporation power to pass the resolution which is now called in question?

It has long been held that the courts will not inquire into or interfere with the decisions and actions of local authorities and other statutory bodies so long as their decisions are reached bona fide and within their statutory powers.

It is conceded by Mr. Russell, and indeed it is abundantly clear on the authorities, that, in relation to the dismissal of servants, a statutory body, such as a borough council, stands in a

somewhat different position from that of a private individual. Under the law of this country a private individual can engage and dismiss servants at his will, and if he engages a servant on terms that that servant's employment can be terminated at a month's notice, the master, if he be a private individual, can give a month's notice and no court can inquire into the motive for so doing.

A local authority or any statutory body cannot, however, either employ or dismiss servants except under statutory authority: their powers are derived from the statute or statutes under which they are created, and it is a well-known principle of law that statutory powers can only be exercised for the purposes for which they are granted. Therefore, there may be cases where a local authority in resolving to dismiss a servant or to take any other action can have its decision called into question in the courts if those who challenge it can establish that the decision was taken either mala fide or that it was a decision which did not lie within their statutory powers.

The burden, as is conceded by Mr. Gardiner, rests upon those who call into question any decision of a local authority, and it is a heavy burden. I have not here to decide whether it was right or wrong that the corporation in this case should have decided to dismiss the six plaintiffs and the other members of the association. What I have to inquire into is whether it was within their statutory powers to do so under the particular circumstances now under consideration.

Mr. Russell concedes that if the corporation's construction of section 49 of the Education Act, 1944, be wrong, the corporation would not be entitled to say to a teacher in their employment: "Either you carry out duties in connexion with the school meals "service in addition to the duty of supervision, or you go"; and that if he refuses to do so, a notice of dismissal given on that ground would be outside the powers of the authority. He seeks, however, to distinguish the facts of the present case and to say that that is not the true position now before the court. His argument was put in this way: the practice under which teachers did collect money and perform other duties and services in connexion with school meals had been going on for many years; it had been the subject-matter of discussion arising out of certain complaints; it had all been dealt with in a reasonable way by both the corporation and the teachers, and there had been no specific objection to the particular task of collecting the children's money. In those circumstances the corporation bona fide reached the conclusion that an employee, for what he described as a by-purpose, some entirely extraneous purpose unconnected with the actual collection of the money, who then says that in future he will not carry out that service is an irresponsible, unfaithful, unfair and inconsiderate employee to whom the local authority are entitled to say that he is no longer to be employed by them. He says that here in essence the corporation are not requiring their teachers to provide

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services other than supervision in connexion with school meals or in respect of school meals; all that they are doing is dismissing, with proper notice, employees whom, for the reasons which he indicated, they think are irresponsible and inconsiderate and no longer worthy to be employed.

There is, of course, a very real distinction between the two situations, and if the position here had been that the corporation were saying—whether rightly or wrongly it is not for me to decide—that members of an association who took this sort of action, not because they had any dispute with the corporation, but because they objected to some Act of Parliament for the terms of which the corporation were in no way responsible, were the type of men whom they did not want to employ, then, as I see it, they would be perfectly entitled to give them the requisite notice to terminate their employment.

Is that the true position here? I do not think that it is. Mr. Russell appreciates the difficulty which arises from the wording of the resolution and of the letter of the director of education which followed it. If the resolution had declared that all members of the association on whose behalf the letter of March 23, 1956, had been sent must go, that would have been a decision which it would be within the corporation's power to take. But that is not what the resolution says. The resolution was that those teachers employed by the corporation who are members of the association and who refuse to collect money for school meals in school hours are to be dismissed.

There are the dual requirements: membership of the association and refusal to collect money. That clearly does not refer to some past refusal. As I understand it, it means a continuing refusal to collect money by virtue of the notice given on March 23.

Mr. Russell sought to overcome that difficulty by saying that the corporation are not trying to insist, contrary to the direct prohibition of the statute, that teachers shall carry out duties other than supervision but that all that they are saying is that if these teachers withdraw from the untenable position in which they have got themselves and continue to collect the money, the corporation will treat them mercifully and will not carry out the threat of dismissal.

I am bound to say that that reasoning is somewhat too subtle for my mind. I think that it is abundantly clear that the corporation are saying—and may be saying because they entirely misapprehended, as I think, the true legal position—"Unless you "withdraw your refusal to collect the children's money, you have "got to go." That seems to me, without any shadow of doubt, to be a requirement that the teachers shall undertake a duty in respect of meals other than the supervision of pupils. If that be so, I find it very difficult to attribute any other meaning to the resolution—either read alone or in conjunction with the letters preceding it and following it—than one which seems to me to render it clearly ultra vires. It cannot be within the powers of

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the local authority to resolve to take an action which the Act of Parliament under which their powers are derived clearly prohibits.

I think, without carrying the discussion further, that there can be no doubt that this resolution does require the teachers to collect the school meals money under pain of dismissal. That is the only way in which such a requirement can be enforced; and a threat of dismissal unless a teacher carries out that duty is to my mind the clearest possible contravention of the express wording of section 49 of the Education Act.

In those circumstances I have come to the conclusion that, although no one suggests that the corporation were not acting, in a sense, bona fide, or that they were actuated by a malicious motive —that has never been suggested—the action which they took was in fact outside their powers. As I have already indicated, they were under the impression that the teachers were under contractual obligation, as part of their terms of service, to carry out these duties. If that had been the true position the corporation would obviously have been justified in taking the action which they did. Ignorance of the law, however, cannot justify their action, and, on the view of the law which I hold, their resolution to dismiss these teachers merely because they decided to withhold a voluntary service, when the Act of Parliament expressly prohibits them from requiring that service, is clearly a resolution which is ultra vires.

In those circumstances I think that the plaintiffs are entitled in substance to the relief claimed. There will be a declaration to the effect (a) that the resolution is ultra vires the defendant corporation; (b) that duties of collection and recording the cost of school meals are duties in respect of meals other than supervision within the meaning of section 49 of the Education Act, 1944; and (c) that, accordingly, the corporation is not entitled to impose such duties on teachers in its employment.

Declaration accordingly.

Solicitors: *Craigen, Wilders & Sorrell; Sharpe, Pritchard & Co. for G. S. McIntire, Sunderland.*

J. F. L.

[SHROPSHIRE ASSIZES.]

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June 25,
26, 27.

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*WARRELLOW *v.* CHANDLER AND BRADDICK AND ANOTHER.

G. F. LESTER & CO. (BIRMINGHAM) LTD. (THIRD PARTY).

[1954 W. No. 1657.]

Licensor and Licensee—Indemnity clause—Construction—Indemnity by licensee to licensor for personal injury, loss or damage "which, "but for the permission hereby granted would not have arisen"—Construction.

Causation.

In 1942 the British Transport Commission's predecessors granted G., the third party, a licence to carry on in a yard beside a goods station the business of buying and stripping old motor-cars and selling the serviceable parts. The licence contained a clause whereby the third party agreed to "release and indemnify [the "commission] . . . from and against all liability for personal "injury (whether fatal or otherwise), loss of or damage to property "and any other loss, damage, costs and expenses however caused "(except where proved to have been caused solely by the neglect "or default of the [commission], their servants or agents), and "which, but for the permission hereby granted, would not have "arisen." The yard was approached by means of a semi-roadway which ran between two railway sidings until it reached the yard entrance, where a number of sleepers were so placed as to form a level crossing giving access to the yard.

In 1953 an employee of the third party was walking along one of the sidings, travelling from the yard to an unknown destination, when he was knocked on to the railway line and killed by a collision at the sleeper crossing between the first defendants' lorry (which was also leaving the yard) and a wagon which was being shunted by the commission's servants. In his widow's action against the first and second defendants (the commission), the first defendants were dismissed from the action. In giving judgment for the plaintiff against the commission the judge assessed the deceased man's responsibility at one-quarter and the commission's at three-quarters. In the third party proceedings the commission claimed an indemnity from the third party under the terms of the licence:—

Held, that the words "which, but for the permission hereby "granted, would not have arisen" meant, and were confined to, liabilities which arose only by reason of the relationship of licensor and licensee which the licence created; but that the fatal accident was one which, but for the licence, would not have arisen—the deceased would not have been there; and that as the commission were not "solely" responsible for the accident, there being a finding of contributory negligence on the part of the deceased, the commission were entitled to the indemnity claimed from the third party.

John Lee & Son (Grantham) Ltd. v. *Railway Executive*, 65 T.L.R. 604; [1949] 2 All E.R. 581 applied.

[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

ACTION.

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The third party, G. F. Lester & Co. (Birmingham) Ltd., in 1933 acquired a licence to occupy certain premises at the side of the second defendants' goods station. That licence, which permitted the third party to carry on the business of dealers in scrap metal, was granted by the Great Western Railway Co., the then owners of the premises, and by clause 10 it exempted the licensors from responsibility for loss or damage or "any loss "of life or personal injury sustained by the licensees or any other "person while on the said land or the company's premises, or "any approach thereto in the exercise of any or such licences or "privileges, except such as shall be proved to have arisen from "wilful misconduct of the company, or their servants"; and the third party undertook to indemnify the licensors against claims in respect of such loss, damage or injury. In 1942 the third party began another, but entirely separate, business for the buying and stripping of old motor-cars and selling serviceable parts as spares. This second business was also carried on at a site beside the second defendants' goods station and under a separate licence dated June 5, 1942. Clause 12 (b) of the licence stated that "the licensees will be responsible for and will release "and indemnify the company and their servants and agents "from and against all liability for personal injury (whether fatal "or otherwise) loss of or damage to property and any other "loss, damage, costs and expenses however caused (except when "proved to have been caused solely by the neglect or default of "the company, their servants or agents) and which, but for the "permission hereby granted, would not have arisen." Yet a further licence was granted in respect of another business in 1948.

The plaintiff, Hilda Mary Warrellow, started an action under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, as widow and administratrix of her husband, who was employed by the third party in the work of dismantling motor-cars. Warrellow had nothing to do with the scrap-metal business carried on under the licence of 1933. The premises upon which the third party carried on business were approached by means of a semi-roadway between two sidings, Chapman's stables siding and the gas siding, until it reached a point about opposite the entrance to the third party's premises. At that point a number of sleepers were so placed as to form a level crossing to afford access to the premises. On February 11, 1953, a lorry belonging to the first defendants, Chandler and Braddick, visited the third party's premises by this route whilst shunting operations were in progress on Chapman's siding. The first defendants' lorry in leaving the third party's premises proceeded over the sleeper crossing, but before its tail had cleared the crossing it was struck by a wagon which was being shunted by the second defendants' servants. The deceased was walking alongside Chapman's siding. He was apparently coming from the premises governed by the second licence, where

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he usually worked; there was no evidence to show what his destination was. He was seen near the lorry and at the time of the collision between the wagon and the lorry he also was struck in some way, knocked on to the railway line and so suffered injuries from which he died.

In the action between the plaintiff and the first and second defendants, the first defendants were dismissed from the action; and in giving judgment for the plaintiff against the second defendants the judge assessed the deceased's responsibility at one-quarter and the second defendants' at three-quarters.

In the third party proceedings, with which this report is alone concerned, the second defendants claimed an indemnity against the third party (1) under the terms of the licence of May 30, 1933, on the ground that it must be inferred that the deceased was making his way to the premises to which that licence applied at the time of his fatal accident; (2) under the terms of the licence of June 5, 1942, on the ground that the deceased at the time of the accident was coming from the premises to which that licence applied.

M. A. B. King-Hamilton Q.C. and *G. T. Meredith* for the plaintiff.

John Busse Q.C. and *Maitland Coley* for the first defendants.

John Harington for the second defendants.

Kenneth Mynett for the third party.

LYNSKEY J. stated the facts, and after finding that there was no evidence as to the deceased man's destination at the time of the accident, and, in particular, none to show that he was then on his way to the premises forming the subject-matter of the 1933 licence, held that there was therefore no further need to consider the terms of that licence, and continued: With regard to the second licence, which obviously was the licence which applied to this man when he met with his accident, I must try to determine the meaning of the terms of that particular licence. The document is described as "an agreement" made between the Great Western Railway Co., who were then the owners of the premises, and G. F. Lester & Co. (Birmingham) Ltd., "hereinafter called 'the licensees,'" and the operative words are: "Whereby the company agree to grant to the licensees a "licence to use the premises described in the following schedule "and the company and the licensees mutually agree that the "conditions hereunder shall be the terms of the licence, and that "each of them will in all respects abide by and perform such "conditions."

In other words, this document is a licence; the third party is described as a licensee, the operative part of that document is the grant of a licence of the premises which are described in the annexed schedule, and the words "the terms of the licence" obviously mean the terms and conditions under which that licence

is to be held. The terms are headed "Great Western Railway. "Premises at stations." It is clear that that was a common form document, which I rather anticipated to be the case when I first read it.

I am now informed that those conditions are printed conditions which were in operation in 1942 and that they continued to be the conditions in respect of the further licence which was granted in 1948; but I do not think that I ought to draw any inference from that fact, because it seems that they were printed conditions to which nobody objected in the two years 1942 and 1948, notwithstanding the fact that in 1945 the Law Reform (Contributory Negligence) Act was passed, which, of course, might make a considerable difference as regards liability, particularly when the question of sole negligence arises.

In clause 12 (*b*) the lines which I must consider in particular are: "the licensees will be responsible for and will release and "indemnify the company and their servants and agents from and "against all liability for personal injury (whether fatal or other-"wise), loss of or damage to property and any other loss, damage, "costs and expenses however caused (except when proved to "have been caused solely by the neglect or default of the "company, their servants or agents) and which, but for the "permission hereby granted, would not have arisen." Thus the licensees—the third party in the present case—undertake the liability for all loss or damage of the kind described, "which, "but for the permission hereby granted, would not have arisen," and which was not "caused solely by the neglect or default of "the company."

I have been referred to *John Lee & Son (Grantham) Ltd.* v. *Railway Executive*,[1] which was only recently before the Court of Appeal. That case was very similar from the point of view of the document, except that it was tenancy agreement and not a licence. The headnote reads: "Goods stored in a "railway warehouse let to a tenant were damaged by fire and "the tenant brought an action against the Railway Executive "alleging that the accident was due to their negligence because "a spark or other combustible material ejected from their railway "engine had caused the fire. The Railway Executive set up a "clause in the tenancy agreement providing that: 'The tenant "'shall be responsible for and shall release and indemnify the "'company and their servants and agents from and against all "'liability for personal injury (whether fatal or otherwise) loss "'of or damage to property and any other loss damage costs "'and expenses however caused or incurred (whether by the "'act or neglect of the company or their servants or agents or "'not) which but for the tenancy hereby created or anything "'done pursuant to the provisions hereof would not have "'arisen.'"

[1] 65 T.L.R. 604; [1949] 2 All E.R. 581.

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The finding of the court in that case was that: "the words "'which but for the tenancy hereby created . . . would not "'have arisen' were confined to liabilities which arose by reason "of the relationship of landlord and tenant; the fact that the "tenant was occupying the warehouse under an agreement from "the Railway Executive was immaterial to the allegation in the "present case of negligence; and the tenant, therefore, could "not be called on to release or indemnify the Railway Executive "in the event of negligence being established."

It is said that that is an extremely strong case in favour of the third party. In that particular case the cause of action was the fact that the Railway Executive had ejected a spark from their railway engine which set fire to those goods in premises adjoining the railway line, and that that was due to either a faulty system of the engine or a faulty control of the firing, or something of that sort; something which had nothing whatever to do with the terms of the tenancy between John Lee & Son and the Railway Executive.

In giving judgment in that case Evershed M.R. said [2]: "Although it may have been the defendants' intention to "protect themselves from possible claims of that character, the "difficulty I have found in considering this clause is that the "parties, not being willing to be explicit in their language or to "confine themselves to damage of this kind, have evolved a form "of words which, if counsel's construction of the material words "'but for the tenancy hereby created' is right, seems to me "to have most remarkable, if not extravagant, results. 'The "'tenant . . . shall . . . indemnify the company . . . against all "'liability for personal injury . . . which but for the tenancy "'hereby created . . . would not have arisen.' What is the "meaning of that? Counsel for the plaintiffs has taken the "example of a customer of the first plaintiffs, who sets forth from "London for the express purpose of visiting the first plaintiffs at "their warehouse, and owing to the negligence of the defendants "the customer is injured in an accident between Kings Cross "and Grantham. Is such a case covered? Counsel for the "defendants may well say: 'Everything is covered assuming "'such a case can be proved.' But if it is covered—and I would "agree with the argument that, reading 'but for the tenancy "'hereby created' as equivalent to 'but for the existence of the "'tenancy,' it would be covered—then the clause has a scope "which I regard as too vague and too extravagant to be supported "if a narrower construction presents itself and can be adopted "with equal justice to the language. There is an alternative "construction equally available on the language, namely, that "the words 'which but for the tenancy hereby created would not "'have arisen' mean, and are confined to, liabilities which only "arise by reason of the relationship of landlord and tenant which

[2] [1949] 2 All E.R. 581, 583.

" this document creates. On that construction, a proper test " would be, on any given claim: Is the fact that the first plaintiffs are the tenants of the defendants under the agreement of " June 13, 1939, a necessary or material allegation? If that test " be applied in the present case, the answer would be: 'No.' " Examples again have been given of the kind of case that, on " this view, would be covered in possible claims against the defendants under implied covenants for quiet enjoyment and so " on, but limiting the liability to that which is really related to " the relationship of landlord and tenant which the agreement " creates."

That is a statement of the law in relation to that particular case and these various guides on construction are simply guides which are not binding on one, but they are often very helpful. I am asked to construe that case first of all upon the basis that the words used there are " which but for the tenancy hereby " created . . . would not have arisen." It is said that that is what distinguishes it from the present case, because there was not a tenancy and the wording of the clause does not suggest that I should substitute the words " licensee " and " licensor " for " tenant " and " landlords."

With great respect to counsel, it seems to me that those words " which, but for the permission hereby granted, would not have " arisen " mean the permission as given by the licence and by nothing else, and that that licence in fact, in the present case, gave permission. I can see no difficulty, from the point of view of the wording, in saying that " the licence hereby granted " is equivalent, in the context in which the words arise here, to the words " the permission hereby granted," and I would so construe that clause.

I have come to the conclusion that the reasoning applicable to the case of landlord and tenant in *John Lee & Son (Grantham) Ltd.* v. *Railway Executive* [3] is equally applicable to this case, reading that clause as being a clause as between a licensee and licensor and not as between a landlord and tenant. To apply that, therefore, and to adopt the narrower construction which the Master of the Rolls suggests should be adopted, does not help the third party in this case, because in the *Lee* case [3] it was not necessary to invoke the tenancy agreement at all in defining the cause of action. But in this case, so far as the deceased man is concerned, it is true to say that if he had not been there this accident would not have happened, but that is not the only thing one can say here.

It can be said here that one must ask the question whether in fact it would be necessary to allege and prove, for the purpose of establishing his claim, that the cause of action really arose because of the existence of that licence at the time. The result would be this, that unless the deceased man was there under the

[3] 65 T.L.R. 604; [1949] 2 All E.R. 581.

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licence he would have been a trespasser and would not have had the cause of action alleged in this case, as the duty of the railway company arises out of the relationship of licensee and licensor, and only in that way.

Under those circumstances it seems to me, applying the Master of the Rolls' statement as to construction in the other case: "that the words 'which but for the tenancy hereby created "'would not have arisen' mean, and are confined to, liabilities "which only arise by reason of the relationship of landlord and "tenant which this document creates," and substituting the words "licensee" and "licensor," and applying the test of the relevant liabilities which only arise by reason of the relationship of licensor and licensee which this document creates, it is the existence of that document and the rights given by it which gives the plaintiff his cause of action. There would be no duty on the railway company but for that licence and it is necessary to invoke that licence and the relationship under it.

Under those circumstances it seems to me, applying the narrower construction which the Master of the Rolls applied in *Lee's* case [3]—with which the other members of the court agreed—that I am bound to hold here that so far as this damage and loss and fatal accident were concerned, the accident was one which, but for the word "permission" here, simply would not have arisen: neither the liability nor the case would have arisen.

The only other question is that in connexion with the word "solely." Counsel for the third party has not pressed his argument very strongly as to the meaning of that, because on the face of it there is, as far as I can see, no room for argument. I may say that I should have liked to be able to construe the word rather differently, but in view of my findings I do not think that it is open to me to take that construction and I am bound to construe that word in its ordinary meaning.

In this case I have already held that the accident was caused by the neglect of the second defendants, but was partially caused by neglect on the part of the deceased man. It seems to me that that clause applies and that those defendants are entitled to an indemnity against the third party.

Judgment for second defendants against third party.

Solicitors: *G. H. Morgan & Sons, Shrewsbury; B. A. P. Hayes, Shrewsbury; M. H. B. Gilmour; J. C. H. Bowdler & Sons, Shrewsbury.*

[COURT OF APPEAL.]

*LLOYDS BANK LTD. *v.* BRITISH TRANSPORT COMMISSION AND ANOTHER.

C. A.
1956
Feb. 14, 15, 16.

[1954 L. No. 1567.]

Denning, Morris and Parker L.JJ.

Railway—Level crossing—Accommodation road—Scope of duties of railway authorities and employees.

At about 5.45 a.m. on a January morning a train approaching Great Yarmouth from the south came into collision with a motor-car on an accommodation level crossing. Both occupants of the car were killed. The personal representatives of the driver brought an action for negligence against the Transport Commission and the driver.

The crossing had been in use for about 100 years, and served a private road leading from the highway to a farm and some cottages. It crossed the metals at an angle of about 45 degrees, so that a driver approaching the farm from the road would have to look over his shoulder to see if any train was approaching from the south on the down line. There were gates on either side of the crossing, and sufficient space between the gates and the metals to enable a driver to stop in safety and look up and down the line. Persons using the crossing were warned to close the gates, and the railway authorities took steps to see that this was done. There was a clear view of about 350 yards along the lines to the south. No accident was known to have occurred at the crossing, over which there was little traffic.

At the hearing of the action the plaintiffs contended that the defendant commission should have placed a whistle-board at the approach to the crossing, and that the driver should have kept a look-out for the lights of an approaching car. Lynskey J. found that the approach gate had been left open, that the deceased had driven through it and over the metals without stopping to see whether a train was approaching, and that the accident was caused by the failure of the deceased to take reasonable precautions for his own safety, and he dismissed the action.

On appeal:—

Held, (1) that having regard to the lay-out of the crossing and the nature of the user there had been no failure on the part of the railway authorities to take such precautions to ensure safety as were reasonable in the circumstances; (2) that no negligence on the part of the driver had been established, as the duty of drivers and firemen was to keep a look-out for signals and on the track ahead.

Observations on the duties of a railway authority and of drivers and firemen with regard to accommodation crossings.

Smith v. *London, Midland and Scottish Railway Co.*, 1948 S.C. 125 distinguished.

Decision of Lynskey J. affirmed.

APPEAL from Lynskey J.

The facts are set out in the judgment of Denning L.J.

Marven Everett Q.C. and *Michael Havers* for the plaintiffs.

Neil Lawson Q.C. and *A. P. Babington* for the defendants.

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The following cases cited in argument are not referred to in the judgments: *Liddiatt* v. *Great Western Railway Co.*[1]; *Clarke* v. *Midland Railway Co.*[2]; *Bilbee* v. *London, Brighton and South Coast Railway Co.*[3]; *Jenner* v. *South Eastern Railway Co.*[4]; *James* v. *Great Western Railway Co.*[5]; *Ellis* v. *Great Western Railway Co.*[6]

DENNING L.J. There was a tragic accident on the early morning of January 8, 1954, when a motor-car was crossing a level crossing in Suffolk about 3 miles out of Great Yarmouth. A train ran into it and carried it nearly half a mile along the line, and both the driver and the passenger were killed. The administrators of the driver now claim against the British Transport Commission alleging that they were at fault. It has to be admitted that the driver of the car unfortunately must have been at fault in some degree himself; but it is said that the commission themselves were at fault because this was a level crossing of such special peculiarities that they ought to have taken steps to safeguard people using the crossing, which they did not do.

I must therefore describe the nature of this crossing. The railway was built about a hundred years ago. At that time there was a farm with a lane (a private road) leading to a main road. The railway crossed the lane. An accommodation crossing was provided for the lane so that the farmer and the people occupying the cottages near the farm could get across the railway to the main road. We are told that that farm and the four cottages were there when the railway was built; they are there now, and there has not been any increase of buildings or houses on that side of the railway. In those days I have no doubt there were horses and carts which used this level crossing; today there are lorries, tractors and cycles. But, so far as one can judge, although the kind of traffic has altered, the degree has not substantially varied in this last hundred years. At all events, there is no evidence that it has.

The lane did not cross the railway at right angles but on the slant at an acute angle of about 45°. The driver of a car coming from the main road along the lane to cross the railway would come first to a gate, across the lane; then, owing to this slanting crossing, he would go, beyond the gate, 32ft. 4ins. before he came to the first line of rails; then he would cross the two lines, first the up and then the down line, which took 27ft. 1in.; and then there would be another 40ft. 7ins. before he got to the far gate on the other side; so altogether the distance between the gates was 100ft.

In the old days the railway company used to provide padlocks

[1] [1946] K.B. 545; 62 T.L.R. 345; [1946] 1 All E.R. 731.
[2] (1880) 43 L.T. 381.
[3] (1865) 18 C.B.(N.S.) 584.
[4] (1911) 27 T.L.R. 445.
[5] (1867) L.R. 2 C.P. 634n.
[6] (1874) L.R. 9 C.P. 551.

and keys for use of the farmers and those entitled to use the crossing, so that they could keep the gates locked, and they had heavy gates there. A few years ago it was discovered that people were leaving these gates open and not closing them afterwards, the reason being that the gates were so heavy. It was difficult for the women to handle them. As the result of protests and representations that were made, lighter gates were installed, which are there to this day. Those lighter gates, according to the evidence, have been closed and kept more regularly closed than the old gates used to be; but still people do leave them open from time to time. The ganger has instructions to close them whenever he sees them open, and the station master himself kept an eye on them. That was the state of the crossing and the gates.

So far as the railway line was concerned, about 25 yards on the Yarmouth side there was the distance signal for the Yarmouth South Station. On the other side (from which the train in this particular case came) 350 yards away there was a bridge carrying a road over the railway. There was a clear view from the gates to that bridge; looking through the bridge a person might see as far as 425 yards; but the effective vision was 350 yards up in the direction of the bridge. After going through the bridge the railway had a bend in it. There is nothing in the history of this crossing to show there was ever an accident before this one.

On January 8, 1954, Mr. Fenn, who was employed by the Suffolk County Council and whose work was to go to farms and take samples of milk, started off very early in the morning from his home in Ipswich to get to the farm on the other side of the line, Capton Hall Farm. He had to start early because they milk at 6 o'clock and he started from his home between 4 and 5. His wife did not want him to go out on this bitterly cold winterly morning, but still it was his duty and he went and picked up a companion. About half-past 5 in the morning, when it was quite dark, he drove his car up the lane. A bicyclist had seen him a little before and he certainly had his headlights on. He drove his car up the lane. On the evidence the judge found that the first gate had been left open by the last person who had gone through. We do not know who it was. He had left the gate open and pushed it back against the hedge. So that when Mr. Fenn came up in his car there was the open gate, and no doubt he drove straight through. He drove over the distance of 32ft.; then over the up line; then on to the down line; and just as he got on to the down line, the train carrying the early morning newspapers to Yarmouth, with only one engine and a brake carriage, came along, hit the car broadside, carried it for over 600 yards along the line, and the two men in it were both killed.

It is said that the British Transport Commission were guilty of negligence in that at this crossing there ought to have been

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better precautions. In particular it is said that there ought to have been a whistle board on the far side beyond the bridge, say a quarter of a mile away, so that if the engine had whistled there, it would be a warning to anyone about to cross the line.

That is the serious point for consideration. This was not an ordinary accommodation crossing connecting two fields where an occasional cart or animal might be driven across say once or twice in a day. This was a level crossing where there was an appreciable amount of traffic from this little homestead the other side of the railway. There was the acute angle at which the car had to be driven, and the driver, in order to look for trains approaching on the up line, would have the difficult task of looking behind across his left shoulder to see if anything was coming along the line. There was the distance signal, which was horizontal in the day time and at night showed an orange or amber light. It was said to be a reddish light. If the driver of a car saw it, he might well think that no train was coming. He would think that a train would only come if it was a green light. It is said that in those circumstances, with a view of only 350 yards up the line, the railway company or the British Transport Commission ought to have put a whistle board up so that every train coming round should whistle.

There was cited to us a case in the Scotch courts of *Smith* v. *The London, Midland and Scottish Railway Co.*,[1] in which a railway company were held guilty of negligence on a crossing which seemed at first sight to be very similar to this. But on close comparison of the two cases I think that case is to be distinguished. In that case the crossing served two villages: and there was a public right of way across it. In addition, the gates were nearly always left open. Those factors distinguish that case from this.

Then take the latest case (*Lloyds Bank Ltd.* v. *Railway Executive*[2]) of a crossing near Peterborough. There was a lot of traffic on the railway and over the crossing. The railway had been extended since it was originally made and there was a history of accidents. That again is a much stronger case for saying there must be a whistle board or other precaution taken.

In all these cases the precautions which should be taken depend on the degree of danger, and that depends on the particular circumstances of the case.

In this case, there the situation is substantially as it was when the railway was built a hundred years ago, where there is no evidence of any increase in traffic and no evidence of any accident for all those years, it seems to me that the judge was justified in holding that the British Transport Commission were not negligent in their management of the railway.

I ought to say that the station master at Yarmouth, who has left that district now, said: "I prophesied there would be an

[1] 1948 S.C. 125.

[2] [1952] 1 T.L.R. 1207; [1952] 1 All E.R. 1248.

"accident there." He prophesied it because the gates had been left open. He was not saying that there was any fault on the part of the British Transport Commission, but fault on the part of the people who left the gates open. The commission did what they could to see that the gates were kept closed. They prosecuted on some occasions when people left them open. They told the ganger always to keep them closed. That statement of the station master is not such as, in my mind, to import a failure on the part of the defendants.

Then, apart from the management of the railway, it was said that the driver or fireman of the train were negligent because if they had kept a proper look out on this morning at half-past 5, they would have seen the headlights of this car coming up the lane and crossing the crossing. They could not fail to see them, it was said, because at that time of night the beam of the headlights was almost a searchlight across the countryside. I was at first very impressed with that point, but I do not think it prevails, because you cannot treat a train going along a railway as you can a motor-car going along a road. The driver and fireman on an engine must keep a good look-out ahead of them. They must, of course, keep a good look-out for signals and for the track ahead; but they cannot be expected to keep the same look-out for the side roads or lanes coming up to the railway. They might quite reasonably assume that people who approach a crossing will look out for the trains. Even if the driver sees headlights on a car, he would assume reasonably that the car would halt and stop for the train to go through. After all, a train cannot be brought to a standstill in much less than half a mile; whereas a car can be brought to a standstill in a few feet. In this case the driver and fireman did not see the headlights of the car at all: but the explanation is that they were engaged on their proper duties of looking out for the distance signal, which they saw, and indeed they whistled 175 yards away from the crossing at the distance signal. They have not been proved to be guilty of negligence in not seeing the headlights.

In all these cases it is a matter of degree. It is for the tribunal of fact to make up its mind on that degree; and, although we have to form our own judgment on such a case as this, we must have particular regard to the view of the learned judge who tried the case. He thought that there was no fault on the part of the commission, but the misfortune was due to the fault of the driver of the motor-car himself on this cold wintry morning. The driver assumed, as most people would, that all would be clear. Unfortunately someone had left the gate open, and so he drove straight on to the railway. He kept his windows closed, which would make it more difficult to hear a train or whistle, and he drove across the crossing. It seems to me that he ought to have stopped before actually crossing the line. There was enough space—over 30ft.—to do it between the gate and the actual line. That was the time to stop and look in

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both directions. If he or his passenger had done so, they could have seen the lights of this train 200 or 250 yards away, could have stopped and then crossed in safety. That, at all events, was the judge's view on the matter—that it was incumbent on those men who were crossing this level crossing to look out for themselves; and that is no doubt the case. The blame can only be attached to the British Transport Commission if it is proved. The judge held that it was not proved and I do not see my way to take any different opinion from him.

I would dismiss the appeal.

MORRIS L.J. I have reached the same conclusion. This was a most distressing occurrence and the facts merited the very careful presentation of them which we have received in this court. The position was that the railway crossed not a public carriage road but a private road. The road belongs to Mr. Riseborough, who is the occupier of Capton Hall. It is used by him, by his visitors, and by those who reside in cottages which are near by. It is clear that there is what is called an accommodation crossing, and that there was a duty on the part of the Transport Commission to do what was reasonably necessary in all the circumstances to provide against danger to persons or animals crossing the railway.

We were referred to the Railway Clauses Consolidation Act of 1845. The duty imposed by section 68 of the Act includes the duty to maintain gates. There is a provision that the company shall make and at all times maintain works for the accommodation of the owners and occupiers of lands adjoining the railway; there is included an obligation to make and maintain such convenient gates as shall be necessary for the purposes of making good any interruptions caused by the railway to the use of lands through which the railway passes.

There was, I think, a duty not to expose users of this crossing to any perils beyond those ordinarily inherent in the user of an accommodation crossing. In the case to which we were referred, *Smith* v. *London, Midland and Scottish Railway Co.*,[3] Lord Russell, in his judgment in the Court of Session, said: "It "appears to me that the duty of a railway company whose line "travels over what is called an 'accommodation crossing' is to "use all reasonable precautions, care and skill to protect "members of the public who may be using that crossing. The "result accordingly is that every case requires its own formula- "tion of the particular duty devolving upon the company, "dependent upon the special features which are present, "physically and otherwise, in relation to the particular crossing."

This case has been presented in two ways. First, it has been said that there was negligence on the part of the Transport Commission in the planning and management of their railway

[3] 1948 S.C. 125, 139.

system. It has been said that they failed to provide precautions in train operation which were in the circumstances necessary. Secondly, the case has been put as one in which there was negligence on the part of the driver operating the particular train on the particular day.

The way in which the law is stated in the Scottish case does not seem to me to differ from the way in which it was stated in the judgments in *Cliff* v. *Midland Railway Co.*[4] In the judgments in that case of Mellor J. and Lush J. both negligence in system and negligence in operation are referred to. Mellor J., for example, said this[5]: "and in crossing a footway on a level "the company are bound, as to the mode of working their "railway, as to the rate of speed, and signalling or whistling, or "other ordinary precautions in the working of a railway, to do "everything which is reasonably necessary to secure the safety "of persons who have to cross the railway by means of the "footway."

He later said[6]: "I have already said that the legislature, "when it authorizes a railway company to construct a railway "and to work it, does by implication require that the company "shall work it in the ordinary way, and shall take all usual and "reasonable precautions in the working of the traffic, in the "management of the trains up and down the line, as experience "shows to be proper and necessary."

Lush J. said this[7]: "I think that where the legislature "authorizes a railway to cross a way, public or private, upon a "level, and does not require from the company any precaution "to avoid danger, the legislature intends that the persons who "have to cross that line should take the risk incident to that "state of things. But, it may be, and I am inclined to think "that it is, a sound principle that if the railway company, in "the construction of the works so authorized,—in the exercise "of the discretion which the legislature has vested in them,—do "anything which prevents persons passing over the line from "taking care of themselves, and exposes them to greater peril "than is ordinarily incident to a level crossing, the company "thereby impose upon themselves an obligation to take other "than the usual precautions for the protection of persons who "have a right of pass there, and, as it were, to make up to the "public for that which they have taken away from them."

Here was a private road across which this railway was constructed: thereafter there was this accommodation crossing with gates put in position by the railway company: there was clearly a duty on the part of the railway company to do what was reasonably necessary in the particular circumstances to provide against danger to those using the crossing. As Lush J. has stated, there are certain perils which must be incident to and inevitable in the

[4] (1870) L.R. 5 Q.B. 258.
[5] Ibid. 261.
[6] Ibid. 262.
[7] Ibid. 264.

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user of a crossing of this kind; but those operating the system must take reasonable care not to expose people crossing to perils beyond those which are ordinarily incident to the user. For example, those responsible for the railway should consider whether the line is straight for a reasonable distance from the crossing, or whether there is a curve at such a distance as may create a danger to those who are using the crossing. If there is a curve near by, then those using the crossing may not see the approach of a train, and the railway authority must do what in particular circumstances is reasonable in order to minimize or not to add to the risk. So, a railway authority should consider whether there are any unusual circumstances relating to a crossing which add to the danger of those who use the crossing.

If there have been accidents and a history of any troubles or disasters, it would be reasonable to make inquiry as to how and why they had come about, and if steps ought, in the light of such inquiry, reasonably to be taken which could minimize the perils, then doubtless such steps would have to be taken. Furthermore, regard must be had to the condition of the gates, their physical condition and everything that relates to the way in which they are used.

It seems to me that there are many features of the present case which distinguish it from the Scotch case, *Smith* v. *London Midland and Scottish Railway Co.*[8] In that case the gate was more often open than not, and indeed the Lord President says[9]: "since 1940 there has been no gatekeeper, and I do not think that "I am overstating the position when I say that the company's "system of precautions has latterly been not only defective but "non-existent. The gates are now, and have for some years "been, normally open."

Lord Russell in his judgment referred to the gate as "the "almost ever-open gate."[10]

Now, endeavouring to approach this part of the case in the light of the guidance given by the authorities, it does not seem to me that there are here any unusual circumstances which have created an added danger for those using this crossing beyond those which are necessarily incident to the user of the crossing. First of all, there was a view from the crossing which extended to a distance of over 425 or 440 yards. The police sergeant was asked: "Of course, if one gets through this gate in a car, one "has got quite a substantial piece of roadway between the two "crossing gates from which you get considerable visibility along "the down line, do you not? You get visibility of 440 yards from "the centre of the gate? (A) Yes."

Then it is shown by the evidence that the state of affairs now existing has been in existence for approximately a hundred years; and the lay-out here is such that a car could pass through the gate and be halted on the crossing before being near the lines.

[8] 1948 S.C. 125.
[9] Ibid. 137.
[10] Ibid. 140.

and so could be halted in a position from which a clear view could be commanded.

Next, I think it is of great significance that there is no history of any accident having taken place. The user of this crossing was denoted by evidence as to a census that was taken on January 18, 19 and 20. The census related to the hours from six in the morning till 10 at night. The figures of those three days show that during those hours on those days there was an average per day of 13 motor vehicles, 24 cycles and 8 pedestrians.

Furthermore, there seems to be in this case no history of any lack of concern on the part of the railway authority in regard to the condition of these gates and to the necessity of having them closed. There was a difference of opinion between Mr. Riseborough and the railway authority. They wanted padlocks put on the gates with keys for the users. Mr. Riseborough did not want them. He thought that the gates were too heavy, and, rather as a protest, he left a gate open. He, so to speak, invited a prosecution and he was prosecuted. Other people were prosecuted. The railway authority were insisting upon the gates being closed.

Furthermore, they required a ganger, the witness Cooper, to walk every day along the length of the line which included this crossing. His instructions were to look at the gates, to test them every time that he walked the road and to inspect them. We were referred in detail to the evidence of various witnesses as to whether recently the gates have been open or closed. I do not pause to go through the references which were given to us in the very careful submissions made to us. It seems to me that the effect of the evidence is that in recent times it was really only occasionally found that the gates had been left open. The evidence seems to me to establish that the railway authority have been at pains to try to ensure that the gates are kept closed.

It seems to me, therefore, that there are no features in this case which have made it reasonably necessary for the railway authority to take any steps in regard to this crossing which they failed to take. I therefore am of opinion that so far as concerns the system of train operation it is not shown that they failed in their duties.

Then, secondly, the case is put as being one in which the defendants are liable because the train driver was on this morning guilty of negligence in the driving of the train. I think that it is undesirable that the approach to this matter should be sought to be equated to the approach that is made when considering the driving of a motor-car along a public thoroughfare. The driving of a train and the driving of a motor-car are two quite different things. A train has priority on its track; it is being driven on a fixed track; it is normally expected to proceed to a time schedule; the driver has obligations to look out for signals by which in the main the running of the train along the track is controlled. Of course, he has a duty to do all that is reasonable to keep a look

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out along the path that he will travel and to do all that is reasonably possible to look out for any obstructions there may be on the line; but it would be too exacting I think if it were said that he must look sideways to see whether something approaches from a side road. He has the responsibilities of seeing that his engine is in the condition that it ought to be in and the great responsibility of seeing that the signals permit of his progress.

I was impressed by the submission that was made that it was surprising that the lights of the motor-car were not seen either by the driver or by the fireman. Negligence is not alleged against the fireman, but against the driver. The driver was on the left hand side of the footplate, looking through the side window. He was looking for his signal. He did not see his signal. That is accepted. While it may be somewhat perplexing why neither the driver nor the fireman saw the headlights, I cannot but think that there is really some explanation. It may well be that at the time that the car reached the crossing the headlights were pointed away from the on-coming train with the result that the driver was not negligent in not having seen the beam of the headlights. I think there is great force in the submission made by Mr. Neil Lawson that in any event it may be that this terrible calamity would not have been averted had the headlights been seen. The driver did whistle when he was 175 yards from the crossing. It seems very unlikely that if that did not avert this accident, the sounding of a whistle a second or two sooner would have had any effect. But, whether that be so or not, I am not satisfied on the evidence that it is shown that the driver of the train was guilty of any negligence. I therefore think that the judge came to a correct conclusion.

PARKER L.J. I agree. We were referred to a number of cases but the only passage to which I wish to refer is a passage in the judgment of Scrutton L.J. in an unreported case of *Burrows* v. *Southern Railway Co.* referred to and set out in *Knight* v. *Great Western Railway Co.*[11] Scrutton L.J. said this: "Now "I should be very reluctant to lay down a rule that at any private "crossing the railway company is bound to use special precautions "of some kind. I can quite conceive of cases where owing to "a sharp turn in the railway, or the presence of large numbers of "trees in a cutting obstructing the view, a jury may find 'We "'think some reasonable precautions should be taken even at a "'private crossing.' But I ask myself, and I have considered "the evidence very carefully, whether at this crossing as we "see it, and on the facts we know, there was anything to dis-"tinguish it from any other private crossing where the railway "company has for some reasons granted rights to particular people "in the locality, but not to the whole public, because obviously "there are great differences between cases where any member

[11] [1943] K.B. 105, 108; 58 T.L.R. 352; [1942] 2 All E.R. 286.

" of the public, not having seen the crossing before, may come to " a crossing and cases where the crossing is only used by people " who are always using it, because they are in the locality and " using it for the purposes of their business."

That seems to me to be a useful passage, and approaching the matter in the way that Scrutton L.J. did, I can see nothing in what I may call the lay-out of this crossing which called for special precautions on the part of the British Transport Commission.

It is true that the crossing was at an angle, but any difficulty in looking to the left along the lines was largely obviated by the very considerable space which existed between the south gate and the lines themselves, the space in which any prudent driver of a motor-car would pull up and stop and look carefully in both directions.

Secondly, it is said that there was an insufficient look-out to the left in that there was a railway bridge and a bend in the line. But the evidence here is that from a position in the centre of the south gate one can see 440 yards along the down line, which distance would decrease as one crossed the crossing; but at all times one could see up to the bridge, which was 350 yards away. It seems to me, as the judge held, that that is an ample distance in which to be able to see an on-coming train.

Finally, it is said that the presence of the distance signal in this case constituted a trap, in that if the signal was horizontal, a driver of a car might think that no train was in the vicinity and that he could safely cross. So far as this case is concerned, that is pure speculation. One does not know whether the deceased did look up at the signal which was at rather a sharp angle; and, if so, whether he did see the light and position of the signal, and whether he was misled. But, speaking for myself, having regard to the fact that on the evidence the light shown was an orange or amber light, I do not think any person would be likely to be misled. And finally, and, as it seems to me, almost conclusively, there is no history of any accident whatsoever at this crossing in the period of some hundred years during which it has existed.

Indeed, I think, throughout this case the mainstay of the appellants has been *Smith's* case [12] to which my Lords have referred. At first sight the facts in that case bear a very striking resemblance to the facts of this case. On analysis, however, I think that it was an entirely different case. In particular, the road there which crossed the railway was not a private road in the sense that it merely served, as in this case, the farm and cottages appertaining to the farm; it was a road, albeit not a highway, used by the public at large going from one village to another village. That seems to me to be an entirely different case. And again in *Smith's* case, no doubt owing to that public user, it was impossible for the railway to take any effective

[12] 1948 S.C. 125.

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steps, and indeed they took no steps, to secure that the gates were kept closed. That is quite different from the present case where the evidence shows that there was a very considerable attempt through the owner of the farm, Mr. Riseborough, and by their servant, the ganger, to keep these gates closed. The evidence is that of latter years, at any rate, they are kept closed most of the time.

Finally, in *Smith's* case there was evidence—and this evidence was accepted—that the driver of the car had slowed to 5 miles an hour, had seen the distance signal with the signal horizontal and had really been misled by it.

So far as the alleged negligence of the crew of the engine is concerned—and for this purpose I am not making any real distinction between the fireman and the driver, albeit that I think that strictly no negligence is alleged against the fireman—be that as it may, I am satisfied for the reasons given by my Lords that no negligence is proved on the part of the crew of the engine. Again, in saying that I am not unmindful of the fact that both the Lord President and Lord Keith in *Smith's* case [13] held that on the facts of that case there was negligence on the part of the crew in failing to keep a proper look-out. As I have said, that is a very different case; but if and in so far as the Lord President and Lord Keith were saying that it is the duty generally of drivers and firemen to take note of any traffic approaching a crossing as distinct from forming an obstruction on it, I would respectfully feel that they had gone too far.

The truth of the matter, as it seems to me, in the present case is that this unfortunate deceased must in a moment of forgetfulness or a moment of rashness have driven right on to and across this crossing. The judge has so held and it seems to me that it is an almost irresistible conclusion, because if he had stopped or reduced his speed and had looked, he must have seen the approaching train and have seen it in ample time to avoid it.

For these reasons and those given by my Lords I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co. for Gotelee & Goldsmith, Ipswich; M. H. B. Gilmour.*

F. R. D.

[13] 1948 S.C. 125.

[COURT OF APPEAL.]

* GOLD *v.* BRIGHTON CORPORATION.

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July 27.

[Plaint No. L. 1359.]

Denning, Birkett and Parker L.JJ.

Landlord and Tenant — Act of 1954 — *Business premises (Security of Tenure) — Terms of new tenancy — Restriction on existing user of premises imposed by county court judge — No evidence to justify restriction of user—Intention of Act—Improper exercise of discretion to determine terms of new lease—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23, 35.

The tenant of shop premises in North Street, Brighton, dealing in new and secondhand furs and clothes, applied under the Landlord and Tenant Act, 1954,[1] for the grant of a new lease to begin on the expiry of a notice to quit served on her by the landlords, the Brighton Corporation. The landlords agreed to grant a new 14-year lease, but proposed that the new lease should contain a clause prohibiting the sale or purchase of secondhand goods save with the consent of the corporation; and the issue as to the terms of the new lease was referred to the county court judge. At the close of evidence by the estate valuer to the corporation, the judge elicited from him the statement that he "would expect a prudent "landlord to restrict the user of these premises so as not to lower "the tone of the district." The judge thereupon granted a new lease, but imposed a clause restricting the user to exclude the sale or purchase of secondhand goods other than furs save with the consent of the corporation, and ordered the tenant to pay half the corporation's costs. On appeal by the tenant:—

Held, (1) that such restriction on user as would not protect the tenant in respect of her existing business or would deprive her of an important part of it was contrary to the intention of the Act, and accordingly the terms of the new tenancy should be such as to permit her to use the premises for her existing business, including dealings in secondhand clothes.

(2) That in the absence of sufficient evidence that a secondhand clothes shop in that locality would lower the tone of the district, the judge, exercising the wide discretion conferred on him by section 35 of the Act, was not justified in so restricting the user.

(3) That the tenant should not have to pay any part of the landlord's costs in the county court since the parties had had to come to court after failing to agree on the terms of the new lease.

Per Denning L.J. There is no need to give the tenant unrestricted user of the premises such as to enable her to carry on any kind of shop in them, for the object of the Act is to protect the tenant in respect of his or her business and not to put a new saleable asset into her hands.

APPEAL from Judge Dutton Briant, sitting at Brighton County Court.

[1] S. 35: "The terms of a tenancy "granted by order of the court under "this Part of this Act (other than "terms as to the duration thereof and "as to the rent payable thereunder) "shall be such as may be agreed "between the landlord and the tenant or as, in default of such agreement, may be determined by the "court; and in determining those "terms the court shall have regard to "the terms of the current tenancy "and to all relevant circumstances."

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In 1931 the Brighton Corporation purchased shop premises at No. 40, North Street, Brighton, under a proposed scheme for road-widening; but in 1940 they granted a lease on a yearly tenancy, terminable at six months' notice, to one Simon Zeff, a bespoke tailor, who dealt in secondhand clothes. On February 8, 1954, Zeff assigned the lease to the tenant, Mrs. S. Gold, who thereafter carried on, under the name of "Adrienne, Furs and Fashions," a high-class business as a dealer in new and secondhand furs and new and secondhand ladies' wear, the main part of that business being in secondhand clothing. On May 7, 1955, the corporation served on her notice to quit, to expire on December 25, 1955. The tenant thereupon served on the corporation the requisite notice under the Landlord and Tenant Act, 1954, asking for a new lease for a term of 14 years, at a rent of £400 per annum, and otherwise on similar terms so far as applicable to those contained in the existing tenancy agreement dated December 17, 1940. That agreement contained a clause which provided that the tenant was "not to use or suffer or "permit to be used the said premises or any part thereof otherwise than as shops offices photographers' studio or dental "surgery with or without residential flats or accommodation "without the consent of the corporation," and accordingly entitled the tenant to use the premises for any kind of shop business which she chose to carry on there.

The corporation filed an answer to that notice on December 7, 1955; and later, on April 18, 1956, delivered an amended answer, which stated that the corporation did not oppose the grant of a new tenancy, but objected, inter alia, to the term being on similar terms to those of the existing tenancy agreement, in so far as such terms were not in accordance with the terms of a draft lease annexed to the answer. The annexed draft lease contained the following terms: "Not to use or suffer to be used "the demised premises otherwise than as a furriers and for the "sale of ladies' wear without the consent of the corporation . . ."; and (clause 14): "Except with the prior consent of the cor"poration . . . not to use or suffer to be used the demised "premises for the sale or purchase of secondhand goods."

The issue as to the terms of the new lease was referred to the county court judge, and at the hearing on May 28, 1956, the estate valuer for the corporation gave evidence on its behalf. At the conclusion of that evidence, the valuer, in reply to a question by the judge, said that "he would expect a prudent landlord to "restrict the user of these premises so as not to lower the tone "of the district."

The judge granted the new tenancy of 14 years at a rent of £650, but said that it was reasonable to put some restriction on the user of the premises and ordered that while children's wear could be sold in addition to ladies' wear, the user of the premises for the sale and purchase of secondhand goods, with the exception of furs, should be prohibited save with the consent of the

corporation. He directed that the tenant should pay half the costs of the corporation.

The tenant appealed, asking that the order of the judge should be varied in respect of the restriction of user and costs. At the hearing of the appeal the court was informed that since these proceedings the premises next door to those of the tenant—No. 40A, North Street—where the tenant's daughter had carried on a secondhand clothes business for some years, had been the subject of a similar application for a new tenancy, and a new lease had been granted on terms which permitted the tenant to sell secondhand clothes in the premises.

Harold Brown Q.C. and *T. J. Sophian* for the tenant.
Leslie G. Scarman for the corporation.

DENNING L.J. stated the facts and continued: The tenant says that it was wrong for the judge to restrict her from selling secondhand clothes, because that would deprive her of part of her existing business. She says that the secondhand clothing was the main part of her business. She said it was a very high-class secondhand shop, and it was the main part of her business. She asks for the restriction to be removed, on the ground that that was not a proper order for the judge to make. It is common ground that the rent of £650 is not affected by the restriction one way or the other.

The reason why the corporation seek to impose this restriction is because they say that to use these premises in North Street, Brighton, for secondhand clothes would lower the tone of the street: and would hamper them in their efforts to keep up the character of the street. There was very little evidence in the court below to support this contention—it was only hinted at—and since the decision, the corporation have acted in a way that is hardly consistent with it. It has been disclosed to us that the very next door premises, No. 40A North Street, which are also owned by the corporation, have since been the subject of a similar application for a new tenancy. A new lease has been ordered whereby the tenant of those premises (a relative of Mrs. Gold) is permitted to continue to sell secondhand clothes there as she has done for some years.

Turning now to the Act of 1954, I think it plainly intends to protect the tenant in respect of his business. Section 23 says that the Act applies to premises which are occupied by the tenant "for the purposes of a business carried on by him." Inasmuch as the tenant is to be protected in respect of his business, the terms of the new tenancy should be such as to enable him to carry on his business as it is. They should not prevent him from carrying on an important part of it. At any rate, if he is to be prevented from using the premises in the future in the way in which he has used it in the past, it is for the landlord to justify the restriction: and there ought to be

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strong and cogent evidence for the purpose. I find no such evidence here. The mere suggestion or hint that the tone of the street would be lowered is not enough. On this ground I would allow the appeal.

It seems to me that the new tenancy ought to be such as to permit the tenant to carry on her existing business of a furrier and seller of ladies' wear, and the additional business of selling children's wear, and that it should not be confined to new clothes, but should extend to secondhand clothes as well.

A question has arisen before us as to whether the tenant should not be allowed more liberty still. It was suggested that she should be left unrestricted to the same extent as in the former lease, with the result that she could carry on any kind of shop there. I do not think that would be right. The judge, when he gave his judgment, said that he thought it was reasonable to make some restriction. It is to be remembered that the object of this Act is to protect the tenant in respect of his or her business, and not to put a new saleable asset into her hands. The clause which I have proposed enables Mrs. Gold to carry on her existing business, and, indeed, in respect of children's wear, enables her to expand it. That is, I think, sufficient. After all, if in the years to come a change of user was reasonable, no doubt the corporation would give their consent. It seems to me that this appeal should be allowed and the terms of the new lease ordered by the judge should be varied in the way I have said.

Then a question arose as to costs. The judge ordered the tenant to pay one-half of the corporation's costs. I do not think that was right. Both parties negotiated for a new lease and could not come to terms. It had to be referred to the judge on the amount of rent and other terms. He struck a middle course. I see no reason why the tenant should have to pay any part of the landlord's costs. I think that there should be no costs of either side in the court below; but in this court the appellant, Mrs. Gold, should have her costs.

BIRKETT L.J. I am of the same opinion, and for the reasons which have been given by my Lord. As I took rather a strong view about this matter, and, I am very much afraid, was too vocal about it, perhaps, by way of appeasement, I had better add a word or two for myself.

I think that when one has an Act like the Landlord and Tenant Act of 1954, when the provisions are so very important with regard to tenancies, and it is used to strike at the livelihood of somebody, and a very vague phrase like "the tone of "the district" is used, the matter wants very close examination.

It was contended here, for example, that one could sell a secondhand mink coat in this particular street without lowering the tone of the district, but if one sold a secondhand ladies' costume, because some lady found that it did not fit her properly

or for some other reason, that, for some obscure reason, lowered the tone of the district. I was never able to see it. I think, as I said, that if one is going, under an Act of this kind, to say to somebody who has a business there: "You shall not carry on "that business though it be the principal means of your liveli- "hood," it is so important that it wants a little careful examination.

Mr. Scarman naturally said: "If you look at section 35 of "the Act, the discretion which is vested in the county court "judge is naturally made very wide." The section provides that in default of agreement between landlord and tenant, the terms of a tenancy shall be such as "may be determined by the court" —that is the county court—"and in determining those terms, "the court shall have regard to the terms of the current tenancy "and to all relevant circumstances." Mr. Scarman says: "Phrasing it as widely as that, the county court judge was in a "position, particularly in view of his local knowledge, to look "at the tenancy, to look at the premises, to look at all the "facts proved before him, and to come to his own conclusions."

First of all, I think on that matter with my Lord, that the manifest purpose of this Act quite palpably, certainly in Part II—which is headed "Security of tenure for business, professional "and other tenants"—was that when a particular tenancy came to an end, that tenant (who possibly by industry had built up a very fine business there) should have some security.

If a county court judge can say: "You have carried on this "business for two years and your predecessors have carried it on "for ten years, but if you get a new tenancy, you cannot carry "on that business but it will be restricted in some particular "way," it wants very careful consideration before that can be regarded as a matter which the county court judge can use in the way suggested in this case.

The Act was designed to provide security for the tenant, and I do not think myself there is room for a prohibition of the nature sought to be imposed in this case. But, quite apart from that, even if I were wrong about that (which I venture to hope I am not), it is an essential thing that if one is going to make such a change, there should be some evidence to support it. Rather vaguely, as I said, it was suggested that dealing in secondhand clothing would in some way lower the business tone of the district. If it be so, there should be some evidence given about it and opportunity for the person most closely concerned to offer evidence to the court about it, too. It is a very remarkable thing, as I think, that in the notes which we have of the case as it was conducted before the judge, there is no direct evidence of that kind at all. It is quite true that Mr. Scarman says that one may infer from this or from the other question the point that was at issue; but when, for example, Mr. Nye, the estates valuer to the corporation, was called, he never said a word about it in chief. He never said to the county court

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judge: "The corporation instruct me to say how very important "it is that secondhand clothing should not be sold along there." Indeed, he was compelled to say: "Why, very next door, in "40A, the corporation are permitting this very kind of thing to "be done." It was not till the very end of the professional witnesses' evidence that he said, apparently in answer to some question by the court, "I should expect a prudent landlord to "restrict user so as not to lower the tone of the district." So would I; but I should like to hear some evidence of what it is suggested does it and how it does it, and some opportunity given for the person most closely concerned to be able to deal with it.

It is on those two points that I feel myself that this decision of the county court judge ought not to be supported. There were other matters. I think it is now conceded there was no real argument here about tenure and user being associated; and Mr. Scarman said, with very great frankness, that there was no question about the rent being fixed because of this or the other condition. It seems that it was left with the very vague point that in some way the tone of the district was to be lowered.

Giving the best consideration I can to all the points which were so carefully put before the court by Mr. Scarman, I feel that this judgment in this respect ought not to stand, and I, too, would be in favour of allowing the appeal to the extent indicated by my Lord.

On the question of costs, I do not desire to add anything to what my Lord said. I agree with it in its entirety.

PARKER L.J. I agree, and would only add a very few words. Undoubtedly under section 35 of the Act the county court judge is given a very wide discretion, but in the ordinary case, at any rate, it is difficult to think of any considerations which would justify changing the restrictions on user in such a way as to alter or limit the nature of the business which the tenant has lawfully carried out on those premises and which it is clearly the object of the Act to preserve. This case, however, as it seems to me, is a somewhat special case, in that the tenant only had a tenancy from year to year, the landlords being enabled to give a six-months' notice to expire on any quarter day. Nevertheless, the landlords throughout have been ready and willing to grant a tenancy for a fixed term of 14 years and to abandon the right which they had previously of giving a six-months' notice. In those circumstances, it might well be that a landlord would desire to make the case, and could make the case, that there ought to be some restriction on user, at any rate in that he was abandoning the right to give six months' notice; but in this present case not only did the landlords offer a 14-years' lease, but negotiations proceeded on that basis for some time, and, as the county court judge himself said in his judgment: "The "only issue is as to the terms on which a lease of that duration "shall be granted." It seems to me that the corporation utterly

failed to make out any case for a restriction of user. Such evidence as there was was of the flimsiest nature and quite insufficient to justify the imposition of a restriction which seriously alters the nature of the business previously carried on. I would allow the appeal and I agree with the proposed order.

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Appeal allowed with costs; no order as to costs in court below. Terms of tenancy agreement varied.

Solicitors: *Amery-Parkes & Co. for Gates & Co., Brighton; Sharpe, Pritchard & Co. for W. O. Dodd, Town Clerk, Brighton.*

M. M. H.

[COURT OF APPEAL.]

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July 23, 24, 25.
Singleton, Morris and Romer L.JJ.

Metropolis—London Government Act—Notice—Notice to quit by county council—Notice by council signed by officer of council—Authority of officer not proved by evidence or by statement on notice—Warrant for possession refused—London Government Act, 1939 (2 & 3 *Geo.* 6, *c.* 40), *s.* 184—*Landlord and Tenant Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 25 (1) (*a*).

Landlord and Tenant — Act of 1954 — *Business premises (Security of Tenure)—Notice to quit—Form.*

Justices—Case stated—Remission—New point.

By a memorandum of agreement the London County Council let to a tenant for storage purposes premises on land which they now wanted as a site for the carrying out of a housing scheme under the Housing Act, 1936. Clause 6 of the agreement provided that a notice by the landlord to determine the tenancy should be in writing and signed by the director of housing and valuer of the council, an office which at the time of the lease was filled by one man. It had since been divided, the director of housing being in charge of dwelling-houses and the valuer being responsible for business premises. Therefore when a notice to quit was served on the tenant it was signed only by the valuer, and the action brought by the council before a metropolitan magistrate under the Small Tenements Recovery Act, 1838, for a warrant for possession of the premises was dismissed on the ground that the notice should also have been signed by the director of housing, and was therefore bad. The notice was expressed to be given under section 25 of the Landlord and Tenant Act, 1954, but no point under that Act was raised before the magistrate.

On appeal by the council to the Divisional Court, the council took the point for the first time that the notice was valid under section 25 of the Landlord and Tenant Act, 1954, and that the valuer had power to sign the notice by virtue of section 184 of the

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London Government Act, 1939.[1] No evidence was given that the valuer was authorized to sign the notice nor was there a statement in the notice that he was so authorized. The Divisional Court dismissed the appeal as no such evidence had been given.

On appeal the Court of Appeal were asked to remit the case to the magistrate for him to hear evidence whether the valuer was authorized by the council to give the notice:—

Held, (1) that, the council having failed to give or tender any evidence that the valuer was authorized to sign the notice, the notice was not a document in accordance with section 184 (2) of the London Government Act, 1939.[1]

(2) That it would not be right to remit the case to the magistrate for the determination by him of a question which would involve the hearing of evidence and which had not been raised by the council at the original trial.

Kates v. *Jeffery* [1914] 3 K.B. 160 applied.

APPEAL from the Divisional Court.

By a memorandum of agreement dated September 4, 1953, the London County Council let to the defendant, Charles Albert Farren, certain premises in Gosset Street and Turin Street, Bethnal Green, for storing purposes. The buildings were situate, together with other premises, on land on which the council intended to erect dwellings for the housing of old people under the Housing Acts. Clause 6 of the memorandum of agreement provided that a notice by the landlords to determine the tenancy should be in writing and signed by the director of housing and valuer of the council. At the time of the granting of the tenancy the two offices had been under one head, but they had since been divided, the director of housing being in charge of dwelling-houses and the valuer being responsible for business premises. Accordingly when, on February 2, 1955, the council served notice on the tenant to terminate his tenancy on August 5, 1955, the notice, which was expressed to be given under the provisions of section 25 of the Landlord and Tenant Act, 1954, was signed only by one Toole, as valuer and agent to the council.

The tenant not having vacated the premises, the council brought an action under the Small Tenements Recovery Act, 1838, before Mr. Leslie Marks, at Old Street Magistrate's Court, for a warrant to recover possession of the premises. The magistrate, holding that the notice to quit was bad because it was not signed by both the director of housing and the valuer, refused the application for a warrant.

[1] London Government Act, 1939, s. 184: "(1) Any notice, order or "other document which a local authority is authorized or required by or "under any enactment (including any "enactment in this Act) to give, "make or issue may be signed on "behalf of the authority by the clerk "of the authority or by any other "officer of the authority authorized "by the authority in writing to sign "documents of the particular kind or "the particular document, as the case "may be. (2) Any document purporting to bear the signature of the "clerk of the authority or of any "officer stated therein to be duly "authorized by the authority to sign "such a document or the particular "document, as the case may be, shall "be deemed, until the contrary is "proved, to have been duly given, "made or issued by the authority of "the local authority."

The council thereupon appealed to the Divisional Court (Lord Goddard C.J., and Cassels and Donovan JJ.), which on April 25, 1956, dismissed the appeal.

Lord Goddard said that the notice to the tenant was given under section 25 of the Landlord and Tenant Act, 1954. That Act provided that the landlord should terminate the tenancy by himself signing the notice, although it was quite possible, if proper steps were taken, that a landlord could sign by an officer. If the notice had contained a statement that Toole, the valuer, was authorized to sign, it perhaps would have been a good notice by reason of section 184 of the London Government Act, 1939, which enabled the council to sign by an officer. Evidence must be given that he was authorized to sign or the notice must contain a statement that he was authorized. It was not a good notice under the Act of 1954. It was a point of the highest technicality, but one of which the tenant was entitled to take advantage.

The council further appealed, asking that the case should be remitted to the magistrate's court with an intimation (1) that the notice was not invalid on the grounds given in the case stated by the magistrate; (2) that the notice was governed by the Act of 1954 and not by the memorandum of agreement between the parties; and (3) that if the question of authority to sign the notice was raised by the tenant the council should be given an opportunity to adduce evidence. Alternatively the court was asked to remit merely with an expression of the court's opinion.

R. E. Megarry Q.C. and *C. Fletcher-Cooke* for the London County Council.

Mark Littman for the tenant.

Cases cited in argument are referred to in the judgments.

SINGLETON L.J. This case arises out of an application by the London County Council for the possession of certain premises in Gosset Street and Turin Street, Bethnal Green, of which premises the London County Council are owners and are the landlords for the purposes of the Landlord and Tenant Act, 1954. They applied to the magistrate, Mr. Leslie Marks, for an order for possession. The application failed. They asked for a case to be stated by the magistrate. A case was stated. The Divisional Court upheld the determination of the magistrate; and the London County Council appeals to this court against the judgment of the Divisional Court.

The case stated is very short. It is desirable that I should read it so that it may be seen precisely what the question before the magistrate was. In paragraph 1 of the case it is stated that on November 11, 1955, application was made, pursuant to the Small Tenements Recovery Act, 1938, by Mary Winifred Westgate, acting for the London County Council, for a warrant to recover possession of the premises which I have mentioned.

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In paragraph 2 the magistrate said: "I heard the said complaint on November 11, 1955, and found the following facts: "(a) The above-named tenement was let to the respondent by a "memorandum of agreement dated September 4, 1953, and made "between the London County Council by Cyril Herbert Walker "their director of housing and valuer and agent of the one part "and the respondent of the other part at a rent of £36 per month "payable monthly in advance." Thus the rent of the premises, which were used for storage purposes, was something over £400 a year. "(b) The tenancy so created commenced on August 1, "1953, and was to continue until determined as provided by the "said memorandum. Clause 6 of the said memorandum is as "follows: 'The tenancy may be determined by one month's "'notice to expire at any time. If determined by the council "'it shall be by a written notice signed by the director of housing "'and valuer to the council and served on the tenant or left for "'the tenant upon the premises or if the same are unoccupied "'affixed to the premises one month at least prior to the day "'of determination. If determined by the tenant it shall be by "'a notice in writing signed by the tenant and served upon the "'director of housing and valuer or one of his assistants at the "'offices of the council one month at least prior to the day of "'determination. The notice in either case may instead of being "'served be sent through the post by registered letter addressed "'to the tenant at his last known address or to the director of "'housing and valuer at the offices of the council as the case "'may be.' (c) By a notice dated February 2, 1955, and served "upon the respondent and expressed to be given under the "provisions of section 25 of the Landlord and Tenant Act, 1954, "the London County Council purported to terminate the said "tenancy on August 5, 1955. The said notice was given by and "signed by Joseph Edward James Toole, valuer and agent to the "London County Council. (d) In spite of the said notice, the "respondent remained and remains in possession of the above-"named tenement. (e) The London County Council require "possession of the above-named tenement for redevelopment of "a housing estate, pursuant to Part V of the Housing Act, 1936. "(f) At the time of the grant of the said tenancy, the housing "and the valuer's departments of the London County Council "were combined in one department under the director of housing "and valuer to the council. Some time between the date of the "said grant and the service of the said notice the London County "Council resolved to split the combined department into two "departments, that of the director of housing and that of the "valuer to the council. (g) At the time of the giving of the said "notice Joseph Edward James Toole was valuer to the London "County Council. The director of housing was a Mr. Allerton."

Paragraph 3: "It was submitted by the respondent at the "close of the case for the appellant that there was no case for "the respondent to answer, and that the application should fail,

"upon the preliminary ground that the said notice was not "signed as required by the memorandum of agreement." Paragraph 4: "It was contended by the appellant that the valuer "was on February 2, 1955, the right and proper person to give "and sign the said notice on behalf of the London County Council "according to the standing orders of the London County Council "then in force." Paragraph 5: "It was contended by the respon- "dent that by the terms of the said memorandum of agreement "the said notice had to be signed by the director of housing and "valuer to the council and that since the functions of the director "of housing and those of the valuer were now exercised by two "different persons, the notice ought to be signed by both such "persons. The respondent further contended that in any event "there was no evidence that the said J. E. Toole had authority "to sign the said notice on behalf of the director of housing. "The respondent further contended that the standing orders of "the council could not affect the contractual position between the "council and the respondent and that in any event no such orders "had been proved in evidence." Paragraph 6: "I was referred "to no cases." Paragraph 7: "I was of opinion that the said "notice was bad because it was not given and signed both by "the director of housing and by the valuer to the London County "Council and that in any event the said notice was not signed "by the director of housing or by anyone on his behalf, and "I accordingly refused the application for a warrant." Paragraph 8: "The question for the opinion of the High Court is "whether or not the said notice was good notwithstanding that "it was given and signed only by the valuer to the London "County Council."

I have read the case stated by the magistrate in full in order to make clear beyond doubt what the position was when the application came before him. It is clear that the only question which was raised was whether the notice given by the London County Council or by someone who is said to be acting on their behalf was a good notice, for by clause 6 of the tenancy agreement it was provided that notice to determine should be "by a "written notice signed by the director of housing and valuer to "the council." The contention put forward on behalf of the tenant was that the notice which had been given was not a document signed by the director of housing and valuer to the council.

The position had changed. The London County Council had determined to divide the department, which they had in the year 1953, into two departments, and the contention put forward on behalf of the tenant was that, as that had happened, there must be, in order to determine the tenancy, a notice signed by the director of housing and signed also by the valuer to the council. Some might think it unnecessary in one sense, having regard to the change in the constitution of the office of the London County Council. If one looks further down clause 6 of the

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tenancy agreement, one finds the words "or one of his assistants "at the offices of the council," from which it appears that at the time that that document came into existence it was only contemplated there should be one signature. It is unnecessary to go further into this point for reasons which I shall give in a moment.

The magistrate was asked to determine the case upon that submission and upon nothing else, as he himself set out in the case which he has stated. He reached the conclusion that the notice was not in accordance with the contractual requirements, and he dismissed the application of the London County Council.

The case came before the Divisional Court on April 25, 1956. Mr. Megarry, who now appears for the London County Council, told us that the case took a very short time in the Divisional Court. Certainly he cannot say that of the hearing in this court, which has lasted quite a long time, as I ventured to point out to him. When the case was before the Divisional Court Mr. Fletcher-Cooke, on behalf of the London County Council, took a new point. He raised a question which had not been mentioned to the magistrate. The notice which had been given to determine the tenancy was signed by J. E. J. Toole, it was headed "London "County Council," and on the next line in still larger print was "Landlord and Tenant Act, 1954." It is a landlord's notice to terminate a business tenancy. It states at the head of it that the notice is given by Mr. Toole, valuer and agent to the London County Council, and it is a notice "terminating your tenancy "on August 5, 1955."

In accordance with the requirements of the Landlord and Tenant Act, 1954, clause 2 of the notice states: "You are "required within two months after receiving this notice to notify "me in writing whether or not you will be willing to give up "possession of the premises on that date." Clause 3: "I would "oppose an application to the court under Part II of the Act for "the grant of a new tenancy on the ground that on the termina-"tion of the current tenancy the landlord intends to demolish "or reconstruct the whole or a substantial part of the premises "or to carry out substantial work of construction on the whole "or part of them and that he could not reasonably do so without "obtaining possession of the premises." Clause 4: "This notice "is given under the provisions of section 25 of the Landlord and "Tenant Act, 1954. Your attention is called to the notes over-"leaf." The notes are notes reproduced from Form 7, which is the prescribed form for giving notice under section 25 of the Landlord and Tenant Act, 1954. The notice is signed by Mr. Toole as valuer and agent to the London County Council.

When Mr. Fletcher-Cooke appeared before the Divisional Court he pointed out that he was not arguing the contractual question which had been dealt with by the magistrate. The case he submitted was based entirely on the Landlord and Tenant Act, 1954. It is a matter for regret that that was not mentioned before the magistrate. I know that those who have to attend to

these cases have many other things to think about, and I realize, as we have been told by Mr. Megarry, that these cases often go through without any question being raised, and that many orders are made by lay magistrates, or by metropolitan or stipendiary magistrates, but at the same time I would point out that the notice is headed in large type "Landlord and Tenant Act, 1954," and, though I do not want to be critical of anyone, I am inclined to think that the first thing anyone going to a court to obtain a warrant for possession on a notice of this kind would do would be to look at the Landlord and Tenant Act, 1954. If reference had been made to Part II of that Act the position would have been mentioned to the magistrate. Part II of the Act of 1954 is headed: "Security of tenure for business, professional and other "tenants." Section 23 states the tenancies to which Part II of the Act applies.

I should like to make it clear that nothing I say in this case is intended to deal with anything other than a tenancy under Part II of the Act of 1954.

The marginal note to section 24 of the Act is "Continuation "of tenancies to which Part II applies and grant of new "tenancies"; and subsection (1) provides: "A tenancy to which "this Part of this Act applies shall not come to an end unless "terminated in accordance with the provisions of this Part of "this Act; . . ." The most important section is section 25. Subsection (1) reads: "The landlord may terminate a tenancy "to which this Part of this Act applies by a notice given to the "tenant in the prescribed form specifying the date at which the "tenancy is to come to an end (hereinafter referred to as "'the date of termination')." The prescribed form is Form 7 which appears in the Appendix to the Landlord and Tenant (Notices) Regulations, 1954. Section 25 deals with what is to happen when a notice is given, and it prescribes in particular that if a notice is given under that section it shall not terminate earlier than it would have done if it had been terminated under the contract. Rights of contract between parties are preserved to that extent at least.

Mr. Fletcher-Cooke pointed out in the Divisional Court that he relied upon section 25, which gave the landlord a right to terminate the tenancy by a notice given to the tenant in the prescribed form. He referred the Divisional Court to the prescribed form, and to the notice which he had given which was in the prescribed form, so it was claimed.

He was asked by a member of the court what authority Mr. Toole had to give the notice. Mr. Fletcher-Cooke thereupon referred the Divisional Court to the London Government Act, 1939, s. 184. That section is intended to simplify as far as possible the task of those who have to give notices on behalf of a local authority within the area of the London Government Act, 1939. Subsection (1) of section 184 provides: "Any notice, "order or other document which a local authority is authorised

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" or required by or under any enactment (including any enact-
" ment in this Act) to give, make or issue may be signed on
" behalf of the authority by the clerk of the authority or by any
" other officer of the authority authorised by the authority in
" writing to sign documents of the particular kind or the particular
" document, as the case may be." A local authority need not put its seal upon every notice. Their clerk may sign a notice on their behalf, or a notice may be signed by any other officer of the authority authorized by the authority in writing to sign documents of the particular kind, or the particular document. Subsection (2) provides: " Any document purporting to bear the
" signature of the clerk of the authority or of any officer stated
" therein to be duly authorized by the authority to sign such a
" document or the particular document, as the case may be, shall
" be deemed, until the contrary is proved, to have been duly
" given, made or issued by the authority of the local authority."
The notice had at the foot of it the name of Mr. Toole, valuer and agent to the London County Council.

The provisions of section 184 had been overlooked, or it was not thought necessary to follow them. Mr. Toole was an officer of the London County Council, but he was not stated in or upon the document to be duly authorized by the authority to sign such a document. Therefore, upon the face of the document, the document does not prove itself, as it would have done if the words which I have read had appeared upon it. Thus, when Mr. Fletcher-Cooke cited section 184 to the Divisional Court, he was armed with a document which might be described as a notice, but it was not a document which proved itself in the sense that there was nothing upon the document which would enable it to be said under subsection (2) of section 184 that Mr. Toole was authorized to sign that document or documents of that class.

Mr. Megarry in argument before this court said that, in general, if a document was signed by an agent for a landlord, signed as agent, the document was a good notice. In one sense no doubt that is right, but in regard to a document of this kind the statute prescribed what form of document shall be treated as a notice given, made or issued by the authority of local authority, and a document, in accordance with subsection (2), is to be deemed to have been so given until the contrary is proved. This document is not such a document so that there was no proof of authority upon the face of the document; and, moreover, no evidence was called before the magistrate to show that Mr. Toole was authorized to sign this document or documents of this character.

Thus a fresh point was taken on behalf of the London County Council before the Divisional Court. It is said by Mr. Megarry that a new point as to authority was sprung upon the London County Council in the Divisional Court. I do not think that is the right way to describe the position. The point that this was a good notice under the Landlord and Tenant Act, 1954, was

taken by and on behalf of the London Council Council. Then, quite naturally, someone asked what authority had Mr. Toole to sign it. The Divisional Court dismissed the appeal by way of case stated from the decision of the magistrate, and dealt with it both on the ground of the notice required under the contract of tenancy and also upon the terms of section 25 of the Landlord and Tenant Act, 1954.

Mr. Megarry told us that he did not now seek to say that the decision of the magistrate was wrong in regard to the requirement of two signatures. He has not argued that point in this court. He has asked us to consider the case solely under the provisions of the Landlord and Tenant Act, 1954. It is for that reason that I do not think it necessary to express any final view upon the only question raised before the magistrate. I propose to say no more about it. Mr. Littman did not argue it here, because Mr. Megarry and Mr. Fletcher-Cooke did not raise the point. Thus, so far as the argument in this court goes, the decision of the magistrate on the case put before him is not challenged, but Mr. Megarry submits that all we need consider is the Landlord and Tenant Act, and particularly sections 24 and 25.

The definition of " landlord " in section 44 of the Act shows that a landlord for the purposes of the Act of 1954 may be someone other than the person who entered into the contract of tenancy. The landlord within the definition may terminate the tenancy by a notice given in accordance with the provisions of section 25 (1). Unless those provisions are complied with the tenancy to which the Act applies does not come to an end. If the landlord is a local authority within the area of the London Government Act, 1939, all that is necessary is to comply with the terms of section 184 of that Act.

Lord Goddard C.J., having dealt with the position under the contractual notice, referred to the Act of 1954 which had been brought to the attention of the court, and he said: " That Act, " in section 24, provides: ' A tenancy to which this Part of this " ' Act applies shall not come to an end unless terminated in " ' accordance with the provisions of this Part of this Act.' That " is as clear as anything. These premises are premises to which " the Landlord and Tenant Act applies—that seems to be con- " ceded—and therefore section 24 provides that no matter what " the contract of tenancy says it can only be determined in the " manner provided by the Act. Then you find that section 25 " provides: ' The landlord may terminate a tenancy to which " ' this Part of this Act applies by a notice given to the tenant " ' in the prescribed form specifying the date at which the " ' tenancy is to come to an end (hereinafter referred to as " the " ' " date of termination ").' The notice that was served upon " the tenant is almost in banner headlines; it says: ' Landlord " ' and Tenant Act 1954 . . .' No doubt if this document had " contained a statement that Mr. Toole was authorized to sign,

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"then perhaps this document would have been a good docu-
"ment because it would have been signed by the landlord
"because the section enables the county council to sign by an
"officer. Either evidence must be given that that officer was
"authorized to sign or the document must contain a statement
"that the officer is authorized to sign. Then he is deemed to
"be authorized unless the contrary is proved."

Thus, upon this part of the case, the Divisional Court reached the view that, there being no evidence given or tendered that Mr. Toole was authorized to sign a document of this nature and the document not being in accordance with section 184 (2) of the London Government Act, 1939, there was no evidence of authority. I am of the same opinion.

There was no application made to the Divisional Court to remit the case for the consideration of the magistrate. I am not sure that one would have succeeded. We are asked in this court to remit the case to the magistrate so that he may come to a decision on hearing new evidence whether or not Mr. Toole was authorized by the London County Council to give notices of this character, or to give this particular notice.

The power is said to arise under section 6, or possibly under section 7, of the Summary Jurisdiction Act, 1857. Section 6 (as amended) provides: "The court to which a case is transmitted "under the Magistrates' Courts Act, 1952, shall hear and deter-"mine the question or questions of law *arising thereon*, and "shall thereupon reverse, affirm, or amend the determination in "respect of which the case has been stated, or remit the matter "to the justice or justices, with the opinion of the court thereon, "or may make such other order in relation to the matter, and "may make such orders as to costs, as to the court may seem "fit; and all such orders shall be final and conclusive on all "parties. . . ." I emphasise the words "*arising thereon.*"

The case stated by the magistrate is confined to the question whether or not the notice is a good notice, having regard to the fact that it was only signed by the valuer and not by two persons, as the tenant contended it ought to have been. The magistrate determined that case upon the facts before him. It is now said on behalf of the London County Council that another case ought to be put before him, a case arising under sections 24 and 25 of the Landlord and Tenant Act, 1954. That is not the case which was raised before the magistrate. He has stated a case. The point raised in the Divisional Court under the Landlord and Tenant Act, 1954, is not something "arising thereon," so it appears to me. That is what makes me doubt whether or not the case could properly be sent back, even if a wide interpretation ought to be given to the power under section 6 of the Act of 1857. What is sought in this court is that this court shall remit the case to the magistrate for him to determine a question which was never before the magistrate and never considered by him. That is why I very much doubt that such an order could be made.

Mr. Megarry drew our attention to certain authorities which go to show that the Divisional Court in such a case may determine a question of law which is not raised by either party and which does not appear upon the case itself, if no further evidence is necessary.

The last authority is *Kates* v. *Jeffery*.[1] The headnote states: "Upon the argument of an appeal from justices by way of case "stated a point cannot be taken before the Divisional Court "upon the facts stated which was not taken before the justices, "except upon a question of law which no evidence could alter." I do not think it necessary to read the facts. It is sufficient to read the judgment of Darling J., with which Avory and Rowlatt JJ. agreed.

Darling J. said[2]: "I am of opinion that this appeal must be "dismissed. With regard to the first point, *i.e.*, whether there "was sufficient evidence of the appointment of the respondent "as sanitary inspector, that was the only point which was taken "in the court below, and Mr. Barrington-Ward on behalf of the "appellant does not now rely upon it. There is no ground for "suggesting that there was not sufficient evidence that the "respondent was a sanitary inspector. But Mr. Barrington-"Ward raises the point that no evidence was given before the "justices that the sanitary inspector obtained the authority from "the local authority which was necessary to enable him to take "these proceedings against the appellant. That point was not "taken before the justices. If the point had been taken, the "justices would in all probability have adjourned the case if "necessary for the evidence to have been produced, and if it "had been forthcoming would have then again proceeded with "the hearing. In *Knight* v. *Halliwell*[3] Blackburn J. said, after "referring to *Purkis* v. *Huxtable*[4] and observing that if the "point which was attempted to be raised before the Court of "Queen's Bench in that case had been taken before the justices "evidence with regard to it could have been supplied, 'here a "'question of law, which no evidence could alter, arises on the "'statement of facts.' I think that if Lord Alverstone C.J. "used the words attributed to him in the report in the Law "Journal in *Gieblier* v. *Manning*[5]—'We have invariably taken "'the view in cases of this class, that where the particular point "'arises on the facts as found, even although it was not raised "'in the court below, we are entitled to give our judgment "'upon it'—and which have been quoted by Mr. Barrington-"Ward, he must have been speaking in the same sense as "Blackburn J. did in *Knight* v. *Halliwell*,[6] and that his "language is equivalent to what Blackburn J. laid down, namely, "that a question of law arising on the facts stated by justices, "but which was not taken before them, can only be taken before

[1] [1914] 3 K.B. 160.
[2] Ibid. 163.
[3] (1874) L.R. 9 Q.B. 412.
[4] (1859) 1 E. & E. 780.
[5] [1906] 1 K.B. 709.
[6] L.R. 9 Q.B. 412.

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"this court if it is one which no evidence could alter. In my "judgment, if this court sees that a question of law arises upon "the face of a case stated by justices which no evidence could "alter, this court is entitled to take the point and to deal with "the question of law although the point was not taken before "the justices. And this court cannot refuse to raise such a "point merely because one of the parties has not taken it in the "court below. For example, if a case stated by the justices "alleged that a lease for five years was an estate in fee simple, "this court would not only be entitled but bound to take the "point of law. But no such point of law arises upon the facts "stated in the present case. The question whether the respon-"dent was duly authorized to take proceedings against the "appellant was a pure question of fact, and if the point of law "had been taken that, without evidence of that fact, the prose-"cution would not lie, the justices might and probably would "have adjourned the hearing in order to enable the authority of "the sanitary inspector to be produced. In my judgment, there-"fore, the point is not now open to the appellant, and this appeal "must be dismissed."

In the present case no such point was taken before the magistrate. There was no request for an adjournment before him. The point as to authority could not and cannot be decided without evidence. There is nothing on the document to show that the agent, Mr. Toole, had authority to sign documents of this character. There was no evidence to show that he was authorized in fact. Mr. Megarry submitted that the word "agent" on the document was sufficient to show that he had authority, that it was equivalent to that. I do not agree. The fact that the word "agent" appears upon the document does not mean that he was the agent to sign notices or that he was authorized to sign notices. Consequently, I am satisfied that the point raised could not be decided without evidence.

It would be unusual, to say the least, that a case which had been dealt with by the magistrate solely on one point should be sent back to him, and he be asked to deal with it on quite a different point which would require further evidence. Over and above that I think it would not be right for the Court of Appeal to send the case back when there has been no such request made to the Divisional Court. It may be—I say no more than this—that, if there had been such a request and if the Divisional Court had been told that the authority could be proved, they would have considered an application to remit though, as I have said, I doubt whether they could properly have done so. The ordinary practice in matters of this kind should be followed.

The position of the tenant has to be considered. So far the tenant has succeeded. It is only when the case reaches the Court of Appeal that there is any suggestion that the case should be remitted to the magistrate for consideration upon a point not previously raised. That would be a little hard upon the tenant.

in one sense. He wishes to keep the premises so that he can carry on his business. We are told he has been there for some long time. That is not a matter for us, unless the question becomes one of discretion. In my opinion the appeal should be dismissed.

MORRIS L.J. I have reached the same conclusion. It is clear that in the magistrate's court the tenant took the point that the notice was not as required by the memorandum of agreement. When that point was taken the answer which should have been given was that the whole matter was governed by the Landlord and Tenant Act, 1954. I do not say that in any critical spirit because I realise how easy it is for matters to be overlooked; but that is what in fact happened and what brought about the subsequent history.

It is plain that thereafter, during the hearing before the magistrate, the matter proceeded entirely upon a consideration of the contractual position, and of the contractual position as affected by the complication that there had been a separation of the functions of the director of housing and of the functions of the valuer. The magistrate gave his decision on the points raised, and the case was stated on the points discussed before him and decided by him and raised in the case.

As my Lord has said, when the matter came before the Divisional Court, an entirely new point was raised, namely, that the provisions of the Landlord and Tenant Act, 1954, were applicable. I propose to proceed on the assumption that, so far as this case is concerned and so far as the notice to be given by the landlord is concerned, the provisions of that Act do apply.

The Divisional Court were not expressly asked to send the case back. I cannot accede to Mr. Megarry's submission that the notice which was served is a notice that satisfies the language of section 184 (2) of the London Government Act, 1939. I cannot think that it bears the signature of an officer "stated therein to "be duly authorised by the authority to sign such a document."

So the question arises whether we should accede to Mr. Megarry's invitation to us to send the case back so that the magistrate should be invited to exercise his discretion as to whether or not he will hear evidence to prove authority. Mr. Megarry says that he would like to have the opportunity to prove authority under section 184 (1) of the Act of 1939, or possibly under section 40 of the London County Council (General Powers) Act, 1953, or possibly in a more general way, apart from statutory provisions, to prove that Mr. Toole was an agent. I do not feel that it would be right for us to send this case back. I do not wish to say anything that would seem in any way to limit the powers which are given to remit a case, but I very much doubt whether the situation arising here is of the kind which was contemplated by section 6 of the Summary Jurisdiction Act, 1857.

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The case as it is now being argued involves a complete departure. If we send it back it would mean sending back when the Divisional Court were not asked to send it back, and it would mean sending the case back in circumstances which would make the point now raised quite unrecognisable as compared with the point previously before the magistrate. I do not think that this is within the spirit of section 6, even if there be a power to remit. This as it seems to me is a new point never raised before the magistrate, to which his mind was never directed, which he has not decided, to which the evidence was not directed, and for the decision in regard to which new evidence or further evidence may have to be given. To do what we are asked to do, as it seems to me, would involve, not remitting the matter raised by the case, but remitting quite a different matter. The court is not being asked to consider the question of law arising on the case stated, but a quite different question which was never even thought of when the learned magistrate was asked to state a case and for the determination of which new evidence may be necessary. It seems to me that this is like seeking to put new wine into an old bottle. I do not think that it would be right for us to accede to the application made.

ROMER L.J. I agree, and I have only a very few words to add. The question whether in point of form the notice determining the tenancy was governed by the terms of the tenancy agreement or whether it was governed, and governed exclusively, by the provisions of sections 24 and 25 of the Landlord and Tenant Act, 1954, is undoubtedly a pure question of law, if taken by itself. Accordingly, within such decisions as *Kates* v. *Jeffery* [7] and *Knight* v. *Halliwell* [8] to which we were referred, it was open, although the matter had not been touched upon before the magistrate or in the case stated, for that point of law to be brought up for discussion before the Divisional Court. That was done, and the point of law, as such, was decided by the Divisional Court in favour of the London County Council. That, I think, appears quite plainly from certain passages in the judgment of Lord Goddard C.J. and also by the very fact that the court proceeded to discuss the case on the footing that the Act of 1954 did apply; but the decision on that point of law in itself was not sufficient to enable the London County Council to succeed, because then the question arose under section 184 of the London Government Act, 1939, with regard to the presumed authority of Mr. Toole to sign the notice. The Divisional Court accordingly proceeded to consider that aspect of the case. No objection, as far as I know, was raised to them doing so, and they did decide that in a sense adversely to the London County Council.

They were not asked to remit the case so that evidence to prove Mr. Toole's actual authority could be adduced before the

[7] [1914] 3 K.B. 160. [8] L.R. 9 Q.B. 412.

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magistrate. I think there is considerable doubt whether, having regard to section 6 of the Summary Jurisdiction Act, 1857, the Divisional Court could have remitted the matter in that way, even if they had been asked, but they were not asked. The first request for such a remission has been made to this court, and it appears to me quite clear that, even assuming the jurisdiction, we ought not to entertain this application which for the first time has been made before this court.

Mr. Littman said, and, I think, rightly, that after a party has closed his case and then asks the Divisional Court, when the matter comes to them on case stated, for a remission so that he may re-open his case and produce further evidence, it is only in the rarest possible cases, if at all, that that should be acceded to. I am quite certain that that observation applies a fortiori where the application is made to this court. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *J. G. Barr; Franks, Charlesly & Leighton.*

A. W. G.

[COURT OF APPEAL.]

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July 27.
Lord Evershed M.R., Jenkins and Hodson L.JJ.

* *In re* SONGEST, DECD.
MAYGER AND ANOTHER *v.* FORCES' HELP SOCIETY AND LORD ROBERTS' WORKSHOPS AND OTHERS.

[1954 S. No. 2648.]

Practice and Procedure—Order—Order not drawn up—Application—Variation of scheme directing cy-près application of charitable funds—Payment to body not party to proceedings—Court of Appeal. Charity—Cy-près doctrine. Will—Construction.

Continuation of proceedings reported ante, p. 897, no order having been drawn up.

Denys Buckley for the Attorney-General.

Nigel Warren for the Commandant of the Star and Garter Home for Disabled Sailors, Soldiers and Airmen.

Ian Campbell for the Forces' Help Society and Lord Roberts' Workshops.

George M. Parbury for the trustees.

Albert C. Sparrow for the next-of-kin.

Denys Buckley. As a result of publicity given to the proceedings a third claimant, a local charity called "The Disabled Sailors' "and Soldiers' Workshops, Bournemouth," has come forward. This charity is incorporated under the Companies Act, and

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although the name only refers to soldiers and sailors, the memorandum of association shows that it is also for the assistance of airmen; and the information which the Attorney-General has received is such that had it been available to the court in the proceedings for the construction of the will, there would have been very little doubt but that this is the body to which the testatrix intended to refer in her will. In the circumstances, it seems right that the matter should be mentioned to the court. The two charities who would have benefited under the scheme directed by the court are prepared to accede that payment should be made to this body.

Nigel Warren and *Ian Campbell* supported the proposed scheme.

LORD EVERSHED M.R. The order should be that payment be made by way of scheme, the Attorney-General not objecting, whereby the fund in question is paid to the "Disabled Sailors' "and Soldiers' Workshops, Bournemouth."

JENKINS and HODSON L.JJ. agreed.

Order accordingly.

Solicitors: *Treasury Solicitor; Charles Russell & Co.; Cunliffe & Airy for Shenton, Pain & Brown, Winchester; Gordon, Gardiner, Carpenter & Co. for John R. C. Miller, Portsmouth; Robbins, Olivey & Lake.*

E. D.

[QUEEN'S BENCH DIVISION.]

1956
Oct. 4.

* *In re* A SOLICITOR.

Lord Goddard C.J., Hilbery and Ashworth JJ.

Solicitor—Discipline—Appeal from Disciplinary Committee—Sentence—Solicitor convicted of indecent assault—Struck off the Roll for conduct unbefitting a solicitor—Appeal to Divisional Court against penalty—Misconduct of non-professional nature—Powers of court to vary penalty.

A solicitor was convicted on two charges of indecent assault and sentenced to three months' imprisonment against which he did not appeal. The Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, on a finding that the solicitor had been guilty of conduct unbefitting a solicitor, made an order striking him off the Roll of Solicitors. On appeal against the order:—

Held, that although in matters concerning professional misconduct the court was very loth to interfere with the committee's decisions and would only do so in a most extreme case, in a case where there was no suggestion of professional misconduct the court was bound to consider, in the same manner as the Court of Criminal

Appeal, whether the sentence was in proportion to the misconduct proved; in all the circumstances of the present case, the penalty was too severe and would be reduced to two years' suspension.

Appeal from Disciplinary Committee established under the Solicitors Acts, 1932 to 1941.

The appellant, Oliver Howell Penn Jones, a solicitor, on an application made to the Disciplinary Committee on behalf of the Law Society, was required to answer an allegation that, having been convicted and sentenced for certain criminal offences, he had been guilty of conduct unbefitting a solicitor.

The following facts were proved or admitted before the committee. The appellant was admitted a solicitor in February, 1932, and at all material times practised alone in Merthyr Tydfil. At the General Quarter Sessions held at Birmingham on January 6, 1956, the appellant was found guilty on two charges of indecent assault and was sentenced to three months' imprisonment. The appellant did not appeal against his conviction.

Counsel for the appellant submitted that the appellant had been wrongly convicted. He put before the committee copies of the depositions taken before the magistrate and suggested that the two complainants had agreed to make the charge. He also submitted that no actual indecency had taken place, and that in any event the alleged offence had no connexion with the appellant in his practice. Counsel further read a number of affidavits from solicitors and other persons of standing in his town, that the appellant had always borne a high character, and desiring that he should continue in his practice.

The committee's findings were that they had given the greatest possible weight to the appellant's submissions but they could not ignore the fact that the appellant was tried and found guilty by a jury and sentenced to imprisonment. There was no appeal, and the committee could not go behind the conviction. They therefore felt that it was impossible for them to pass over an offence of this nature and that they had to exercise their full disciplinary powers.

The committee ordered that the appellant's name be struck off the Roll of Solicitors.

The appellant appealed against the penalty imposed.

F. Elwyn Jones Q.C. and *John Rutter* for the appellant.

J. R. Cumming-Bruce for the Law Society and the Registrar of Solicitors.

No cases were cited in argument.

Lord Goddard C.J. This is an appeal brought under the Solicitors Acts by a solicitor who has been removed from the Roll by order of the Disciplinary Committee. The law gives a person who has been found guilty of professional misconduct or conduct unbefitting a solicitor, and who has been punished in

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Lord Goddard C.J.

one form or another by the Disciplinary Committee, the right to appeal to this court. If an appeal is brought to this court, the court cannot rid itself of the responsibility, which is cast upon it by the Acts, of deciding for themselves on the merits of the appeal, both as regards conviction and sentence. There is no appeal here against the order finding the solicitor guilty of conduct unbefitting a solicitor.

The solicitor, who had been in practice since 1932, and against whom hitherto there had been no suggestion of misconduct either professionally or outside his profession, one evening in the month of June last year travelling down from the North of England towards Birmingham, indecently assaulted a young soldier who had gone to sleep in the compartment in which the solicitor was riding. Then, when he objected somewhat forcibly, the solicitor seems to have gone to another compartment where some conduct took place which at any rate a jury were satisfied amounted to an indecent assault, though certainly that was not a serious case.

Any case of indecent assault on a male person by another male person is of course a detestable and serious matter. The court would merely observe in this case, having cognizance of these cases from Assizes and in the Court of Criminal Appeal, that so far as this class of case can be regarded as not serious, these were not serious cases, nothing like as serious as many we have before us. They were assaults, not attempts at corruption.

The Disciplinary Committee, having had proved to them that the solicitor had been convicted by a jury on both counts and sentenced to three months' imprisonment, struck him off the Roll, and against that sentence he appeals. This court is, and always has been, very loth to interfere with the findings of the Disciplinary Committee either on a matter of fact, or with regard to the penalties, if that is the right word to use, and I think it is because it is a penalty which they impose. If it is a matter of professional misconduct, it would take a very strong case to induce this court to interfere with the sentence passed by the Disciplinary Committee, because obviously the Disciplinary Committee are the best possible people for weighing the seriousness of professional misconduct. There is no suggestion of professional misconduct in this case. That being so, I think this court is bound to consider, as the Court of Criminal Appeal would have to do, whether or not the sentence is in proportion or out of proportion to the misconduct which has been proved.

Mr. Cumming-Bruce is quite right, no doubt, in saying that in this class of case the Disciplinary Committee act to protect the honour of the profession and to maintain the confidence which it is desirable that the public should have in the solicitors whose advice they seek. So far as that is concerned, it is certainly remarkable in this case that the appellant's professional brethren and others who are acquainted with him and have had experience of his life and practice in the neighbourhood where he practises, have sent in a very large number of affidavits testifying to the

excellent character he has hitherto borne, not only as a solicitor but as a man, and all express their anxiety that he should still be able to practise among them and their willingness to meet and co-operate with him. So far as public confidence is concerned, I think it may be said that lamentable as was this lapse —and it is only fair to say that it is not suggested that it was more than an isolated occasion—it does not seem that the public confidence need be shaken. Of course it is necessary that the honour of the profession should be protected and that an offence of this sort should not be overlooked by the profession, but we have to consider whether in all the circumstances of the case the sentence passed is one which we feel is in proportion to the character of the offence. As I have said, if there was any suggestion against the professional conduct of the solicitor, we should only interfere in the most extreme case, but the court has carefully considered the representations made on both sides and they are quite satisfied that, bearing in mind the finding of the committee that the appellant was guilty of conduct unbefitting a solicitor, which of course is not appealed against, the order is one which is too severe considering the nature of the offence which was proved. It was a shocking offence, no doubt, from a social point of view that a man should act in this way, but in one sense it is no worse in a solicitor than in anybody else and no better in a solicitor than in anybody else, and it is not an offence which can be passed over. We entirely agree that the committee did not think that they were bound to pass this particular sentence. The expression which they use is one very well known to judges and chairmen of quarter sessions; they very often say they cannot overlook the offence and must pass a certain sentence. Having given this case the fullest and most anxious consideration, we have come to the conclusion that we shall set aside the order striking off the Roll and substitute therefor a sentence of suspension for two years.

Mr. Cumming-Bruce has made a strong point that it would have been open to the solicitor to go to the Master of the Rolls and apply to be reinstated. That is perfectly true, and if it were a matter of professional conduct I think that it would have been a very appropriate remedy, and I am not suggesting for a moment in this case that it would not be open to the solicitor to go to the Master of the Rolls. But when we are dealing with a case not of professional misconduct but of a crime having been committed, we do not think we should shirk the duty cast upon us and say we are going to leave it to the Master of the Rolls. If it had been a case of professional misconduct, I think it would have been a proper thing for the court to say that they are not going to interfere in a matter of professional misconduct in which the Disciplinary Committee are the best possible judges and if there is to be mercy shown that should be left to the Master of the Rolls. In this case we think we are bound to give effect to our own opinion, and the appeal will be allowed to that extent, that

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the order striking off the Roll will be set aside and a suspension for two years substituted.

Hilbery J. I agree.

Ashworth J. I also agree.

Penalty varied.

Solicitors: *Cartwright, Cunningham for Martin Evans & Son, Merthyr Tydfil; Hempsons.*

C. J. E.

[Court of Appeal.]

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Oct. 2, 3.

Singleton, Jenkins and Parker L.JJ.

* GRANT *v.* GEORGE WIMPEY & CO. LTD.

[1955 G. No. 2353.]

Building—Safety regulations—Temporary structure—Construction of concrete house by means of "shuttering"—Regulation requiring "sound material, adequate strength and stability, having regard "to the purpose for which it is used"—Inapplicability to demolition of structure—Building (Safety, Health & Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 93.

Regulation 93 of the Building (Safety, Health and Welfare) Regulations, 1948, requires that any "temporary structure erected "for the purpose of operations to which these Regulations apply, not "being a scaffold . . . shall be of good construction, sound material "and adequate strength and stability, having regard to the purpose "for which it is used."

The plaintiff, a builder's labourer employed by the defendants, suffered injury by the falling of a wooden corner piece, some nine inches thick, during the demolition of a temporary structure erected by the defendants for the purpose of building a number of concrete houses. He sued his employers for damages, alleging, inter alia, a breach by them of regulation 93:—

Held, that the regulation ceased to apply so soon as demolition of the temporary structure began, and the plaintiff's claim failed.

Decision of Lynskey J. affirmed.

Appeal from Lynskey J.

In September, 1954, the defendants, George Wimpey & Co. Ltd., were engaged in building concrete dwelling-houses on a site at Prescott, Lancashire, and the plaintiff, Philip Grant, was in their employment as a builder's labourer. For the purpose of building the houses the defendants adopted a "shuttering" system, by which a temporary structure was erected and liquid cement poured into it. When the cement had hardened the structure was demolished and re-erected and used elsewhere. During demolition a wooden corner piece, some 9 inches thick, fell and struck the plaintiff's back, causing injury.

The plaintiff sued the defendants for damages, alleging negligence at common law and breach of statutory duty.

Lynskey J. dismissed the claim on both grounds, and the plaintiff appealed on the ground of breach of statutory duty only.

A. D. Karmel Q.C. and *J. W. Stansfield* for the plaintiff.
D. J. Brabin Q.C. and *D. G. F. Franks* for the defendants.

SINGLETON L.J., having stated the facts, said: The defendants had no reason to anticipate danger of the kind which brought about this accident. It was not shown that they had failed in their duty to take reasonable care for the safety of their workmen and the claim at common law could not succeed.

The matter which was pursued in this court, and which is of importance, arises under regulation 93: "Construction of tem- "porary structures. Any temporary structure erected for the "purpose of operations to which these Regulations apply not "being a scaffold or a structure to which Regulation 35 applies, "shall be of good construction, sound material and adequate "strength and stability, having regard to the purpose for which "it is used." Mr. Karmel submitted that the upright, the corner piece, was a "temporary structure erected for the purpose of "operations to which these regulations apply," and that, consequently, regulation 93 required that it should be of "adequate "strength and stability, having regard to the purpose for which "it is used." He submitted, further, that as it fell when the shuttering was being moved it was not of "adequate strength and "stability." On the other hand, it was submitted by Mr. Brabin that at the time the plaintiff sustained his accident the regulation had no application at all.

Lynskey J. said that this was not a very simple question; and I agree with him. Let me consider regulation 93 for a moment. The regulation does not expressly cover demolition. "Demolition of buildings" is dealt with in Part V, regulation 79. and from sub-regulation 6 of that regulation it appears that during the demolition of a building that which remains may be described as "the structure." "Structure" is not defined in the interpretation regulation, regulation 3, though the words "temporary "structure" are used under the definition of "scaffold." There are no regulations covering the demolition of "temporary "structures." Maybe it was not thought practicable to make regulations covering the demolition of temporary structures, large or small, or maybe it was considered that the duty under the common law was sufficient. For the purposes of this appeal, it is not disputed that the shuttering formed part of the structure; nor is it disputed that the shuttering when first erected was a "tem- "porary structure." The question to be decided is whether the corner piece which fell and caused the plaintiff's injury was a "temporary structure," within the meaning of regulation 93, at the time at which it fell.

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Mr. Karmel's submission is that each shutter and each corner piece was a "temporary structure," and that the fact that a corner piece fell during demolition shows that it, a "temporary structure," did not comply with regulation 93. Again, it is not plain that the shuttering and corner pieces as originally erected were not of adequate strength or stability. I do not regard it as the right approach to look at one particular part of a "temporary "structure" during the process of demolition. Towards the close of that process a part or parts remaining must of necessity become unstable. Moreover, their use for the purposes covered by the regulation has ceased: they are no longer intended for use, nor are they required for that purpose: the "structure" is in process of demolition. The temporary structure was of "adequate strength and stability, having regard to the purpose "for which it is used," during the time for which it was so used. A time came at which there was no further use for it: demolition started, and was proceeding when the accident took place. When that stage was reached, regulation 93 ceased to have any application.

It is said on both sides that the question is really one of fact, or one of degree. That is right; and in determining the question one must have regard to the facts of the case and to the purpose of the regulation, which is for the protection of those working on, in, or near a temporary structure, as distinct from those engaged on demolition of a building, which is a matter dealt with in regulation 79. It may be (though I express no final opinion upon it) that if the purpose of the temporary structure had been exhausted and it was left standing and an accident happened there would be liability under regulation 93, or at common law in some cases; but I am not prepared to hold that the defendants are liable under regulation 93, and apart from negligence, when they are engaged in demolition of a temporary structure such as this, which was properly erected and which did not offend against the regulation, until the purpose for which it had been erected had ended and its demolition had been undertaken. In other words, the regulation does not apply to the facts of this case. In my judgment the appeal should be dismissed.

JENKINS L.J. I agree.

PARKER L.J. I agree. Regulation 93 of the Building Regulations is not altogether easy to construe. It is, however, clear (and, indeed, it was admitted) that when the shuttering was all erected to form a mould it constituted a "temporary structure" within the meaning of regulation 93. That being so, it had to be of "adequate stability" having regard to the purpose for which it was used, namely, to receive the liquid concrete and to allow that concrete to set. It was clearly stable for that purpose, as the events proved. The question then arises as to when the regulation ceases to apply. Does it cease to apply when the

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purpose is fulfilled, even though the whole structure is left in place and not removed? Does it continue to apply until the last bit of the temporary structure is removed? Or does it cease to apply when the first bit is removed, or at what stage in the demolition?

I confess that as at present advised I see difficulties in making the fulfilment of the purpose the sole test. The regulation applies to a temporary structure when erected, and presumably continues so long as it remains erected. On the other hand, it seems to me that the object of the regulation is to ensure safety during the actual operation for which it is designed. It is not, I think, concerned with safety during the course of erection or in the course of demolition. That being so, I think that, just as it only begins to apply when the erection is completed, so it ceases to apply the moment part of it is removed. Incidentally, in the normal practice this will no doubt be so soon as the purpose is fulfilled. But be that as it may, so far as the present case is concerned, when this accident occurred the corner piece, as it seems to me, disconnected as it was from the temporary structure, no longer could be said to form part of the temporary structure: it was merely material, namely, two or three long pieces of wood, joined together, which had formed part, but no longer formed any part, of that temporary structure. Nor do I think it can be validly contended that its purpose had not been fulfilled. That purpose, just as in the case of every other bit of the mould, was to contain the concrete when poured in and to allow it to set. I also would dismiss this appeal.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co. for Leigh & Johnson, Manchester; Gardiner & Co. for A. W. Mawer & Co., Manchester.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

* SAMPLE *v.* HULME. WALMSLEY *v.* HULME.

1956
Oct. 4.

Lord Goddard C.J., Hilbery and Ashworth JJ.

Hawkers and Pedlars—Pedlar—Meaning—Salesmen travelling to town in motor van—Motor van left in town—Salesmen going from house to house on foot offering goods for sale—"Travels and trades on foot "or goes from town to town or to other men's houses"—Whether salesmen travelling "on foot"—Whether salesmen "pedlars"—Pedlars Act, 1871 (34 & 35 *Vict. c.* 96), *ss.* 3, 4.

By section 3 of the Pedlars Act, 1871, "The term 'pedlar' "means any hawker, pedlar, petty chapman . . . or other person "who, without any horse or other beast bearing or drawing burden, "travels and trades on foot and goes from town to town or to

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"other men's houses, carrying to sell or exposing for sale any "goods, wares, or merchandise . . ."

Two salesmen, employed by a firm in Barnsley, travelled to Dewsbury with two other employees of the same firm in a motor van in which were also carried goods which they intended to offer for sale or use as samples. They had no horse or other beast bearing or drawing a burden. In Dewsbury the motor van was left in Reform Street and the salesmen left the van and went separately and on foot from house to house in Reform Street carrying goods with them. Each of them effected a sale of some goods to an occupant of a house in Reform Street, the sale in each case taking place at the door of the house. On appeals by each of the salesmen against conviction of having unlawfully acted as pedlars within the meaning of the Pedlars Act, 1871, without having obtained a certificate, contrary to section 4 of the Act:—

Held, that the defendants, having left the motor van, had travelled on foot from house to house and that, therefore, they were pedlars within the meaning of section 3 of the Pedlars Act, 1871, although they had travelled to Dewsbury by car.

CASE STATED by Dewsbury, Yorkshire, justices.

Informations were preferred against the defendants, Dennis Sample and Jack Walmsley, alleging that each of them on May 26, 1955, at Dewsbury, had unlawfully acted as a pedlar within the meaning of the Pedlars Act, 1871,[1] without having obtained a certificate, contrary to section 4 of the Act.

The following facts were found by the justices. On May 26, 1955, the defendants, who were employed by Messrs. Butterfield and Massey, of Barnsley, with two other employees of the same firm travelled to Dewsbury in a motor van in which were also carried goods which the defendants intended to offer for sale or use as samples. They had no horse or other beast bearing or drawing a burden. In Dewsbury the motor van was parked in Reform Street and the defendants left the van and went separately and on foot from house to house in Reform Street carrying goods with them. The defendant Sample offered for sale to Mrs. Isobel Gledhill, of 54, Reform Street, Dewsbury, one pair of blankets and one carpet, and Mrs. Gledhill agreed to buy the goods which were then left in her possession. A small deposit was paid and the defendant Sample gave two payment cards to Mrs. Gledhill. The sale took place at the door of Mrs. Gledhill's house and at the time of the sale the defendant Sample had also in his possession an eiderdown. The defendant Walmsley offered for sale to Mrs. Jean Brierley, of 34, Reform Street, Dewsbury, towels, sheets and a table cover. Mrs. Brierley agreed to buy a table cover which was left in her

[1] Pedlars Act, 1871, s. 3. "In "this act . . . The term 'pedlar' "means any hawker, pedlar, petty "chapman, tinker, caster of metals, "mender of chairs, or other person "who, without any horse or other "beast bearing or drawing burden, "travels and trades on foot and goes "from town to town or to other "men's houses, carrying to sell or "exposing for sale any goods, wares, "or merchandise, or procuring orders "for goods, wares, or merchan-"dise . . ." S. 4 "No person shall "act as a pedlar without such "certificate as in this Act men-"tioned . . ."

possession, and the defendant Walmsley gave a payment card to Mrs. Brierley; the sale took place at the door of Mrs. Brierley's house.

It was contended by the defendants that upon the evidence adduced by the prosecution there was no case in law to answer, in that they had not acted as, and were not, pedlars as defined by section 3 of the Act.

It was contended by the prosecutor that upon the evidence the defendants did so act and were pedlars.

The justices were of the opinion that the defendants had acted as pedlars as defined by section 3 of the Act at a time when they were not holders of pedlars' certificates, and accordingly found that the charges against them had been proved, and ordered each of them to pay a fine of 10s. and 7s. 6d. costs.

The question for the opinion of the High Court was whether upon the above statement of facts the justices came to a correct determination in point of law, and if not, what should be done in the premises.

Richard Elwes Q.C. and *Philip Syrett* for the defendants.
Geoffrey Rippon for the prosecutor.

No cases were cited in argument.

LORD GODDARD C.J. This is a case stated by justices for the County Borough of Dewsbury, before whom the defendants were charged with unlawfully acting as pedlars within the meaning of the Pedlars Act, 1871, without having obtained a certificate, contrary to section 4 of the Act.

The facts found by the justices show that the defendants, who are employed by a firm at Barnsley, travelled by motor-car to Dewsbury and then got out of their car at Dewsbury and proceeded to go from house to house offering goods for sale. The question was whether they were acting as pedlars and, with all respect to the strenuous argument of Mr. Elwes, I should not have thought that there was the smallest doubt about it.

Section 3 of the Pedlars Act, 1871, provides: "The term "'pedlar' means any hawker, pedlar, petty chapman, tinker, "caster of metals, mender of chairs, or other person who, with- "out any horse or other beast bearing or drawing burden, "travels and trades on foot and goes from town to town or to "other men's houses, carrying to sell or exposing for sale any "goods, wares, or merchandise, or procuring orders for goods, "wares, or merchandise immediately to be delivered, or selling "or offering for sale his skill in handicraft." As the word "or" is disjunctive, the section should be read in this way: "without "any horse . . . . travels and trades on foot and goes to other "men's houses carrying or exposing goods for sale." It seems to me that it is impossible to say that because a man arrives at a fixed point and there leaves his vehicle and proceeds to walk

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through the town—it may be for a mile, it may be for six miles—he is not travelling on foot. He is going from house to house and he is travelling from house to house. We cannot regard the word "travelling" as meaning travelling from one town to another. A man travels on foot as soon as he has left his car or his van or a house. I think that the justices came to the only possible conclusion, and I would dismiss these appeals.

HILBERY J. I agree.

ASHWORTH J. I agree.

Appeals dismissed.

Solicitors: *Paisner & Co.; Sharpe, Pritchard & Co. for A. James, Dewsbury.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1956
Oct. 4.

* LANGTON AND OTHERS *v.* JOHNSON.

Lord Goddard C.J., Hilbery and Ashworth JJ.

Road Traffic—Heavy motor-car—Braking system—Six-wheeled lorry—Hand brake operated on two rear wheels only—Whether braking system complied with regulations—Motor Vehicles (Construction and Use) Regulations, 1955 (*S.I.* 1955, *No.* 482), *reg.* 39 (1) *and* (7).

The defendants were charged with using a vehicle which did not have an efficient braking system in compliance with reg. 39 of the Motor Vehicles (Construction and Use) Regulations, 1955.[1] The vehicle was a six-wheeled lorry, with four front steering wheels and two rear driving wheels. The hand brake operated only on the two rear wheels:—

Held, that regulation 39 (1) required that one should ascertain the number of wheels of the vehicle and the brake should apply to not less than half that number of wheels, but by paragraph (7) one should not include within that notional half more than one front wheel. Since the defendants' vehicle was a six-wheeled lorry and the hand brake only applied to two wheels, they had not complied with the regulation and were guilty of an offence.

[1] Motor Vehicles (Construction and Use) Regulations, 1955, reg. 39: "(1) Every heavy motor car shall be equipped with an efficient braking system or efficient braking systems in either case having two means of operation so designed and constructed that notwithstanding the failure of any part . . . through or by means of which the force necessary to apply the brakes is transmitted there shall still be available for application by the driver to not less than half the number of the wheels of the vehicle brakes sufficient under the most adverse conditions to bring the vehicle to rest within a reasonable distance . . . (7) (*a*) (i) not more than one front wheel shall be included in half the number of the wheels of the vehicle for the purposes aforesaid . . ."

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CASE STATED by the Recorder of the City of Sheffield.

Ernest Langton and Robert Earl & Sons (Transport) Ltd. were convicted by Sheffield magistrates on informations preferred by Edward Armstrong Johnson, an inspector of police, of using on a road in Sheffield a heavy motor-car which did not comply with paragraph (1) of regulation 39 of the Motor Vehicles (Construction and Use) Regulations, 1955,[1] in that the vehicle was not equipped with an efficient braking system or efficient braking systems in either case having two means of operation so designed and constructed that notwithstanding the failure of any part through or by means of which the force necessary to apply the brakes was transmitted, there was still available for application by the driver to not less than half the number of wheels of the vehicle, brakes sufficient under the most adverse conditions to bring the vehicle to rest within a reasonable distance, contrary to the regulations and section 3 of the Road Traffic Act, 1930.

On appeal to the recorder the following facts were found. The vehicle in question was a six-wheeled Albion lorry, of 5½ tons unladen weight, equipped with four front steering single wheels running in pairs on two axles one behind the other and two rear driving wheels on an axle at the rear of the vehicle. The two rear wheels were each twin wheels but each of them counted as a single wheel by virtue of regulation 3 (4). The vehicle was equipped with two braking systems consisting of a foot brake which operated by hydraulic means on all six wheels of the lorry and a hand brake which was rod-operated on only the two rear driving wheels. The vehicle was owned by Robert Earl & Sons (Transport) Ltd., and on the date in question was being driven by their servant, Ernest Langton, in the course of his employment. A police officer on patrol duty stopped the vehicle in the course of a routine check. The part of the road where the vehicle was stopped was at an incline, and noticing that the driver was applying both his foot and his hand brake, the officer directed the driver to release his foot brake. On the driver releasing the foot brake, the vehicle started to run slowly forward down the incline and it continued so to do for a few feet, in spite of the hand brake being fully on, until the driver reapplied his foot brake. Later the same day the police officer sat beside the driver while he drove the vehicle along another road for the purpose of testing the two brakes. The road was level and its surface was dry and good. At the officer's request the driver applied independently first of all his foot brake and then his hand brake when the vehicle was being driven at a speed of from 12 to 15 miles an hour. The foot brake on being so applied worked efficiently but when the hand brake was applied it had little retarding effect with the result that the vehicle rode to a standstill over a distance of about 60 yards instead of stopping within the normal distance of about 20 yards. The police officer then examined the hand brake system which, had it been properly maintained, was efficient in that it was capable of holding the

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lorry and acting as a brake on the rear wheels, but he found in fact that the hand brake was quite inefficient owing to faulty adjustment of the brake parts through wear and tear. Subsequently the driver and the owners were respectively charged with (1) the offence of using on a road a heavy motor-car which did not comply with regulation 39 (1) of the Regulations of 1955, and (2) the offence of unlawfully using or permitting the use of the vehicle when its hand braking system and the means of operating the same was not maintained in good and efficient working order and properly adjusted, contrary to regulations 76 and 104. At the hearing of the charges before the magistrates the defendants pleaded Not Guilty to the first charge but Guilty to the second charge, in respect of which the defendant driver was fined £1 and the defendant company £5.

It was contended on behalf of the defendants that the facts disclosed an offence under regulations 76 and 104 but not under regulation 39 on the following grounds: first, (i) that the defendants had been charged with and pleaded guilty to an offence contrary to regulations 76 and 104 in that they used a lorry on which the brakes were not maintained in good and efficient working order and were not properly adjusted; (ii) that that offence was the only offence revealed by the evidence; (iii) that the condition of the vehicle's hand brake did not justify a conviction on a charge under regulation 39 (1) to the effect that the vehicle was not equipped with an efficient braking system or braking systems; and (iv) that that was supported by *Cole* v. *Young* [2]; secondly, that paragraph (1) of regulation 39 must be read together with paragraph (7) (*a*) (i), and that since on a proper construction of paragraph (1) and (7) (*a*) (i) not more than one of the vehicle's four front steering wheels was required to be included in calculating half the number of the wheels of the vehicle to which the hand brake system had to be applied, it followed, seeing that the hand brake operated in fact on the two rear driving wheels, that no offence under paragraph (1) of regulation 39 had been committed.

It was contended for the prosecutor that the fact that the hand brake only operated on the two rear wheels constituted all the evidence necessary as to faulty construction or an inefficient braking system; and that the plain construction of regulation 39 (7) (*a*) (i) did not affect the plain construction of regulation 39 (1). In the present case, having regard to the six wheels of the vehicle, the hand brake should have applied to at least three of them. Paragraph (7) (*a*) (i) merely limited to one front wheel the number of front wheels which could be included in those wheels to which the hand brake had to apply.

The recorder came to the conclusion that the defendants' vehicle was equipped with an efficient braking system or efficient

[2] [1938] 4 All E.R. 39.

braking systems within the meaning of regulation 39 so as to comply therewith, and he allowed the appeal.

The prosecutor appealed.

J. I. Arnold appeared for the prosecutor.

D. T. Lloyd for the defendants.

No cases were cited in argument.

ASHWORTH J., delivering the first judgment. This appeal comes before this court by way of case stated by the recorder of Sheffield and raises a troublesome point under regulation 39 of the Motor Vehicles (Construction and Use) Regulations, 1955. The particular paragraph of regulation 39 which is material is paragraph (1) and the proviso which is contained in paragraph (7).

[His Lordship read regulation 39 (1) and (7) (*a*) (i), and continued:] The facts found show that this particular vehicle was to be deemed to be a six-wheeled vehicle; in fact it had eight wheels but the four rear wheels were to be treated as two wheels, and the vehicle was equipped with two braking systems, the first system consisting of a foot brake which operated by hydraulic means on all the six wheels of the lorry, the second system consisting of a hand brake which was rod-operated on only the two rear driving wheels.

The main issue in this case is whether on those facts an offence was committed against regulation 39. It is perhaps not without importance to notice that the wording of paragraph (7) by way of proviso has been altered. At one time the wording was such as at least to admit of the construction that the process of excluding all but one of the front wheels of the vehicle was to be embarked upon in counting the wheels of the vehicle before ever the half was calculated. It seems to me that the change of language has rendered that process no longer operative, and for my part I find the approach to this case relatively simple.

Paragraph (1) provides that a system must be provided under which there shall be available for application by the driver to not less than half the number of the wheels of the vehicle sufficient brakes. In my view, the first step to take is to ascertain the number of wheels of the vehicle. In this case it was six. Prima facie, therefore, there must be available for application to three of those wheels an efficient braking system. It is found as a fact that the alternative system provided on this vehicle only applied to two wheels, and therefore I should be content to stop there and adopt the first of the contentions put forward by the prosecutor below "that the fact that the hand brake only "operated on the two rear wheels constituted all the evidence "necessary as to faulty construction or an inefficient braking "system." It seems to me that the proper approach to the application of the proviso is as follows: one first ascertains the notional half by dividing the total number of wheels of the vehicle

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by two. Then, in order to comply with the regulation one has to see that to that half there is available an efficient braking system; but the regulation provides that in that half there must not be included more than one front wheel. One cannot apply the proviso for the purpose of calculating the half. When one has ascertained the half one must not include in it more than one front wheel. In fact, in this case no front wheel was included in the half at all, but it would prevent in a six-wheeled vehicle a construction which resulted in two front wheels and one rear wheel being included in the half. That, in my view, would not be a compliance with the regulation.

For those reasons, which I have stated quite shortly, I think that this appeal should be allowed.

HILBERY J. I agree, and for the same reasons.

LORD GODDARD C.J. I agree. I have found the greatest difficulty in construing these regulations, but I think on the whole that the judgment given by Ashworth J. does give a meaning to these very obscure provisions which motor-vehicle drivers are supposed to understand. I agree, therefore, that this appeal should be allowed, although I am not at all happy about it because I think that, having got the conviction under regulation 76, there really was no necessity to proceed to a prosecution under this regulation as well. However, that is another matter; the magistrates convicted and we have only to consider whether the recorder was right in quashing the conviction. We have come to the conclusion that he was not, and therefore the decision of the magistrates must stand. The appeal is allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for John Heys, Sheffield; Bell, Brodrick & Co. for A. B. Thorneloe & Son, Sheffield.*

C. J. E.

[COURT OF APPEAL.]

C. A.

1956
Oct. 2, 15.

*HUNT v. ALLIED BAKERIES LTD.

[1955 H. 3148.]

Lord Evershed M.R., Birkett and Romer L.JJ.

Practice and Procedure—Interlocutory order—Meaning—Striking out pleading where no reasonable cause of action disclosed, or where action frivolous or vexatious—Further proceedings stayed—Whether order interlocutory or final—R.S.C., Ord. 25, *r.* 4.

An order under R.S.C., Ord. 25, r. 4, striking out the whole or part of a claim on the ground that it discloses no reasonable cause

of action, or is frivolous or vexatious, and staying all further proceedings is to be treated as interlocutory, in the absence of special circumstances.

MOTION.

The issue arising on the first five paragraphs of a statement of claim by the plaintiff K. D. Hunt having been tried as a special point of law, the defendants applied to have the remainder of the statement of claim and the corresponding prayers, including a claim for an injunction, struck out. On July 27, 1956, Upjohn J. made the order asked for on the ground that the paragraphs in question disclosed no reasonable cause of action. The order recited that the plaintiff had been given an opportunity to amend but had stated that he did not desire to do so. The plaintiff was ordered to pay the costs of the action except those occasioned by the preliminary issue on which he had succeeded, and all further proceedings were stayed. The plaintiff applied ex parte to the Court of Appeal, on a motion for leave to appeal, asking whether the order was interlocutory or final, leave being required if it was interlocutory.

This report relates only to the preliminary application.

The plaintiff appeared in person.

No cases other than those referred to in the judgments were cited to the court.

Cur. adv. vult.

October 15. LORD EVERSHED M.R., having stated the facts summarized above, continued: The first question is whether the order made in that form and in the circumstances stated is interlocutory or final, since if it be the latter then, of course, no leave to appeal is required. Mr. Hunt has invited us to express our view on that matter; and, after hearing his argument, we thought it right to adjourn before we gave our conclusion in order that we might make some inquiry as to the practice of the court, and also consult the other divisions of the Court of Appeal, since the decision in the case on that point will apply perhaps in a number of other cases in which litigants may find their statements of claim struck out as disclosing no reasonable cause of action.

The power so to strike out a statement of claim, or part of a statement of claim, is to be found in Ord. 25, r. 4, which does not in terms indicate whether an order so made is interlocutory or final. As Mr. Hunt reminded us, the question, which is nowhere precisely defined, is in the last resort one which by section 31 of the Judicature Act, 1925, is left to the determination of the Court of Appeal.

In the Annual Practice, 1956, at p. 423, it is stated that an order to strike out or stay proceedings under this rule is interlocutory, and two cases are cited for that view.[1] It must, I think,

[1] *Price* v. *Phillips* (1894) 11 T.L.R. 86 and *Hind* v. *Hartington* (1890) 6 T.L.R. 267.

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be conceded that the two cases there cited are not in some respects entirely satisfactory; but our attention has since been drawn to another case, which I have no doubt Mr. Hunt has also seen. That is *In re Page*,[2] a decision of this court. In that case, the statement of claim was struck out and the action dismissed, not in terms because it disclosed no reasonable cause of action, but because it was frivolous and vexatious. It will, however, be appreciated that Ord. 25, r. 4, covers both the case of a statement of claim disclosing no reasonable cause of action, and that of it being frivolous and vexatious. Mr. Hunt has, however, raised the point whether there should be a distinction drawn between the two kinds of case.

After consulting with the Chief Registrar and looking at the case, and also after consultation with my colleagues, I am left in no doubt at all that, rightly or wrongly, orders dismissing actions —either because they are frivolous and vexatious, or on the ground of disclosure of no reasonable cause of action—have for a very long time been treated as interlocutory. In the case which I have mentioned, that is stated already as having been the fact in 1910; and since then, of course, another 46 years have gone by.

The judgment of Buckley L.J. upon this matter is particularly worth looking at because it is plain that he felt a little difficulty, at any rate in the logic of the matter, since beyond a peradventure, if the present order stands, it is an end altogether of the case. "To my mind" says Buckley L.J.,[3] "it would be reasonable to say that this is a final order"; but then he defers to the view of his brethren. He says, and this is the passage which seems to me to be important: "I am not prepared to differ from the view taken by the other members of the court. I yield my judgment to theirs without saying that I am completely satisfied"; and then: "A decision to that effect is certainly the more desirable, because if the order is reversed the action will have to go on, and if it is to go on it ought to go on at once." That argument, I think, is of considerable force in considering this kind of case.

I have said that *In re Page*[4] was a case in which the statement of claim was struck out as being frivolous and vexatious. I observe, however, that Cozens-Hardy M.R. in his judgment regarded as governing the case another decision referred to by him where the order had been made for striking out the claim on the ground that an order for security for costs had not been complied with. Furthermore, in another case,[5] this court (consisting of Singleton L.J., Jenkins L.J. and Morris L.J.), held that the same principle and the same rule applied in the case of an action dismissed for want of prosecution.

When these matters are added together, and it is also recalled that Ord. 25, r. 4, covers both the case of dismissal for want

[2] [1910] 1 Ch. 489.
[3] Ibid. 494.
[4] [1910] 1 Ch. 489.
[5] *Arnot* v. *Amber Commercial Co. Ltd.*, The Times, May 20, 1953.

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of showing a reasonable cause of action and also for being frivolous and vexatious, it is, to my mind, perfectly plain that we are now bound to hold that this order was interlocutory, and that no question of the jurisdiction under section 31 of the Judicature Act can assist, because we should have in any case to follow the decisions of the Court of Appeal to which I have already referred.

Finally, I have only this to say. I am satisfied that the fact that in the prayer there was a claim for an injunction cannot affect the matter. This is not a case in which the court has refused to grant an injunction upon the merits of the case, and in the exercise of the court's discretion. For these reasons (and this decision will now necessarily govern other cases) I hold that orders under Ord. 25, r. 4, striking out the whole or part of a claim on the ground that it disclosed no reasonable cause of action, or was frivolous and vexatious, or both, and staying all further proceedings, must be treated as interlocutory. It is possible that there may be cases (though no example now occurs to me and the present case is certainly not one) in which the facts would be of so special a character as to create an exception of the rule. The general rule is, however, as I have stated it. If that view is right, it remains, of course, for Mr. Hunt to contend that leave to appeal ought none the less to be given, and that we will hear. I have tried to avoid saying anything so far which reflects at all upon the merits of the case because we have not heard argument upon it.

BIRKETT L.J. I agree with the decision that my Lord has just announced, and for the reasons given.

ROMER L.J. I also agree.

E. D.

[COURT OF APPEAL.]

* DUNCAN *v.* HAY.

[Plaint No. M.P. 43.]

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Oct. 3, 4.
Denning, Hodson and Morris L.JJ.

Landlord and Tenant—Rent restriction—Service tenancy—"Employment"—Premises let to tenant in consequence of employment by former landlord—Nature of employment changed—Claim for possession by new landlord—Whether tenant "ceased to be in that "employment"—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *Sch. I, para.* (*g*).

In 1944 a hospital took a lease of a farm, and employed the defendant on the farm, first as a tractor driver and later as foreman. In 1951 they sublet to him one of the farm cottages. In January, 1955, they gave him notice to quit, expiring on September 29, on which date they went out of possession. The defendant remained

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on the hospital's books as an employee, and in November was given work in the laundry. The plaintiff, who took over the farm on September 29, and required the cottage for a cowman whom he had engaged, sought possession of the cottage under paragraph (*g*) of Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the ground that the defendant "was "in the employment of a former landlord, and the dwelling-house "was let to him in consequence of that employment" and he had "ceased to be in that employment" [1]:—

Held (Denning L.J. dissenting), that though the nature of the defendant's work had changed, he had not "ceased to be in that "employment" within the meaning of paragraph (*g*), so that the plaintiff was not entitled to possession.

Munro v. *Daw* [1948] 1 K.B. 125; 63 T.L.R. 542; [1947] 2 All E.R. 360 applied.

APPEAL from Judge Rice-Jones, sitting at Croydon County Court.

In 1944 the Warlingham Park Hospital took a lease of Fairchildes Farm, on the borders of Surrey and Kent. They employed the defendant as a tractor driver on the farm, and he occupied different cottages on the farm from time to time. On September 25, 1951, by which time he had become the farm foreman, they sublet to him a cottage on the farm known as No. 1, Fair childes Cottages. In January, 1955, the hospital gave to the defendant a notice to quit on September 29; on that date the hospital gave up possession of the farm, which was taken over by the plaintiff, who made an offer, which was refused, to take the defendant into his employment. The defendant continued to be paid by the hospital, although there was no farm work for him to do, and on or about November 16 he started work as a machine operator in the hospital laundry.

The plaintiff, who required possession of the cottage in order to accommodate a cowman whom he had engaged, brought proceedings in the county court, which were dismissed by the judge. The plaintiff appealed.

V. G. Wellings for the plaintiff.
J. E. Williams for the defendant.

The only case cited in the arguments is referred to in the judgment.

[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I: "A court shall, for the "purposes of . . . this Act, have power "to make or give an order or judg- "ment for the recovery of possession "of any dwelling-house to which the "principal Acts apply or for the "ejectment of a tenant therefrom "without proof of suitable alternative "accommodation (where the court "considers it reasonable so to do) "if— . . . (*g*) the dwelling-house is "reasonably required by the landlord "for occupation as a residence for "some person engaged in his whole- "time employment . . . or with "whom, conditional on housing "accommodation being provided, a "contract for such employment has "been entered into, and—(i) the "tenant was in the employment of "the landlord or a former landlord, "and the dwelling-house was let to "him in consequence of that employ- "ment and he has ceased to be in "that employment."

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DENNING L.J. This case concerns a farm on the borders of Surrey and Kent known as Fairchildes Farm. It was farmed for some years by the Warlingham Park Hospital. The hospital authorities were themselves tenants of the farm and of the cottages that went with it. They employed Mr. Hay for many years as farm foreman and they sublet one of the farm cottages, No. 1, Fairchildes Cottages, to him. They sublet it to him as a farm cottage so as to enable him to do his work as a farm foreman. In 1955 the hospital authorities determined to give up the farm and the cottages going with it. They gave Mr. Hay a valid notice to quit which expired on September 29, 1955, and they themselves gave up their tenancy of the farm and cottages on the self-same day, September 29, 1955. The superior landlord then let the farm and the cottages (including this cottage) to a new tenant farmer, Mr. Duncan. Mr. Duncan took over the farm cottages as from September 29, 1955, and offered to take Mr. Hay into his employment, but Mr. Hay declined. He refused the offer to work on the farm for Mr. Duncan. Mr. Duncan now wants the cottage for a man who will work on the farm. He wants it for a cowman. He has got a married man —a cowman—with eight children waiting to go into it. It is very reasonable that he should have it—the judge has so found; but Mr. Hay refuses to go. He says he is entitled under the Rent Acts to remain there, although he has no longer anything to do with the farm. He has changed his work altogether. He has gone into the Warlingham Hospital to work a laundry machine. He appears in the books of the hospital authorities as a farm foreman until November, 1955, but from that time onwards he appears as a laundry machine operator. If he had gone to work for any other employer, he would clearly not be entitled to stay in the cottage, but it is said that because he is still in the employment of the hospital authorities, he is protected in his occupation of the cottage, although the hospital authorities have no longer anything to do with the farm or the cottages.

The contest is the familiar one between a literal interpretation of the Act and a liberal interpretation of it. It arises under subsection (*g*) of the First Schedule to the Act of 1933, which says that where the court considers it reasonable to make an order for possession, it can be made if "the dwelling-house is "reasonably required by the landlord for occupation as a residence "for some person engaged in his whole-time employment"—that is all satisfied here—"and (i) the tenant was in the employment "of the landlord or a former landlord, and the dwelling-house was "let to him in consequence of that employment and he has "ceased to be in that employment." The county court judge has found that it would be reasonable to make an order in favour of the new farmer, Mr. Duncan, but he has refused to make it because he holds that the tenant, Mr. Hay, has not "ceased to "be in that employment," in that Mr. Hay has been in the employment of the hospital all the time and he is still in that

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employment; he has never ceased to be in that employment; and therefore an order cannot be made.

The case depends on the meaning of the phrase "he has "ceased to be in that employment." Apart from authority I should have thought the words "that employment" meant the relevant employment, that is, the employment in consequence of which the house was let to him, namely, his employment by the hospital authorities as a farm foreman. That employment has ceased and the farmer should be entitled to possession. The judge has held, however, in effect, that the words "that "employment" include the employment of a former landlord: and that so long as the tenant remains in the employment of a former landlord he is protected. I do not think that that is correct. The case of *Munro* v. *Daw* [1] is no authority for that proposition. That case was concerned with the question whether a house was "*let* in consequence of that employment," that is, let at the beginning of the tenancy. It was there held that in such a case you are to consider whether the house was let to the servant because he was a servant, not whether it was let to him because of his work. That concerned the beginning of the tenancy, not the end of it. It seems to me very different when you consider whether the servant has "ceased to be in that "employment."

To test the matter, let me put this instance: suppose the hospital authorities, in addition to giving notice to quit the cottage, had given proper notice to Mr. Hay to terminate his employment as a farm foreman (as they may well have done, for aught I know), and then he was out of work for a few days, and not getting employment elsewhere, he then entered the employment of the hospital again, but this time as a laundry machine operator. I should have thought that he clearly would have "ceased to be in that employment" for the purposes of the subsection. He would have ceased to be in the relevant employment (i.e., in the employment in consequence of which the house was let to him), and would have entered into a new employment altogether. Applying that illustration, the only difference here is that, so far as we know, the hospital authorities did not give Mr. Hay notice to terminate his farm employment, he was not out of work at all, but was taken on straightway as a laundry machine operator. But I do not think that makes any difference in law. What happened was equivalent to it. There must have been an agreement, express or implied, whereby Mr. Hay's employment as farm foreman was terminated, and he was taken on as a laundry machine operator, with a moment of time in between. It was not a mere variation of his existing employment. It was a rescission or termination of the old employment and a substitution of a new one. As a farm foreman he could be directed to do farm work, but he could not be directed to do

[1] [1948] 1 K.B. 125; 63 T.L.R. 542; [1947] 2 All E.R. 360.

laundry machine operating. The contract of a farm worker is governed by many statutory regulations very different from that of a laundry machine operator. It often includes a farm cottage at 6s. a week. I see no reason why he should retain the cottage at that rent when he has ceased to work on the farm at all. It seems to me that an entirely new relationship must have been created by a voluntary determination of the old farm employment and the creation of a new employment as a laundry machine operator. He has ceased to be in the employment in consequence of which the house was let to him. In this situation I, for myself, would have held that the subsection is satisfied and that the landlord, the farmer, is entitled to possession, which the county court judge has held it is reasonable for him to have. I would have allowed the appeal accordingly.

HODSON L.J. This is an appeal from an order of Judge Rice-Jones, sitting at Croydon County Court on May 21, 1956, whereby he refused an order for possession which the plaintiff had asked for. The plaintiff had claimed possession of the cottage, 1, Fairchildes Cottages, at Fairchildes Farm, in the County of Surrey or Kent, he being a tenant farmer. The county court judge was satisfied that it was reasonable to make an order provided that the provisions of the First Schedule to the Act of 1933 were satisfied, the particular provision in question being paragraph (*g*), that "the dwelling-house is reasonably "required by the landlord for occupation as a residence for some "person engaged in his whole-time employment or in the whole-"time employment of some tenant from him or with whom, "conditional on housing accommodation being provided, a "contract for such employment has been entered into, and (i) the "tenant was in the employment of the landlord or a former "landlord, and the dwelling-house was let to him in conse-"quence of that employment and he has ceased to be in that "employment."

No question arises but that the dwelling-house was reasonably required by the landlord for a person engaged in his whole-time employment. The question which has arisen in this case is whether the plaintiff has been able to show that the tenant he desires to eject "was in the employment of the landlord or a "former landlord, and the dwelling-house was let to him in "consequence of that employment and he has ceased to be in "that employment." So far as the first part of that provision is concerned, it is satisfied, but there remains the sole short question, whether the tenant in question has ceased to be in the employment of (in this case) the former landlord.

The tenant, Mr. Hay, on February 17, 1944, became employed by Warlingham Park Hospital as a tractor driver. In September of 1944 the hospital took over Fairchildes Farm, and on September 25, 1951, the hospital let this cottage, No. 1, Fairchildes Cottages, to the tenant. He was then employed by the hospital

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as a farm labourer. He was served with notice to quit by the hospital on January 5, 1955, which took effect on September 29, 1955. It appears that, although he has remained continuously in the employment of the hospital, his farm work as foreman ceased to have any practical use between September 29 and November 16, 1955, because there was no work of a farming nature for him to do, and that on November 16, 1955, he was working for the hospital as a laundry machine operator.

The question as I see it is simply and solely whether he has ceased to be in the employment of the Warlingham Park Hospital. This matter is not entirely free from authority, because the word "employment" in this Schedule has been considered in this court in the case of *Munro* v. *Daw*.[2] The first part of the headnote is: "Premises are let to a tenant 'in consequence of' his "employment by the landlord, within the meaning of paragraph "(*g*) (i) of Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, if they are so let because of the "relationship of master and servant. It is not necessary, to "constitute the prescribed causation, that the premises should "have been let to the tenant because of the nature of his "particular employment with the landlord."

During the course of the argument, Tucker L.J. asked counsel this question[3]: "Are you submitting that the paragraph should "be read as if it said 'in consequence of the nature of the "'employment?'" Counsel answered "Yes." In his judgment Tucker L.J. answered the question in this way[4]: "It is "sufficient to say that, in my opinion, the natural meaning of "the words in para. (*g*) of this schedule is that it refers to the "relationship of employer and employed, and that there is "nothing in the language of the schedule to suggest that what "was intended was a requirement that the letting should be in "consequence of the nature of the particular employment of the "tenant. I think that it would be straining the language used "to put such an interpretation on it."

That case had to do with the entering of the employment and this case with which we are concerned has to do with the cessation of employment, but I am bound to say that I can see no valid distinction between the two cases. In this case the tenant has never ceased to be in the employment of the former landlords. The former landlords who are referred to in paragraph (*g*) (i) are in this case the Warlingham Park Hospital, and he has not ceased to be in that employment. Although he has changed the nature of the work that he has been doing for his employers, it cannot, in any true sense of the word, in my view, be said that he has ceased to be in the employment of the hospital. The county court judge answered the question put before him in the same way, and I agree with him. His judgment is quite short: "In this case the house was let to the

[2] [1948] 1 K.B. 125.
[3] Ibid. 126.
[4] Ibid. 129.

" defendant in consequence of his employment with the plaintiff's " predecessor, namely, the hospital, but, as he is still in that " employment, the plaintiff has failed to prove that the conditions " shown in Schedule (*g*) have been fulfilled."

I agree that this is, on the face of it, a hardship on the plaintiff, who wants the cottage for his cowman and it would be very reasonable that he should have the cottage for this purpose; but Parliament has prescribed, in my view in plain language, that in these circumstances he cannot have the cottage because the occupying tenant has not ceased to be in the employment of the former landlord.

In my judgment, therefore, this appeal ought to be dismissed.

MORRIS L.J. It is common ground in this appeal that the only question which arises relates to the application to the admitted facts of the provisions of paragraph (*g*) of the First Schedule of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The relevant words are the words " the tenant " was in the employment of the landlord or a former landlord, " and the dwelling-house was let to him in consequence of that " employment and he has ceased to be in that employment." The words that must more particularly be considered are the words " that employment."

The tenant is Hay, and Hay was in the employment of a former landlord, namely, the hospital. So the words, when applied in relation to the facts, read: " Hay was in the employ- " ment of the hospital and the dwelling-house was let to him in " consequence of that employment." Pausing there, it seems to me that the words " that employment " must refer to the fact of his having been in the employment of the hospital. The words of the section continue: " and he has ceased to be in that " employment." Again, I think that in the present case the words " that employment " must mean the employment of the hospital. I find myself in agreement with the judgment of the county court judge when he decided that on the facts Hay had not ceased to be in the employment of the former landlord, namely, in the employment of the hospital.

It is common ground that the dwelling-house was let to him in consequence of his being employed by the hospital and that he is still employed by the hospital; that was the evidence. I agree that there is some merit in the claim made by the landlord, but it seems to me that the wording of the Act of Parliament does not permit any result other than that reached by the county court judge.

In the case of *Munro* v. *Daw* [5] the words " in consequence of " were more particularly under review, but I think it is quite clear that the court expressed its opinion upon the meaning of the words with which we are directly concerned. The judgment of

[5] [1948] 1 K.B. 125.

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Tucker L.J. was a judgment with which Somervell L.J. and Evershed L.J. agreed. Tucker L.J. said[6]: "the natural "meaning of the words in paragraph (*g*) of this schedule is that "it refers to the relationship of employer and employed, and "that there is nothing in the language of the schedule to suggest "that what was intended was a requirement that the letting "should be in consequence of the nature of the particular "employment of the tenant." It may or may not be that it would have been a good thing if there had been some such provision. That is not a matter for us at all. It seems to me that the argument submitted for the appellant here involves reading into the paragraph words which are not there. The argument involves making the opening words of the paragraph read "the tenant was in the employment of the landlord or a "former landlord in a particular capacity"; and making the concluding words read: "and he has ceased to be employed in "that capacity." It seems to me that the words "that "employment" refer to the employment of the landlord or a former landlord, and refer to the fact of the relationship of employer and employed. The tenant here has never ceased to be in the employment of the former landlord, namely, the hospital. I therefore find myself in agreement with the judgment of the county court judge and I therefore think that this appeal should fail.

Appeal dismissed.

Solicitors: *F. Miller Parris & Mitchell, Croydon; Copley Singleton & Billson, Croydon.*

F. R. D.

[6] [1948] 1 K.B. 125, 129.

[PRIVY COUNCIL.]

J. C.†
1956
Oct. 15.

* ST. CATHARINES FLYING TRAINING SCHOOL LTD. . . . . PETITIONER;

AND

MINISTER OF NATIONAL REVENUE . . RESPONDENT.

Privy Council—Jurisdiction—"Judicial proceedings"—Canada—Act abolishing appeals to Privy Council—Saving for "judicial proceeding" commenced before coming into force of Act—Notices of appeal and dissatisfaction with tax assessment—Whether "judicial proceeding"—Supreme Court Amendment Act, S.C. 1949 (*2nd Sess.*), *c.* 37, *ss.* 3, 7—*Income War Tax Act, R.S.C.* 1927, *s.* 97, *ss.* 58, 59, 60, 63, 66, 69—*Supreme Court Act, R.S.* 1952, *c.* 259, *s.* 2 (*e*).

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† *Present*: VISCOUNT SIMONDS, LORD NORMAND, LORD OAKSEY, LORD TUCKER.

PETITION.

The respondent, the Minister of National Revenue, raised a preliminary objection to the jurisdiction of the Judicial Committee on this petition by St. Catharines Flying Training School Ltd. for special leave to appeal from a unanimous judgment of the Supreme Court of Canada (October 4, 1955) allowing in part the respondent's appeal from a judgment of the President of the Exchequer Court of Canada (November 17, 1953). The latter judgment maintained the petitioner's appeal from assessments to income tax and excess profits tax for the years 1941 to 1945 inclusive, holding that the petitioner was exempt from taxation as being a non-profit corporation within the meaning of section 4 (*h*) of the Income War Tax Act, R.S.C. 1927, c. 97. The petitioner sought special leave to appeal to Her Majesty in Council from that part of the Supreme Court judgment which decreed that the income of the petitioner earned under a particular contract with the Crown was subject to income and excess profits taxes.

H. Heward Stikeman Q.C. (Canada), *M. A. Seymour Q.C.* (Canada) and *Philip Shelbourne* for the petitioner. The petitioner must establish that the Board has jurisdiction to entertain this matter. The petition was filed after the passing of the Supreme Court Amendment Act, S.C. 1949 (2nd sess.), c. 37, which, by section 3, provides that the Supreme Court shall have exclusive ultimate civil and criminal jurisdiction within Canada, and that "the judgment of the court shall, in all cases, be final and "conclusive," and by section 7: "Notwithstanding anything in "section 3 of this Act, an appeal from or in respect of a judg- "ment pronounced in (*a*) a judicial proceeding that was com- "menced prior to the coming into force of this Act . . . lies or "may be brought as if that section had not been enacted." By proclamation of the Governor in Council in The Canada Gazette the Act came into force on December 23, 1949.

It must therefore be established, if the Board is to have jurisdiction, that there was in this case the commencement of a "judicial proceeding" before December 23, 1949, and in that connexion sections 58, 59, 60, 66 and 69 of the Income War Tax Act are of great importance. Section 58 provides for a notice of appeal against the assessment within one month; under section 59 the Minister may affirm the assessment; section 60 provides for a notice of dissatisfaction, and under section 63 the Minister may transmit the documents to the Exchequer Court. In this case all the procedural requirements of the Income War Tax Act were complied with. The petitioner filed its notice of appeal against the assessment within 30 days on January 4, 1949. On September 2, 1949, some eight months later, the Minister affirmed the assessment. On September 19, 1949, the petitioner filed its notice of dissatisfaction pursuant to section 60 of the Act, and also lodged security for the costs of the appeal. On October 19,

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1950, some 13 months later, the Minister replied to the notice of dissatisfaction, and on November 8, 1950, the documents were under section 63 transmitted by the Minister to the registrar of the Exchequer Court.

It is submitted that for the purposes of the Supreme Court Amendment Act the "judicial proceeding" commenced with the filing of the notice of appeal, or, if that be wrong, that it definitely commenced with the filing of the notice of dissatisfaction, and either of those dates being prior to December 23, 1949, the Board has jurisdiction to entertain an appeal from the judgment of the Supreme Court.

The appeal is from the assessment. "Judicial proceeding" is defined in the Supreme Court Act, R.S.C. 1952, c. 259, s. 2 (*e*), as meaning and including "any action, suit, cause, matter or "other proceeding in disposing of which the court appealed from "has not exercised merely a regulative, administrative, or execu- "tive jurisdiction." *Nicholson Ltd.* v. *Minister of National Revenue* [1] supports the proposition that the filing of the documents by the Minister is a purely mechanical act, and that the judicial proceeding was commenced some time before. It was said in that case: "The sections following section 59 [of the "Income War Tax Act] prescribe the procedure to be followed "before the appellant can have his appeal to the court heard. "This appeal has frequently been referred to as an appeal from "the decision of the Minister but such a description of it is incor- "rect. What is before the court is not the decision of the Minister "but the assessment." And later: "The extent of the court's "jurisdiction under section 66 of the Act is very wide. Subject to "the provisions of the Act it has exclusive jurisdiction to hear "and determine all questions that may arise in connexion with "the assessment." In *Smith* v. *Williams* [2] it was said: "In "my view, as soon as the notice in writing mentioned in "section 59 has been given requiring the commissioners to state "and sign a case for the opinion of the High Court, the proceed- "ings have begun. The notice is the initiation of the proceedings "and thereupon they continue, the duty is cast upon the com- "missioners to state and sign a case forthwith and to transmit "it when so stated and signed to the High Court . . . Normally "the next step in the proceedings is the hearing of the case in "this court, but the proceedings begin with the notice in writing "to the commissioners, and they may end with a decision of "the House of Lords." Substitute the Minister for the com- missioners and there is there a fairly comparable set of proceedings. The Board has jurisdiction to entertain this matter.

K. E. Eaton (Canada) for the respondent. On the question of jurisdiction, in considering section 7 of the Supreme Court Amendment Act of 1949 regard must also be had to section 1 of

[1] [1945] Ex.C.R. 191, 198, 201.

[2] [1922] 1 K.B. 158, 162–163; 38 T.L.R. 116.

Judicial Committee Act, 1844 (7 & 8 Vict. c. 69) which provides "for the admission of any appeal or appeals to her Majesty in "council from any judgments, sentences, decrees, or orders of "any court of justice within any British colony or possession "abroad . . ." Attention is directed to the words "court of "justice"; surely section 7 of the Supreme Court Amendment Act in referring to a "judicial proceeding" may not have the effect of widening the jurisdiction which previously existed. It is proper to read the two provisions together, so that it must be a judicial proceeding in a court of justice. There is no proceeding in a court of justice when the documents are transmitted to the Exchequer Court pursuant to section 63. It is submitted that the preliminary steps which were taken pursuant to sections 58 to 62 of the Income War Tax Act were administrative or executive functions on the part of the Minister; that throughout those preliminary steps there is no judicial proceeding, and, further, no quasi-judicial proceeding. There is no judicial proceeding in a court of justice until the documents arrive at the court of justice. The words of section 63 (2) of the Income War Tax Act "The "matter shall thereupon be deemed to be an action in the said "court" do not assist one way or the other; section 69, which says that "if a notice of appeal is not served or a notice of "dissatisfaction is not mailed within the time limited therefor, "the right of the person assessed to appeal shall cease . . ." rather favours the respondent than the petitioner, because it refers to the right to appeal. *Smith* v. *Williams* [3] cannot affect the submission for the respondent based on section 1 of the Judicial Committee Act of 1844.

VISCOUNT SIMONDS (after consultation): Their Lordships are of opinion that the preliminary point taken by the respondent to this petition succeeds, and accordingly they will humbly advise Her Majesty that the petition should be refused.

Solicitors: *Linklaters & Paines; Charles Russell & Co.*

C. C.

[3] [1922] 1 K.B. 158.

[CHANCERY DIVISION.]

* AUSTIN REED LTD. *v.* ROYAL INSURANCE CO. LTD. (No. 2).

1956
Oct. 10.

Harman J.

[1956 A. No. 1768.]

Landlord and Tenant—Act of 1954—*Business premises (Security of Tenure)—Statutory extension of tenancy pending proceedings—*

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AUSTIN REED LTD. *v.* ROYAL INSURANCE CO. LTD. (No. 2).

Application for new tenancy refused—Appeal dismissed—Leave to appeal to House of Lords refused—Continuation of tenancy until application "finally disposed of"—Until expiry of time for application to House of Lords for leave to appeal—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 64.

Practice and Procedure—Landlord and tenant—Act of 1954—*Application for new tenancy refused by judge and appeal dismissed—Application "finally disposed of."*

Application by tenants under the Landlord and Tenant Act, 1954, for the grant of a new tenancy of business premises was refused by the judge, and the appeal from his decision dismissed by the Court of Appeal. Leave to appeal to the House of Lords was refused by the court, and no application was made to the House of Lords for leave to appeal.

The tenants contended that on the true construction of section 64 of the Act the tenancy expired three months after the expiry of the time within which application might be made to the House of Lords for leave to appeal, that being the date on which the application was "finally disposed of" within the meaning of section 64. The landlord contended that the application was "finally disposed "of" on the date of the decision of the Court of Appeal:—

Held, that the application was "finally disposed of" when the time expired within which a petition could be lodged with the House of Lords for leave to appeal.

ADJOURNED SUMMONS.

The plaintiffs, Austin Reed Ltd., were tenants of business premises at 20, Exchange Street, Manchester, under a lease granted by the Royal Insurance Co. Ltd., dated February 1, 1952, which expired according to its tenor at the end of 1954. The lease, being a lease of business premises, continued in force under the provisions of Part II of the Landlord and Tenant Act, 1954.

On October 7, 1955, the landlord gave the tenants notice under section 25 of the Act, which would have had the effect of making the tenancy expire on April 14, 1956. By a notice under sections 25 and 29, dated November 15, 1955, the tenants stated that they were unwilling to give up possession on the date specified in the landlord's notice; and they applied to the court, under section 29, for the grant of a new tenancy. Their application was opposed by the landlord under section 30. Danckwerts J., by an order made on May 8, 1956, pursuant to section 31, held that the landlord's objection was made out, and refused to make an order for a further tenancy. The tenants appealed to the Court of Appeal, which, by an order made on July 18, 1956, affirmed the order of Danckwerts J., and dismissed the appeal. The court refused leave to appeal to the House of Lords. No application was made by the tenants to the Appeals Committee of the House of Lords for leave to appeal within the month following the decision of the Court of Appeal.

The tenants contended that they were entitled to retain possession of the premises until November 18, 1956, being three months after August 18, 1956, the date on which their right to petition the House of Lords for leave to appeal from the Court of

Appeal had expired. The landlord contended that they were entitled to possession on October 18, 1956, three months after the decision of the Court of Appeal.

The tenants took out the present summons asking for a declaration that by virtue of the provisions of Part II of the Landlord and Tenant Act, 1954, and of section 64 (2),[1] and in the events which had happened, the tenancy would not terminate until November 18, 1956.

R. M. Wilson Q.C. and *A. W. Hamilton* for the tenants.
Charles Russell Q.C. and *Michael Browne* for the landlord.

Case referred to in argument not cited in the judgment: *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co. Ltd.*[2]

HARMAN J. The tenant sues his landlord for relief on the footing that his tenancy goes on for one month longer than the landlord avers. There is no doubt that the landlord intends, on the date which he says is the true date for the determination of this tenancy, to do that which, if the tenancy is not determined, would be a breach of his covenant towards his tenant for quiet enjoyment. The question is simply on what date does the tenancy (so to call it) determine; for it is by no means an ordinary tenancy as lawyers have been used to regard such things.

[His Lordship stated the facts and continued:] That brings me to the nub of this situation, which is: when, in the circumstances, does the statutory tenancy determine? For that I consider Part IV of the Act, which contains the miscellaneous provisions, and I need only read section 64, which provides that where an application for a new tenancy has been made by the tenant (as it has here), and where an application to the court has been made, and "(*c*) apart from this section the effect of "the notice or request"—that is, the notice to determine—"would be to terminate the tenancy before the expiration of the "period of three months beginning with the date on which the "application is finally disposed of, the effect of the notice or "request shall be to terminate the tenancy at the expiration of

[1] Landlord and Tenant Act, 1954, s. 64: "(1) In any case where—"(*a*) a notice to terminate a tenancy "has been given under . . . Part II "of this Act or a request for a new "tenancy has been made under Part "II thereof, and (*b*) an application "to the court has been made under "the said . . . Part II, . . . and "(*c*) apart from this section the effect "of the notice or request would be "to terminate the tenancy before the "expiration of the period of three "months beginning with the date on "which the application is finally dis-"posed of, the effect of the notice or "request shall be to terminate the "tenancy at the expiration of the "said period of three months and not "at any other time. (2) The refer-"ence in paragraph (*c*) of subsec-"tion (1) of this section to the date "on which an application is finally "disposed of shall be construed as a "reference to the earliest date by "which the proceedings on the appli-"cation (including any proceedings "on or in consequence of an appeal) "have been determined and any time "for appealing or further appealing "has expired . . ."

[2] [1904] 1 K.B. 820; 20 T.L.R. 366.

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Harman J.

" the said period of three months "—and then it goes on—" and " not at any other time." Why it was considered necessary to say " and not at any other time " I do not know, unless it means that one date was to be pointed out, and no other, at which the long drawn struggle was finally to come to an end. Here it is not disputed that this tenancy ends three months from the date on which the application for a new tenancy was finally disposed of. Those three months are still running. They will end on October 18 or November 18, according to the decision on this summons.

The statute gives directions by subsection (2) as to what it means by the words " the application is finally disposed of." Mr. Russell pointed out that in some senses applications to the court are never finally disposed of, except so far as the House of Lords itself is concerned, because there is an inherent power in the court to extend the time for appeal or to extend the time for a retrial, and those powers have been used in some very striking cases years after the decision; therefore, in theory it is difficult ever to say that an application is finally disposed of. But subsection (2) of the section says, in effect, that the application is finally disposed of when all time for appeal has expired; that is to say, although a tenant might obtain leave to appeal out of time, that would not save the tenancy, because the three months run according to the time that an appeal may be made under the rules and not that which a court might allow for an appeal. The difference between the parties is on this narrow ground: when can it be said in this case that any time for appealing has expired? I should not, prima facie, be disposed to say that the application is finally disposed of until finality has been reached, that is to say, until there can be no further talk about it. That must be qualified to this extent, that finality must go by the time allowed for appeal and not the indulgence which a court may grant.

In this case the Court of Appeal, having reached its conclusion, refused leave to appeal to the House of Lords. If it had not done that, there is no doubt that the matter would not have been finally disposed of until six months after the Court of Appeal's decision, because if leave to appeal had been given there would have been six months within which the aggrieved party might consider whether or not to tempt his fortunes in the House of Lords. If within that six months he had put a petition of appeal on the records of the House, the time would further have been extended until their Lordships' House had reached its conclusion. But the tenant did not get leave, and the only way, therefore, in which the proceedings could possibly have been kept alive was to go to the House of Lords and get that body's leave notwithstanding the refusal of the Court of Appeal. It is within the knowledge of all practitioners that that proceeding occasionally results in the House of Lords not only giving leave to appeal but allowing the appeal. It is said by the tenants that during

the month after the order of July 18 it could not be postulated that the matter was finally disposed of, because the tenants might put such a petition on the file. They did not do so. Therefore, at the end of one month, that is to say, on August 18, it is admitted that time began to run, and will therefore end on November 18.

That, however, does not satisfy the landlord, he argues that the meaning of the words "finally disposed of" in section 64 is to be found in subsection (2) of the same section and that what it is necessary to consider is whether the proceedings on the application have been determined. There is no doubt that they were determined by the Court of Appeal's decision—"and any time for "appealing or further appealing has expired." Mr. Russell, on behalf of the landlord, says that the Court of Appeal has refused leave to appeal, and, therefore, no right of appeal exists from that moment onwards; and there being no right of appeal, there was therefore no time for appealing; and from the words of the section this inference can be drawn, that time runs against an unsuccessful appellant who has not got leave, for the simple reason that he has no right of appeal vested in him at all. The fact that he may within a month revive his right or get a new right is irrelevant, and really no inconvenience because he must do it within a month, and the other period being three months, there is no serious danger of any overlapping.

He pointed out that under section 7 of the Criminal Appeal Act, 1907, a distinction is carefully drawn between appeals and applications for leave to appeal. That, of course, in connexion with criminal causes involving either corporal punishment or death, might be a very important matter. He says that the two things are different: the application for leave to appeal is not an appeal itself; it is merely a new application, and it would be a twisting of the language to treat it as if time for appealing was there when it was not there, there being no extant right of appeal. Nevertheless, there was a potential right to appeal, and if one looks at it from the other end of the telescope, a person who may obtain a right may be said to have an additional right, just as much as he may be said to have no right until he obtains the leave which gives it him.

In the end I do not think that either way of looking at it really helps me; nor does the alternative view, that applications to the House of Lords by petition may possibly be proceedings in consequence of an appeal; with the result that if the petition were put on the file within the month, well and good, but, as it was not, that time would continue to run which began when the Court of Appeal pronounced its judgment.

This, I have no doubt, is an important matter to the parties, and I do not find it an easy one to determine. Parliament has thought fit to break the contract between the parties and to allow the tenant to continue an occupation to which no contract he ever made gave him any right. It may be that the courts ought

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not to extend that beyond what the statute insists that it should, because, after all, the tenant is occupying somebody else's property; but I do feel (and this eventually decides the case as far as I am concerned) that when the section says "finally "disposed of" I ought to take it to mean what it says. Certainty is the most valuable point of this kind of law, and I feel that there ought to be a time at which one can say without peradventure: "The thing is over. There is nothing more which one can "do before time begins to run, which shall put the landlord out "of his agony of waiting"; and that as the section says that there has to be three months after the matter is finally disposed of, I ought to take the view that when it talks of time for appeal it must include the time for registering a petition for leave to appeal. In my judgment, until the month has passed during which the time for that petition runs, one cannot postulate that the matter has been finally disposed of. If that be right, until that time has expired the period of three months does not begin to run.

Declaration accordingly.

Solicitors: *Underwood & Co.; Linklaters & Paines for Laces & Co., Liverpool.*

I. G. R. M.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1956
Oct. 3.

* REGINA *v.* STREAMS.

PRACTICE NOTE.

Lord Goddard C.J., Hilbery and Ashworth JJ.

Criminal Law—Practice—Venue—Committal by justices to foreign court to avoid delay—Whether necessary to commit to assizes on same circuit—Duty to avoid unnecessary expense.

APPLICATION for leave to appeal against conviction and sentence.

The appellant did not appear and was not represented.

LORD GODDARD C.J. There is no ground whatever for giving leave to appeal either against conviction or against sentence, but I want to make one observation of general application about this case for the guidance of committing justices.

The offence was committed in Berkshire, in Reading Borough, just after the assizes. No doubt the justices thought that it would

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[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

be a proper thing—and this I am not criticizing at all—that they should use the powers which have been given to them of committing to what is called a foreign court, that is, instead of sending the prisoner to Berkshire Assizes, to send him elsewhere for trial to prevent him from being detained for a long time in prison without trial. I hope, however, that justices will bear in mind that when they are exercising that power they should send the case to the nearest convenient court that is possible, because if they send it to a far distant court the expense which is put on public funds is very greatly increased. In fact this case was committed by the Reading justices to Hereford, no doubt because Hereford is on the Oxford circuit, and in the ordinary course the case would go to the Reading Assizes, which are also on the Oxford circuit. The judge on the circuit only had three days at Hereford, and he could not have tried it there, so it was sent to Shrewsbury; but whether it went to Hereford or Shrewsbury is neither here nor there; they are both a long distance from Reading and the increased expense of this prosecution must have been very great.

The obvious place to have sent this case was to the Central Criminal Court because that is very much nearer Reading than Shrewsbury or Hereford. I am far from suggesting that in all cases justices should be very ready to commit to the Central Criminal Court, because that court has plenty of work as it is; but there are occasions in the home counties when, in order to prevent a man from being detained a long time in prison without trial, cases do go there and the judges are willing to try them. If this case had been sent to the Central Criminal Court, a great deal of expense would have been saved, and I therefore hope that justices all over the country will remember that they should commit, if they are exercising their powers to send to a foreign court, to the nearest court that can conveniently be found. It is unnecessary to send a case to a place on the same circuit; it may very often be it would go to another circuit, but the question of keeping down the costs of these prosecutions should be borne in mind because if this case had gone not to the other end of the circuit but to London, there would have been a saving of expense. I am not in the least criticizing the justices for exercising their powers of sending it to a foreign court, but I think it is a pity that they sent it to one so far distant.

Application dismissed.

1956
April 19,
20, 23.

Upjohn J.

* *In re* WALE, DECD.
WALE AND ANOTHER *v.* HARRIS AND ANOTHER.

[1955 W. 1152.]

Settlement—Recitals—Misrecital—Investments comprised in settlement —"A" investments settlor's absolute property—"B" investments registered in names of settlor and settlement trustees as co-executors and trustees of settlor's husband's will—Recital of transfer of investments to settlement trustees—Transfers never executed—Whether settlement valid.

Gift—Incomplete gift—Rule in Strong *v.* Bird*—Settlement—"A" investments settled on daughter—Investments not transferred to settlement trustees—Imperfect gift—Settlement forgotten by settlor —Proceeds of sale of investments dealt with by settlor during her life—Daughter and settlement trustees appointed executors of settlor's will—Whether imperfect gift in settlement perfected.*

A voluntary settlement executed in 1939 in favour of the settlor's daughter comprised "A" investments registered in the settlor's name as absolute beneficial owner and "B" investments to which the settlor was solely and beneficially entitled, but which were registered in the names of the settlor and her two sons as executors and trustees of the settlor's husband's will. The sons were trustees of the settlement which recited that the investments had been transferred into their names. In fact they had not been and never were so transferred. By clause 1 of the settlement the trustees were empowered to sell or retain the investments, and by clause 2 were directed to hold them or the proceeds of sale of them on trust to pay the income to the settlor for life and after her death in trust for the daughter if a widow absolutely and if not a widow on trust to pay the income to the daughter for life and subject as therein provided in trust as to capital and income for the daughter's children or child. By a will of even date with the settlement the settlor left substantially all her estate to the sons in equal shares, expressly stating that she had made no provision for the daughter as she had done so in the settlement. The settlement in fact provided the daughter with an income roughly equal to one-third of the income of the family estate. In 1942 the settlor executed another will, appointing her sons and daughter trustees thereof and leaving her residuary estate to them in equal shares, but so that, should either or both of the sons predecease the daughter, his or their share or shares should be held in trust for her. In 1944 the settlor made, with regard to the estate, a note that the daughter had "had about £5,000 in "shares." In 1945 she wrote to her elder son that, later, he would "share everything in the dividing up." In 1944, 1946, and 1948, money paid on the redemption of certain of the "A" investments was either kept by the settlor or given by her as presents to her children. She appeared to have forgotten the existence of the settlement. By her last will, made in 1950, she appointed her sons and daughter executors and trustees and left her residuary estate in equal shares absolutely to such of the sons and daughter as should survive her. With regard to the "B" investments also, there were sales, redemptions or payments in liquidation, the settlor either keeping the proceeds or making presents to the children. In 1953 her faculties were waning and she was taken to a home. In September, 1953, everything that the children had had

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WALE, DECD., *In re.*

was redivided on the basis of all sharing in it equally. In October, 1953, the settlor died and her solicitor produced the settlement, which the sons had forgotten and of which the daughter then learned for the first time.

On a summons to determine, inter alia, which of the investments were subject to the trusts of the settlement:

Held, (1) that in spite of the misrecital that the "A" and "B" investments had been transferred to the sons as trustees, the settlement on its true construction constituted an assignment of the settlor's equitable interest in the investments to the trustees; (2) that as to the "B" investments it followed that the court, in the exercise of its jurisdiction over trustees in whom the legal estate was outstanding, would order them to deal with the legal estate in accordance with the intention of the owner of the equitable estate; (3) that in the case of the "A" investments there was an imperfect gift so that there was an initial failure; and that as the facts indicated that the settlor had regarded the investments as her own property and had forgotten the existence of the settlement, she had not evinced any continuing intention with regard to the investments so as to bring into operation the principle in *Strong* v. *Bird* (1874) L.R. 18 Eq. 315 that an imperfect voluntary transfer of property is perfected by the appointment of the donee as executor; so that the "A" investments were not and the "B" investments were to be regarded as comprised in the settlement.

Per curiam. The principle that the assignment of an equitable interest need not be in any particular form and that "the language "is immaterial if the meaning is plain" (*per* Lord Macnaghten in *Brandt's (William) Sons & Co. Ltd.* v. *Dunlop Rubber Co. Ltd.* [1905] A.C. 454 at p. 462; 21 T.L.R. 710) applies to a voluntary assignment as well as to one for valuable consideration.

ADJOURNED SUMMONS.

By a voluntary settlement executed in 1939, Elizabeth Wale, the settlor, settled on her daughter on the trusts therein contained "A" investments registered in her name as absolute beneficial owner, and "B" investments to which she was solely and beneficially entitled, but which were registered in her name and in the names of her sons Charles William Wale and Henry Edgar Wale, all three as executors and trustees of her husband's will. The sons were trustees of the settlement, in which was a recital that the settlor had transferred to the trustees the investments therein comprised. In fact she had not done so and never did: and during her lifetime she so dealt with moneys arising on the redemption of some of the investments as to indicate that she had forgotten the existence of the settlement. She showed constantly that she wished her children to share in the family estate equally and, at her request, they redivided equally between the three of them moneys which had already been advanced to them. By a will of even date with the settlement she left substantially the whole of her estate to the sons in equal shares, expressly omitting the daughter, as she had provided for her in the settlement. By a second will, however, made in 1942, she appointed the sons and daughter trustees thereof and left her residuary estate to them in equal shares, and by her last will, made in 1950, she made the same provisions. On her death in

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1953, the family solicitor produced the settlement, which the sons had forgotten and the daughter had never seen: and the sons took out this summons to determine, inter alia, which of the investments comprised in the settlement were subject to the trusts thereof. The defendants to the summons were the daughter, Bessie Mary Harris and her infant daughter, Celia Elizabeth Harris.

The facts are fully stated in the judgment of Upjohn J.

Raymond Jennings Q.C. and *Raymond Walton* for the plaintiffs.

H. E. Salt Q.C. and *H. E. Francis* for the defendants.

Case cited in argument not referred to in the judgment: *In re Freeland.*[1]

UPJOHN J. The first question which arises is whether a voluntary settlement dated August 1, 1939, constituted a complete and perfect settlement by the settlor of certain stocks and shares purported to be settled on certain trusts. The settlor was a Mrs. Elizabeth Wale, and the settlement was in favour of her daughter, the first defendant, Bessie Harris, who had then recently married, and her issue. The trustees thereby appointed were the sons of Mrs. Wale, the brothers of Mrs. Harris.

The settlement, so far as is relevant, was in these terms: "This settlement is made the first day of August, 1939, between "Elizabeth Wale . . . (hereinafter called 'the settlor') of the "one part and Charles William Wale and Edgar Henry Wale . . . "(hereinafter called 'the trustees') of the other part. Whereas "the settlor is absolutely entitled to the investments specified in "the schedule hereto and has transferred them into the names "of the trustees to be held upon the trusts and with and subject "to the provisions hereinafter declared and expressed. Now this "deed made in consideration of the natural love and affection "of the settlor for her daughter Bessie Mary Harris (hereinafter "called 'the daughter') witnesseth as follows: 1. The trustees "may either allow the said investments or any of them to "remain as now invested so long as the trustees think fit or may "at any time or times with the consent of the settlor during her "life and after the death of the settlor at the discretion of the "trustees sell call in and convert into money the same or any "of them and shall with the like consent or at the like discretion "invest the moneys produced thereby in or upon any invest-"ments hereby authorized with power with the like consent or "at the like discretion to vary or transpose any investments for "or into others of any nature hereby authorized. 2. The trustees

[1] [1952] Ch. 110; sub nom. *Jackson* v. *Rodger* [1951] 2 T.L.R. 1076; [1952] 1 All E.R. 16.

" shall hold the said investments and the investments for the " time being representing the same (hereinafter together referred " as ' the trust fund ') in trust to pay the income thereof to the " settlor during her life and after her death if at the time of " such death the daughter shall be living and a widow then in " trust as to capital and income for the daughter absolutely but " if at the time of such death the daughter shall be living but " not a widow then in trust to pay the income of the trust fund " to the daughter during the remainder of her life and subject " as hereinbefore provided the trustees shall hold the capital and " income of the trust fund in trust for all or any the children " or child of the daughter who shall attain the age of 21 years " and if more than one in equal shares." I do not think that I need read any of the rest of the settlement.

The schedule of investments contains some 41 items. Mrs. Harris has issue one child only, namely, the second defendant, Celia Elizabeth Harris, a spinster and an infant. The circumstance which gives rise to the difficulty is this. Of the investments, 21 were at the date of the settlement registered in the sole name of the settlor, and she was the legal and beneficial absolute owner thereof. I shall call those the " A " investments following the classification in the affidavits which have been put before me. The remaining 20 investments were registered in the names of the settlor and her two said sons as executors and trustees of the settlor's husband's will. That estate had been duly administered, and wound up, and the settlor was under the terms of the will solely entitled to such investments absolutely and beneficially. I will refer to these investments as the " B " investments. Transfers were never executed in favour of the trustees of the settlement.

The relevant principles of law are not in dispute. As Sir George Jessel M.R. said in *Richards* v. *Delbridge* [1]: " The " principle is a very simple one. A man may transfer his " property, without valuable consideration, in one of two ways: " he may either do such acts as amount in law to a conveyance " or assignment of the property, and thus completely divest " himself of the legal ownership, in which case the person who " by those acts acquires the property takes it beneficially, or on " trust, as the case may be; or the legal owner of the property " may, by one or other of the modes recognized as amounting " to a valid declaration of trust, constitute himself a trustee, " and, without an actual transfer of the legal title, may so deal " with the property as to deprive himself of its beneficial owner- " ship, and declare that he will hold it from that time forward " on trust for the other person." There is one important principle also to be borne in mind. If the gift for any reason be imperfect, the court will not in effect approve that gift by construing an imperfect gift as a trust. In the same case Sir

[1] (1874) L.R. 18 Eq. 11, 14.

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George Jessel dealt with that principle in this way[2]: "The "true distinction appears to me to be plain, and beyond dispute: "for a man to make himself a trustee there must be an expres- "sion of intention to become a trustee, whereas words of present "gift show an intention to give over property to another, and "not retain it in the donor's own hands for any purpose, fiduciary "or otherwise. In *Milroy* v. *Lord*,[3] Turner L.J., after referring "to the two modes of making a voluntary settlement valid and "effectual, adds these words: 'The cases, I think, go further, "'to this extent, that if the settlement is intended to be "'effectuated by one of the modes to which I have referred, the "'court will not give effect to it by applying another of those "'modes. If it is intended to take effect by transfer, the court "'will not hold the intended transfer to operate as a declaration "'of trust, for then every imperfect instrument would be made "'effectual by being converted into a perfect trust.'"

In *In re Rose*,[4] in the Court of Appeal, the donor was the registered proprietor of certain shares. He executed a transfer in proper form but could not secure registration of the donee in the companies' register in his place, that act being necessarily within the exclusive province of the directors of the company. It was held that, having done everything in his power to transfer his interest in the shares, the donation was complete.

Another familiar principle is that an assignment of an equitable estate need not be in any particular form. As Lord Macnaghten said in *Brandt's (William) Sons & Co. Ltd.* v. *Dunlop Rubber Co. Ltd.*[5]: "The language is immaterial if the "meaning is plain." That, in my judgment, applies as much to a voluntary assignment as to one for valuable consideration as in that case. (See also *Lambe* v. *Orton*.[6]) An equitable assignment may take many forms. It may in terms purport to operate as an assignment, or it may take the form of a direction to the trustees in whom the legal estate is outstanding to hold the property on trust for the donee or on new trusts.

That last method is a perfectly good equitable assignment. As Sargant J. said in *In re Chrimes*[7]: "Now it is well established "that in the case of an equitable interest outstanding in trustees "or other holders a voluntary direction by the owner to the "trustees or holders to hold the whole or part of that interest "upon trust for a third person operates as a complete and "effectual transfer of the interest to which the direction "extends." He then cites four cases. It was argued that something I said in *In re Burton's Settlements*[8] distinguished between an equitable assignment and a direction to hold upon new trusts. With all respect to that argument, I was merely

[2] L.R. 18 Eq. 11, 15.
[3] (1862) 4 De G.F. & J. 264, 274.
[4] [1952] Ch. 499; [1952] 1 T.L.R. 1577; [1952] 1 All E.R. 1217.
[5] [1905] A.C. 454, 462; 21 T.L.R. 710.
[6] (1860) 1 Drew. & Sm. 125.
[7] [1917] 1 Ch. 30, 36.
[8] [1955] Ch. 82; [1954] 3 W.L.R. 581; [1954] 3 All E.R. 193.

striving in that judgment to emphasize the precise language which the settlor had used and not to draw any distinction between the two modes of assignment.

Finally, it seems to me clear that if the legal estate be outstanding in respect of the "B" investments, as in this case in three trustees, one of whom is the beneficial owner, it is sufficient if the beneficial owner gives expression of his or her intention to the other two trustees, and he or she need not go through the form of giving directions formally to all trustees including herself. If the beneficial owner gives directions to the other two it is necessarily implicit that, in his or her capacity as trustee, the beneficial owner will, of course, conform in doing all that is necessary to carry out the directions he or she has given: see *Bentley* v. *Mackay*.[9] Mr. Jennings made a very careful examination of the facts on pp. 14 and 15 in that case, and has drawn my attention very properly to the fact that the headnote seems to be misleading, in that in effect the donor in that case gave directions to three of his co-trustees and not, as stated in the headnote, to two only.

The argument on behalf of the plaintiffs is this. They submit that the recitals in the settlement make it abundantly plain that the settlor has chosen to transfer all her investments into the names of the two trustees in the first place. They submit that clause 2 operates only on the footing that the legal estate has been transferred to the two trustees. If in fact that has not been done, then the beneficial interest does not pass, they submit, in the way contemplated by the settlement. Therefore the argument proceeds on the basis that it is wrong to construe this settlement as operating to pass the equitable estate, for it was intended only as a declaration of trust to take effect on the footing that the transfer of the legal estate in favour of the two trustees had already been executed. That at first sight is an attractive argument.

My real task, however, is to interpret the intention of the settlor as evinced in the settlement on a fair construction thereof in accordance with the usual canons of construction. The settlement starts with a recital which is erroneous as to the "A" investments, in that they had not been transferred. As to the "B" investments the language is not only inaccurate, it is altogether inappropriate. It never could be literally true to say that the settlor, that is, the settlor alone, had transferred the "B" investments into the names of the two trustees. But "A misrecital will not affect the deed if it be sufficiently clear "what is intended." (See the principle stated in Norton on Deeds, 2nd ed. (1928), pp. 210 and 211.)

The words of the second clause of the settlement taken by themselves seem to me to be plain and unambiguous. "The "trustees shall hold the said investments"—that is clearly a

[9] (1851) 15 Beav. 12.

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reference to the investments specified in the schedule and already recited as being the absolute property of the settlor—on certain trusts. Applying the principles I have formulated, it seems to me a perfectly clear assignment of the settlor's equitable interest in the said investments. I do not see how I can, consistently with sound principles of construction, permit the earlier misrecitals to control or qualify that plain and unambiguous language. That, however, would be the effect of acceding to the arguments of counsel for the plaintiffs. In my judgment the settlor has made an assignment of the whole equitable interest of the settlor in the "A" and "B" investments to the trustees constituted by the settlement.

As to the "B" investments, it necessarily follows that this court, exercising its jurisdiction over trustees, has the power and duty to order the trustees in whom the legal estate is outstanding to deal with the legal estate in conformity with the intention of the owner of the equitable estate. Having assigned her equitable interest, the beneficial owner, qua trustee, cannot escape the consequences of her acts and ask the court not to administer the trusts declared by her.

With regard to the "A" investments the situation is admittedly otherwise. The court cannot control the settlor, for she is not a trustee. It is a case of an imperfect gift. Accordingly, in my judgment, the settlement failed initially as to the "A" investments, but was and always has been valid and effective as to the "B" investments.

That brings me to the second point in relation to the "A" investments. I need state only one further fact, namely, that the settlor died in 1953 having appointed her daughter and two sons executors and trustees, and her will has been duly proved by all of them. As the two sons have, together with the daughter, become clothed with the legal estate in respect of such of the "A" investments as remain in the name of the settlor at the date of her death, the question is whether the initial defect is cured. The relevant principle is frequently referred to as the principle of *Strong* v. *Bird*,[10] the case where it was first formulated by Sir George Jessel M.R. I take the principle from the later case of *In re Stewart*,[11] a decision of Neville J. Neville J. said: "It"—that is, the case—"purports to lay down a principle of general "application, and I think I am bound to apply that principle to "the present case. The decision is, as I understand it, to "the following effect: that where a testator has expressed the "intention of making a gift of personal estate belonging to him "to one who upon his death becomes his executor, the intention "continuing unchanged, the executor is entitled to hold the "property for his own benefit. The reasoning by which the "conclusion is reached is of a double character—first, that the

[10] (1874) L.R. 18 Eq. 315.

[11] [1908] 2 Ch. 251, 254; 24 T.L.R. 679.

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" vesting of the property in the executor at the testator's death " completes the imperfect gift made in the lifetime, and, " secondly, that the intention of the testator to give the bene- " ficial interest to the executor is sufficient to countervail the " equity of beneficiaries under the will, the testator having " vested the legal estate in the executor. The whole of the " property in the personal estate in the eye of the law vesting " in each executor, it seems to me immaterial whether the donee " is the only executor or one of several; nor do I think the rule " is confined to cases of the release of a debt owing by the " donee."

Mr. Jennings has made a number of admissions for the purposes of argument. He admits that the principle is capable of being applied to a settlement of stocks and shares in which the trustees are subsequently named executors with another, and he admits that the settlor in this case evinced the intention of making an immediate gift. He challenges the application of the principle solely on the ground that the intentions of the settlor did not continue unchanged until her death. That is purely a question of fact. When the matter was first before me in January the evidence was very sparse, and it was stood over for further evidence to be filed. There is now a considerable body of affidavit evidence before me which has been slightly expanded by oral evidence, but there is still no direct evidence of the settlor's intentions. In view of the evidence it becomes necessary to see what inferences of fact may properly be drawn from the admitted evidence before me.

The father of Charles, Edgar and Bessie, that is the settlor's husband, died on May 21, 1938, and probate was granted to the widow and the two sons. By his will he left everything to the settlor should she survive him by 72 hours, but if she did not the whole of his estate was to be divided between his children as to two-sevenths to Charles, two-sevenths to Edgar, and three-sevenths to Bessie if she was unmarried at the time of his death, as she was. At this time the settlor was living at Watford in a house, and an unmarried son Edgar and her daughter were living with her. The elder son Charles, being married, naturally was living elsewhere, but they appear to have been a united family.

Not long after the father's death the settlor made a will of November 8, 1938, and after a few legacies she gave the whole of her residuary estate equally between her three children, Charles, Edgar and Bessie. There was a hotchpot clause in these terms: " I direct that each of my children shall bring into hotchpot " against the capital of his or her share such sum as may have " been given to them by my late husband or myself during his " or my life." It appears to have been the practice of the father to give from time to time substantial gifts to his children. I need only give one example. It is the most substantial example, but he had given a sum of some £10,000 which stood in the joint

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names of Edgar and Bessie, the income of which was to be used as a dress allowance for Bessie. On March 23, 1939, by the agreement of all parties, that sum was split up between Edgar and Bessie in, roughly speaking, equal moieties. At this time, 1938 and 1939, Bessie was friendly with a gentleman of the name of Harris of whom the family strongly disapproved. She had been friendly with him during her father's lifetime, but at that time there was no question of her marrying him. Later, however, she told her brothers and the settlor that she was going to marry him, and she did so in fact in July, 1939, without the approval of her family. That is the background behind the voluntary settlement which I have already read.

Charles in his affidavit puts the evidence, which is unchallenged, in this way: "Some time later"—that is, after the marriage of his sister—"in July, 1939, I saw my mother at her "house at Watford . . . She told me as best as I can recall, "'It is my intention to make a settlement to prevent Harris "'getting hold of any part of the estate if Bessie dies before "'him.' She asked me to supply her with a list of holdings or "part holdings to represent a third of her estate, having regard "to those holdings which were already in my sister's name." The fact that the settlement was not an ordinary marriage settlement, but was expressly intended to prevent Harris laying his hands upon any part of his wife's fortune, is amply borne out by the express terms of the settlement, which I need not recapitulate. In pursuance of the settlor's request Charles sorted out, obviously at great trouble, investments representing Bessie's one-third share. He told me in the witness-box that he took one-third of what I may call the whole family estate, that is to say, one-third of the property belonging to the settlor at law or in equity which stood in the names of the father's trustees, also sums which had been before that time advanced to Bessie, Edgar or Charles. He found that the whole value of the family estate was £36,378, of which one-third was £12,126. He then made some very careful calculations and adjustments as is proved by the original figures which he produced to me to show that, as at June 30, 1939, when he valued these shares, the shares in Bessie's name amounted to £4,471, and he allocated to the settlement in fixed interest stocks £3,425, and in ordinary stocks £4,084, making a total of £7,509. That gave her an income of £753 as against £754, which was one-third of the total income of the estate. Those figures were supplied by Charles to the settlor and through her to the solicitors, and the next that Charles and Edgar heard about this matter was that they were asked to attend at the solicitors' office to sign a declaration of trust.

Charles' account of the matter, which is substantially agreed to in Edgar's affidavit, was this: "I attended these offices with "my mother and my brother. We saw Mr. Vazie Simons, the "senior partner in that firm, who produced a deed of settlement, "namely, the above settlement. He directed us where to sign.

" which we did. I recall that we did not even read the deed. " Mr. Simons told us we were trustees for my sister and, as he " was the family solicitor, we troubled no further. I thought " that our duties would not commence until my mother's death. " I did not realize the implications of the settlement. In any " case it would have seemed strange to me that during my " mother's lifetime I should have some supervisory duties over " her actions. Mr. Simons did not tell us there would have to be " any transfers, nor did we notice the recital as to transfer in " the settlement. I was not supplied with a copy of the settle- " ment, and the original was left with Mr. Simons." From that moment onwards, so far as Charles and Edgar were concerned, the settlement was never mentioned again, and it is not surprising that both of them forgot all about it. It came to them as something of a shock when, years afterwards, after their mother died in 1953, the solicitor produced this settlement from his records. So far as Bessie was concerned, I am told, and I accept it, she was never informed of this settlement during her mother's lifetime at all. Of course, it is for that reason that the settlement was never mentioned or discussed by anybody during the remainder of the settlor's life, but unfortunately for me there is no direct evidence on the question as to the settlor's intention.

At the same time that the settlement was executed, the settlor executed a will. It is in fact dated the same day as the settlement. The will appointed Charles and Edgar to be executors and trustees. It will be remembered, of course, that in the earlier will of 1938 all three children had been appointed executors and trustees. After certain legacies the settlor gave the whole of her residuary estate to be divided " equally between my two children " the said Charles William Wale and Edgar Henry Wale or the " survivors or survivor of them absolutely "; and this was added: " I have made no further provision for my daughter Bessie Mary " Harris in this my will as I have by a settlement executed in " my lifetime made suitable provision for her."

Naturally Bessie left the settlor's home on her marriage, but Edgar continued to live with the settlor until, unhappily, their house in Watford was destroyed by enemy action some time in 1940. I understand that the settlor went to hospital for a time, and then she went to live with her daughter and her husband at Merthyr Tydvil in South Wales. Apparently that was not a great success, and at some time she returned and went to a place known as the Mardale Nursing Home while she was looking round for a house, and some time in 1942, at any rate before she executed the will in August of that year, she found a house, 14 Mildred Avenue, Watford, where her son Edgar went and lived with her and remained with her until she went many years later to a home.

On August 10, 1942, the settlor executed another will. In that will she appointed all three children to be executors and trustees, and again, after a few legacies, she left the residue of

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her estate " In trust for my said sons Charles William Wale and " Edgar Henry Wale and my daughter Bessie Mary Harris in " equal shares But in the event of the said Charles William Wale " and Edgar Henry Wale or either of them dying in my lifetime " then my trustees shall hold the share of those so dying In trust " for my said daughter Bessie Mary Harris." There was a contemporaneous codicil dealing with advances.

Pausing there, Mr. Jennings for the plaintiffs, Charles and Edgar, submits that the inference at this stage is plain. He says that originally in 1939 she had desired that the daughter should have her one-third share provided by the settlement, and then realised it would be unfair that she should have anything more. The new will in 1942 shows, he submits, that the settlor had wholly forgotten that settlement, and that, having regard to the equality which had always prevailed throughout the family, she could never have intended that the daughter Bessie should have substantial sums under the settlement, and at the same time participate equally with her brothers in the family estate. Mr. Jennings says that that shows that the settlor no longer had any continuing intention to give effect to the settlement. On the other hand, Mr. Salt for the defendants said that those facts are perfectly consistent with another view. In 1942 Bessie had a child, the second defendant. Bessie's earning capacity was, of course, not nearly as great as that of her brother's, and the whole matter, he says, was consistent with this, that the settlor intended that her daughter should have rather more than the brothers, and, therefore, that she, so to speak, while keeping the settlement in mind, still desired that Bessie should have one-third of the family estate, bringing into account that which she had received, of course, in her own hands. Mr. Salt further suggested that the settlor must have known of the imminent breakdown, as it turned out, of the daughter's marriage, but as I am informed the daughter was present in court and did not choose to give evidence on that matter, I do not think it is open to Mr. Salt to take that point. However, this much is clear, that Bessie did in fact desert her husband on March 18, 1943, and went to live with the settlor and her brother Edgar at the house in Watford where they, as I have said, all remained until the settlor a few months before her death in 1953 was, owing to failing faculties, taken to some home. The daughter was divorced by her husband for desertion and the decree absolute was made in 1947.

On November 13, 1944, the settlor made some note (I think it must have been for the purposes of a new will) regarding her estate. That does contain a reference to the fact that Bessie had had about £5,000 in shares. That, of course, was literally true, and speaking for myself I get no comfort or assistance from that document one way or the other.

Then on January 11, 1945, the settlor wrote to her eldest son as follows: " My Dear Charles, I expect you received the " little ' Sweepings ' packet I sent you; I had not time to write

" a note with it. . . . I received the £1,000 cheque from " Shakomato . . . and am buying some Dormans and Bradford " Dyers' with £900 and the £100 of Stewart & Lloyds which has " just fallen in to Edgar. They are both very sound affairs I " believe; not in my name as I wish to save any death duties for " you children—hence also the £100 savings thing you each had " at Christmas. They are in Edgar's and B's names. (Dormans " & Bradford Dyers.) This is no slight on you, for later you " of course share everything in dividing up but E & B will not " share in Colonial Wharf or Wharves. Edgar suggested the " dividing up as being most fair, in spite of costing a trifle more " for stamps, thinking you might like to have a third of Stewart " & Lloyds which he holds, as you know, you'll find E very just " in money matters. We think Stewart & Ll a good thing, the " solicitor here who made me a will most strongly pointed out " that any advancements made must not be mentioned in the " will, or the Income Tax people will give you no peace, but he " points this out in a letter he wrote at the time. That adjust- " ment must be made between you three privately and absolutely " justly. . . ." It is said on behalf of the plaintiffs that that shows that Charles was going to have one-third of the whole estate, meaning the whole family estate, and in addition if the settlor really thought that the settlement was in existence, this would have been a very curious letter to write. Speaking for myself, I am not at all impressed by that argument. But it is, I think, an important letter on the Shakomato investment, and I will deal with that at a later stage in my judgment.

One April 5, 1945, the settlor made yet another will. I do not think I need read it, because the net effect was only to make certain alterations in the specific and pecuniary legacies, and there was in fact no hotchpot clause.

Then, finally, on November 5, 1950, the settlor made her last will which was ultimately proved by the children in the Principal Probate Registry. In that will, after a number of legacies, the settlor left her residuary estate " in trust for such of them my " children the said Charles William Wale and Edgar Henry Wale " and Bessie Mary Harris as shall survive me if more than one " in equal shares for their own use and benefit absolutely." As I have said, the family were always dividing things up in equal shares. They seem to have been very fair with one another, and in September, 1953, as appears from the affidavit of Edgar there was a final adjustment between the children. At that time, leaving out, of course, altogether the investments in the settlement, everything that the children had had was re-divided up on the basis, to use his own words, of all sharing in it equally. Then the settlor died on October 17, 1953.

I must now deal with certain transactions which happened in relation to the shares which were in the settlement. I will deal first with the " A " investments. Amongst the " A " investments were nine Balijan Tea Company Ltd. 6 per cent. Mortgage

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Debentures. They were redeemed and the proceeds naturally paid to the settlor on December 31, 1946. Charles knew nothing of that, but Edgar tells me that the settlor's total holding was 23 debentures, so that she received £2,300 on December 31, 1946. Of that, on January 2, 1947, she gave to Edgar the sum of £2,050 as a present, as I understand it, which he invested in his own name. Then there was a holding of £344 Central Argentine Railway Ltd. 6 per cent. Cumulative Preference Stock. That was repaid on the liquidation of the company on August 19, 1948, when the settlor received a sum of £125 5s. Again, Charles said that he knew nothing about that, and, so far as the evidence goes, the settlor kept that sum herself. I understand that the holding of £334 was part of a larger holding of £1,000. No doubt for the purposes of the settlement in June, 1939, Charles had thought the fairest course would be take exactly one-third of that holding. Then there were these 10 Shakomato Tea Estates Ltd. 7 per cent. Debentures of £100. They were redeemed at par, and the £1,000 was paid to the settlor on September 30, 1944. That apparently was the whole holding in the name of the settlor. These were the shares which were mentioned in the letter to Charles of January, 1945, by which time, as he says, in his evidence (which I accept) he had, of course, completely forgotten that they were in the settlement. What happened with regard to that was that on January 9, 1945, the settlor paid to Edgar the sum of £958, and he invested that in more or less equal shares in his own name and that of Bessie. Those are the transactions that happened with regard to the "A" investments.

Pausing there for a moment, that is all we know about the "A" investments and about the intention of the settlor. The question is: What is the proper inference to be drawn? Ought I to assume, looking at the whole of the evidence which is available, that the settlor, like her two sons, had completely forgotten the existence of the settlement and thought when shares and investments were redeemed or paid off that the money belonged to her, or ought I to make a more limited inference and suppose either that she changed her mind in relation to those investments, and to those investments only, or ought I to make the inference that, while recognizing that the settlement was in existence, she had forgotten that those particular investments remained in the settlement? I have this in mind: this is not a lady who, like some old ladies, finds income getting short and wants to spend capital. She seems to have had ample means, and, as the evidence which I have reviewed shows, in two cases she used the redemption moneys, not for her own purposes but to make presents to one or more of her children. I cannot help feeling that if she had any thought of this settlement in mind she would have gone to her extremely able and businesslike eldest son Charles and said to him: "I am having some investments redeemed. You "remember that settlement? Tell me: What is the position "about it?" Of course, it is all a matter of impression, and

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when it is a question of drawing inferences from a somewhat flimsy background, different minds may come to different conclusions. But the inference I draw on the whole is that the settlor had in fact by the time she died, and probably by the time she had executed the will of 1942, completely forgotten the very existence of the settlement. I think myself that it is rather unlikely—it cannot be put higher—that the settlor would have changed her mind between 1939 and 1942 and desired that her daughter should have either personally or through a settlement substantially more than the brothers. I think, as I say, that she had forgotten the matter by 1942.

I have not so far referred to the transactions which took place after the execution of the settlement in relation to the "B" investments, because on the view I have taken of it all the transactions in those investments were mere breaches of trust, and it has not been argued whether, in those circumstances, it is or is not admissible and proper to regard what happened to those "B" investments in relation to the settlor's intentions as to the "A" investments. I will only say this, that there were on six occasions either sales or redemptions or payments in liquidation in very much the same way as there were in regard to the "A" investments. In each of those cases the settlor either kept the proceeds or made presents to her children. I have reached the conclusion independently of the "B" investments that the settlor had forgotten about the settlement. If it is permissible for me to take the transactions in the "B" investments into account, that, in my judgment, affords strong further support for the view which I have already formed.

Accordingly, in my judgment, the settlor did not evince any continuing intention in relation to the "A" investments so as to bring the principle of *Strong* v. *Bird* [12] into operation.

Order accordingly.

Solicitors: *Billinghursts; Church, Adams, Tatham & Co. for Wallington, Fabian & White, Watford.*

K. R. A. H.

[12] L.R. 18 Eq. 315.

[LEEDS ASSIZES.]

* BELL *v.* HOLMES.

1956
July 26

McNair J.

[1955 B. No. 4658.]

Estoppel—Per rem judicatam—Negligence—High Court action—Claim and counterclaim for damages for negligence—Action in county court on same facts against both parties—County court action begun

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

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after issue of writ in High Court action—Contribution assessed by county court judge without objection although no contribution notice served—Whether parties bound by county court assessment of blame.

On March 26, 1955, a collision occurred between two motor-vehicles driven by the plaintiff and the defendant, and on August 18, 1955, the plaintiff started the present action in which he claimed against the defendant damages for personal injuries suffered as a result of the collision; and the defendant counterclaimed in respect of his own injuries.

On October 7, 1955, a passenger in the defendant's vehicle instituted proceedings against both the plaintiff and the defendant in the county court in respect of her injuries in the same collision, and on February 17, 1956, she recovered damages against both the plaintiff and the defendant. No formal contribution notice was served, but the county court judge was requested to deal with the matter of apportionment between the plaintiff and the defendant and adjudged that the plaintiff should contribute five-sixths and the defendant one-sixth of the damages.

In the present action the defendant claimed that the plaintiff ought not to be admitted to say that he was other than five-sixths to blame for the collision. The allegations of negligence between the plaintiff and the defendant were substantially the same in both actions:—

Held, (1) that in spite of the absence of a contribution notice there were contribution proceedings in the county court.

Croston v. *Vaughan* [1938] 1 K.B. 540 followed.

(2) That even if a contribution notice was necessary, the fact that the defendant raised no objection to the county court judge deciding the matter of contribution amounted to a waiver of the necessity for such a notice.

(3) That the plea of res judicata could arise although judgment in the county court was not pronounced until after proceedings in the present action had been instituted.

The Delta, The Erminia Foscolo (1876) 1 P.D. 393 and *Houstoun* v. *Marquis of Sligo* (1885) 29 Ch.D. 448 considered.

(4) That as the issues of fact and the evidence to support them were identical with those raised in the county court, the defendant's plea of estoppel succeeded.

Dicta of Lush J. in *Ord* v. *Ord* [1923] 2 K.B. 432, 439–443; 39 T.L.R. 437 applied.

PRELIMINARY ISSUE.

On March 26, 1955, a collision occurred between a taxicab driven by the plaintiff, Henry Bell, and a shooting brake driven by the defendant, Keith Robinson Holmes, in which one Betty Elsworth was a passenger; and on August 18, 1955, the plaintiff issued a writ against the defendant claiming damages for the personal injuries which he suffered as a result of the collision. The defendant, by way of counterclaim, sought to recover from the plaintiff damages for the personal injuries which he suffered in the collision, and it was agreed that, subject to liability and apportionment, the amount of damages recoverable by the plaintiff was the sum of £450, and the amount recoverable by the defendant was the sum of £50.

By paragraph 3 of his amended defence the defendant claimed

that by reason of certain proceedings in the Bradford County Court the plaintiff ought not to be admitted to say that he was other than five-sixths to blame for the collision. The facts on which this plea of estoppel was based were as follows: On October 7, 1955, Betty Elsworth started proceedings in Bradford County Court against the present plaintiff and defendant in respect of the injuries which she had suffered in the same collision. By their defences the plaintiff and defendant each alleged that the collision was caused by the negligence of the other. On February 17, 1956, Judge Archibald, after giving judgment for Betty Elsworth against the plaintiff and defendant for £100 damages, adjudged that, having regard to the extent of their responsibility for the damage, the plaintiff should contribute five-sixths and the defendant one-sixth; and judgment was entered accordingly.

By paragraph 1 of his reply the plaintiff alleged: "Save that "it is not admitted that there were contribution proceedings "between the defendants the allegations of fact contained in "paragraph 3 are admitted." Accordingly, at the hearing of the present action McNair J. directed, by agreement with counsel, that the issue raised by paragraph 3 of the defence and paragraph 1 of the reply should be tried as a preliminary issue.

C. D. Chapman for the plaintiff.
A. K. Hollings and *T. R. Nevin* for the defendant.

The cases cited in argument are referred to in the judgment.

McNAIR J. (after stating the facts). When this action came on before me I directed, by agreement with counsel, that the issue raised by paragraph 3 of the defence and paragraph 1 of the reply should be tried as a preliminary issue, and I have had an interesting and very careful argument put before me by counsel on both sides, in which there has been a wealth of authorities cited to me on the questions whether the facts alleged in paragraphs 3 and 1 are such as to constitute an estoppel debarring the plaintiff from contending that he was not responsible for five-sixths of the blame for the collision.

Were it not for the fact of a very long assize list and the approach of the long vacation, I should have welcomed the opportunity of further consideration of some of the authorities which have been put before me, but I do not think in fairness to the parties that I should delay the matter further; so I propose to decide this plea to the best of my ability on the argument which has been put before me and the cases to which I have been referred.

I have had put before me the pleadings in the county court action, that is, the particulars of claim delivered by Miss Elsworth, the plaintiff in that action, and the defence put in by the two defendants who are, respectively, the plaintiff and the defendant

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in the present action. After looking at the particulars of negligence advanced in that action, and comparing them with the allegation of negligence raised on the respective sides in this action, I find them to be substantially identical, and I further find that in the defence in the county court action each of the defendants there blamed the other defendant and in fact adopted as against his co-defendant the allegations of negligence made against him by Miss Elsworth in the county court action.

The first point taken in the reply, which it is convenient that I should consider first, is that in the county court action there were no contribution proceedings. It is true that in the county court action no formal notice of contribution was filed by either of the defendants against the other, and it is equally plain to me, having heard the statements about the course of proceedings made by Mr. Hollings, who appeared for the defendant Holmes before me and in the county court action, that in fact the county court judge was expressly requested to decide the matter of apportionment between the parties. It is equally plain that the result of his judgment was as stated in paragraph 3 of the defence in the present action and admitted in paragraph 1 of the reply, namely, that there should be judgment for Miss Elsworth against both the defendants—that is, Holmes and Bell—for £100 with costs, five-sixths awarded against Bell and one-sixth against Holmes.

In those circumstances can it be said that there were no contribution proceedings? I have been referred on that point, first, to *Croston* v. *Vaughan*,[1] a decision of the Court of Appeal, where it seems to me this precise point was decided. The holding on that point is set out in the headnote[2] as follows: "*Held*, by "the Court of Appeal, that the trial judge had jurisdiction at the "end of the proceedings in which it had been held that the "plaintiff was entitled to recover, to entertain an application to "apportion the blame between the two defendants for the purpose "of fixing a contribution as between the two joint tortfeasors, "and that it was not necessary that some separate formal legal "proceedings should be instituted for that purpose." And Slesser L.J. dealt with the matter quite shortly. He said[3]: "I am satisfied on the authorities that this application was in "the nature of a proceeding; it was a lis arising out of the "original action and was a proceeding which comes within the "language of the section, as decided in such a case, for instance, "as *Hood-Bars* v. *Cathcart*.[4]" Scott L.J., in dealing with this matter, said[5]: "The other point of importance in this "appeal is the question of procedure, which was raised before "us, and is the question whether the learned judge had juris-"diction at all to enter upon the task of apportioning the blame "between the two co-defendants whom he had held liable without "some separate formal legal proceedings being instituted. I

[1] [1938] 1 K.B. 540; 54 T.L.R. 54; [1937] 4 All E.R. 249.
[2] [1938] 1 K.B. 540, 541.
[3] Ibid. 553.
[4] [1894] 3 Ch. 376.
[5] [1938] 1 K.B. 540, 564.

" agree with the judgment delivered by my learned colleagues " on this point, holding that he had jurisdiction and that it was " the intention of subsection (2) of section 6 of the Act of 1935 " that the trial judge should deal with the matter, and that he " had power to dispense with any formal application. And I am " inclined to think that it was open to the learned judge, even if " one of the parties had dissented, to exercise jurisdiction of that " section if he thought fit. Reading that section as a whole, I " think it was the intention of Parliament that the judge who " had heard a case of primarily liability at the instance of a " plaintiff should, with the knowledge of the facts as proved in " evidence before him, then and there assess the apportionment " not merely of the damage, but also of the blame."

In *Clayson* v. *Rolls Royce Ltd. and Evans Lifts Ltd.*,[6] where the question arose whether interrogatories could be administered by one defendant against another when no contribution notice had been given, Somervell L.J. and Denning L.J., while not questioning the decision in *Croston* v. *Vaughan*,[6a] held that it was desirable, where interrogatories were going to be administered, that a contribution notice should be served under the rules so that the issues between the parties could be properly defined.

It seems to be quite plain on those authorities, and also consistent with my experience, that the issue of contribution as between co-defendants whether in a running-down action or in a factory case where the issues are simple is commonly determined —and properly determined—between the two defendants without the formal notice of contribution. I am quite satisfied that if the judge does deal with contribution at the end of a trial, that is a determination in legal proceedings. Furthermore, I think that the facts here which I accept as true, that the present defendant raised no objection to the county court judge deciding the matter of contribution, would amount to a waiver on his part of the necessity for a contribution notice if, contrary to my view, any contribution notice was in the first place necessary.

The next point which was taken was of this nature. It is said that the plea of estoppel by res judicata cannot arise in this case by reason of the fact that at the time when the writ was issued in the present action, namely, August 18, 1955, no judgment had been given in the Bradford County Court, and it was argued that for that plea of res judicata to arise, the res must have been judicata in a sense that judgment must have been given before the institution of the action in which it is sought to raise estoppel; and in support of that there was cited to me—admittedly it is not authoritative—a passage in Halsbury's Laws of England, 2nd ed., Vol. 13, p. 449, para. 505: " A lis pendens without judg- " ment creates no estoppel, and it seems that a judgment cannot " take effect as a res judicata, or an estoppel unless it was given

[6] [1951] 1 K.B. 746; 66 T.L.R. (Pt. 2) 827; [1950] 2 All E.R. 884.

[6a] [1938] 1 K.B. 540.

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"before the proceedings in which it is relied upon were com-"menced." For that qualified statement two judgments are referred to, and it is not contended that those judgments do decide the point, but it is said that I should follow them. The first case referred to is a collision case entitled *The Delta, The Erminia Foscolo.*[7] It was a decision of that great Admiralty judge, Sir Robert Phillimore. Any expression of his is clearly entitled to great respect. In that action he had to consider the effect in the English Court of Admiralty of a judgment which had been given between the same parties in a foreign court, the judgment of the foreign court not having been given until after the time of the institution of the English proceedings. In his judgment Sir Robert Phillimore said this[8]: "On the questions "of foreign law both French and Italian advocates were examined. "Their evidence left it at least doubtful whether the judgments "of the Court of Commerce, given as they were in default of "appearance or prosecution, and never having been executed, "would now have in France or Italy the force of res judicata. "But I think it unnecessary to go into their evidence in detail, "as I am of opinion this defence must fail, for two reasons: the "first is that at the time when the suit against the *Delta* was "begun there was confessedly no res judicata; there was only a "lis alibi pendens; and if the owners of the *Delta* had wished to "escape from having two suits against them for the same matter "brought to a hearing, they should have put the owners of the "*Erminia Foscolo* to their election, compelling them to abandon "one or the other of the suits, according to the rule laid down "by me in *The Mali Ivo*,[9] and quite recently applied in the "*Catterina Chiazzare.*[10]" Now, it is quite plain to me that the basis of Sir Robert Phillimore's judgment in that case was the former rule that was in force in 1876 under which it was possible for a party who was embarrassed with the possibility of two suits to call upon the opposing party to make an election. It is not unreasonable that, if a party fails to take that course he should not be entitled to rely on a decision in his favour in one action to operate as an estoppel in the other. I humbly take the view that that decision by Sir Robert Phillimore does not support the broad principle stated in the text in Halsbury's Laws of England.

The next case referred to is that of *Houstoun* v. *Marquis of Sligo*,[11] where Pearson J., sitting as a judge of first instance in the Chancery Division, according to the headnote, held "that "in order to raise the defence of res judicata it is not necessary "to set forth in detail in the defence the pleadings in the other "action the judgment in which is said to operate as res judicata, "but, in order to judge whether the same questions were at "issue in the first action as in the second, the court will look at "the pleadings in the first action, though they were not set forth

[7] (1876) 1 P.D. 393.
[8] Ibid. 403.
[9] (1869) L.R. 2 A. & E. 356.
[10] (1876) 1 P.D. 368.
[11] (1885) 29 Ch.D. 448; 1 T.L.R. 217.

" in the defence in the second action. . . . Whether a judgment " obtained in one action before the trial of another can operate " by way of estoppel as res judicata, unless the judgment was " obtained before the issue of the writ in the second action, " *Quaere.*" Pearson J. later considered the point, and said [12]: " I am rather inclined to think that that view [that the plea of " res judicata could not succeed as the judgment relied on as an " estoppel did not exist when the present proceedings were insti- " tuted] is right, and that I cannot stop the proceedings in this " action upon the ground that in the interval between the issue of " the writ and the hearing of the present application, judgment " has been pronounced in the Irish action. But I am unwilling to " decide this case entirely upon that ground, because, however " right the decision in *The Delta* [13] may have been under the " old practice, I am not satisfied, without a closer examination of " the existing Rules of Court, that a defendant is not now at " liberty to set up as *res judicata* a decision of the point at issue " by a court of competent jurisdiction during the progress of the " action." The matter went to the Court of Appeal on the main point in the case as to the admissibility of the proof of facts which took place in Ireland; the Court of Appeal ruled on that, but no determination was given by the Court of Appeal on the point discussed by Pearson J., because after the admissibility of evidence the parties came to terms and settled the matter. I do not find that that case, although it is of interest, really supports the proposition stated in Halsbury's Laws of England.

On the other hand, I was referred to, but have not had an opportunity of fully examining, *In re Defries. Norton* v. *Levy*,[14] where it certainly appears that in the Chancery Division in that case an action, or a claim in an action, was held to be barred by a decision of the same Court of Chancery in another action, but given since the issue of the writ in the action in which the estoppel was raised.

In my judgment, therefore, it is not right to say that the plea of res judicata cannot be based on a judgment given after the issue of the writ in which it is sought to raise the plea of estoppel.

Much valuable guidance on this topic of res judicata is to be found in the classic judgment of Lush J. in *Ord* v. *Ord*,[15] and in particular in the passages where the judge says this [16]: " Now, " there is no difficulty in seeing what, in its strict and proper " sense, the plea of res judicata means. The words ' res judicata ' " explain themselves. If the res—the thing actually and directly " in dispute—has been already adjudicated upon, of course by a " competent court, it cannot be litigated again. There is a wider " principle, to which I will refer in a moment, often treated as " covered by the plea of res judicata, that prevents a litigant from " relying on a claim or defence which he had an opportunity of

[12] 29 Ch.D. 448, 454.
[13] (1876) 1 P.D. 393.
[14] (1883) 48 L.T. 703.
[15] [1923] 2 K.B. 432; 39 T.L.R. 437.
[16] [1923] 2 K.B. 432, 439.

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" putting before the court in the earlier proceedings and which " he chose not to put forward, but I am dealing for the moment " with res judicata in its strict sense. As is said in the notes " to the *Duchess of Kingston's* case,[17] if the truth has been " ascertained, the party against whom it has been ascertained " is taken as admitting it. This is what the learned author says: " ' An estoppel, therefore, is an *admission*; or something which " ' the law treats as equivalent to an admission, of an extremely " ' high and conclusive nature—so high and so conclusive, that " ' the party whom it affects is not permitted to offer against it " ' or offer evidence to contravert it.' " Lush J. continues[18]: " The litigant must admit that which has been judicially declared " to be the truth with regard to the dispute that he raised. In " order to see what the fact is that he must admit the truth of, " one has always to see what is the precise question, the precise " fact that has been disputed and decided. This has constantly " been stated to be the law." There are other passages in the same judgment which support the view, which I suggested in the course of discussion, that it is a matter of evidence. If it is a matter of evidence, it is a question of what evidence can properly be given in this court today, and if it is a matter of evidence I can see no reason at all why I should be limited to considering evidence consisting of a judgment in a case where that judgment has been given before the issue of the writ.

A further point was taken of this nature: it is said that the issues in the county court action and the issues in the present action are not the same for this reason, that in the county court action the matter in issue between Miss Elsworth and the two defendants was whether or not there had been a breach of their respective duties towards her, whereas in the present action the question is whether there has been a breach of the duties: (i) by the defendant to the plaintiff; and (ii) by the plaintiff to the defendant. Those are different legal issues, of course, in a sense, but I do not feel the fact that they are technically different legal issues should prevent them from giving effect to the plea of estoppel in a case where, having examined the pleadings in the county court action and comparing them with the pleadings in the present action, I am satisfied that the issues of fact, and the evidence to support them in respect of liability, would be identically the same, and Lush J., in the judgment to which I have referred, quoted[19] from the view of Lord Westbury in *Hunter* v. *Stewart*, in the House of Lords, this[20]: " One of the criteria " of the identity of two suits, in considering a plea of res judicata, " is the inquiry whether the same evidence would support both." Furthermore, it seems to me that as the county court judge's decision on the material matter in the present action was as to the apportionment of the degree of responsibility which rests upon

[17] (1776) 20 State Tr. 355; 2 Smith L.C., 13th ed., 644.

[18] [1923] 2 K.B. 432.

[19] [1923] 2 K.B. 432, 443.

[20] (1861) 4 De G.F. & J. 168, 178.

the two defendants in that action, that question is identical with and would be supported by the same evidence as the issues in this action if it were allowed to go to trial.

The conclusion I have reached on that point seems to me to be wholly consistent with the views expressed by the Court of Appeal in *Marginson* v. *Blackburn Borough Council*,[21] and I do not feel that it is inconsistent with the decision of Cassels J. in *Johnson* v. *Cartledge & Matthews*,[22] if I correctly understand the effect of Cassells J.'s judgment. If there are inconsistencies between those two, it is my duty to follow the decision in *Marginson* v. *Blackburn Borough Council*[23] in the Court of Appeal.

I was referred to a short citation of the judgment of the Australian High Court in *Jackson* v. *Goldsmith*,[24] but I have not had the opportunity of seeing the actual judgment. As I understand it, that case went as follows: The plaintiff, one W., was a passenger on J.'s motor-cycle when it was in collision with a car owned and driven by G. The plaintiff W. brought an action against J., who served a third party notice on G., and in those proceedings G. sought to set up an estoppel based on a judgment in an action which he, G., had brought against J. arising out of the same collision in which he, G., had recovered and J. was found 100 per cent. to blame. The Hight Court of Australia rejected the plea of estoppel on the ground that the previous action had not decided the same issues as arose in the first action. It seems to me that it is difficult to give an opinion on this point in view of the distinction between that case and this, that in the case in the Australian courts the judgment which it was sought to set up as an estoppel was a judgment in an action between two only of the three motorists who were involved in the collision, and I can well understand that the introduction of an additional party might operate and destroy the conclusiveness of the judgment given in the other action.

I think there is only one further point I need mention in relation to this plea of estoppel, and that point is this: it is said that this is really a plea of estoppel by record and that that record could only be proved by the production of the record itself, which has not been done. It is not disputed that the previous case was heard by a court of record and that its judgment could have been proved by the production of the judgment book in which the registrar, under Order XXIV of the County Court Rules, 1936, is required to enter up the judgment. Admitting that, I think on the pleadings in this case it is quite plain from the admission made in paragraph 1 of the reply, that the plaintiff has dispensed with that form of proof, if that form of proof be the only method of record, and I am very far from being satisfied that it is so.

[21] [1939] 2 K.B. 426; 55 T.L.R. 389; [1939] 1 All E.R. 273.
[22] [1939] 3 All E.R. 654.
[23] [1939] 2 K.B. 426.
[24] (1950) 81 C.L.R. 446.

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On these facts, since everything in paragraph 3 has been admitted except the question whether there were contribution proceedings, and since I have been satisfied by the statement at the Bar made by Mr. Hollings that in the county court proceedings the decision of the county court judge was as stated in paragraph 3, I am unable to give effect to the contention that the judgment does not operate as bar merely by reason of the fact that it is not supported by record.

In this judgment, although I may not have given full effect to the arguments by Mr. Chapman for the plaintiff, I think I have considered them in substance, and I have reached the conclusion that this plea of estoppel succeeds.

Judgment for the plaintiff for £33 6*s.* 8*d.*

Solicitors: *Shaw, Smith & Co., Manchester; A. W. Mawer & Co., Manchester.*

[QUEEN'S BENCH DIVISION.]

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July 10, 11, 12.

Stable J.

* CUSACK-SMITH AND OTHERS *v.* LONDON CORPORATION.

[1955 C. 3611.]

War Damage—Landlord and tenant—Notice of retention—Lease of commercial property—Property totally destroyed by enemy action—Permission to rebuild refused—Notice to purchase served by lessees on corporation approved—Notice of retention of lease served by lessees on freeholders at instigation of corporation—Lease subsequently assigned to corporation—Effect of notice of retention—Landlord and Tenant (War Damage) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 72), *s.* 10 (1) (*a*) (*b*).

Contract—Frustration—Lease—Inapplicability of doctrine.

Commercial property in the City of London was let by a lease for 75 years from 1925 at a rent of £750. On May 10, 1941, the buildings were completely destroyed by enemy action. In May, 1950, the lessees, who had continued to pay the rent under the lease, applied to the Corporation of the City of London for permission to rebuild but permission was refused on the ground that such rebuilding would be wholly inconsistent with the proposed scheme of development for the City of London. The lessees then served a purchase notice on the corporation under section 19 of the Town and Country Planning Act, 1947, requiring them to purchase their interest and the notice was confirmed by the Minister on November 9, 1951. On November 27, 1951, the lessees, at the instigation of the corporation, served on the freeholders a notice of retention in respect of the lease pursuant to section 4 of the Landlord and Tenant (War Damage) Act, 1939.[1] In December,

[1] Landlord and Tenant (War Damage) Act, 1939, s. 4: "(1) Where "the land comprised in a lease is "unfit by reason of war damage, the "following provisions of this section "shall have effect, whether the lease "was made before or after the com- "mencement of this Act. (2) The

1951, the corporation took over the lease, paying the lessees £71,250. In September, 1952, the freeholders, having applied for permission to rebuild and been refused, served a purchase notice on the corporation requiring them to purchase the fee simple. The notice was confirmed by the Minister but his decision was subsequently quashed by the Divisional Court of the Queen's Bench Division on the ground that the freeholders were not "owners" within the meaning of section 19 of the Town and Country Planning Act and were not entitled to serve the purchase notice. The House of Lords upheld the decision of the Divisional Court, reversing the Court of Appeal ([1955] A.C. 337; [1955] 2 W.L.R. 363; [1955] 1 All E.R. 302).

The freeholders now claimed a declaration that in the events which had happened the lease had been frustrated, or, alternatively, had been rendered void for illegality by reason of the service of the notice of retention so that they, the freeholders, held the fee simple interest in the property free from the lease. In the further alternative they claimed that the notice of retention was a nullity and of no effect:—

Held, (1) that, having regard to the decision of the Court of Appeal in *Denman* v. *Brise* ([1949] 1 K.B. 22; 64 T.L.R. 335; [1948] 2 All E.R. 141), it was not open to this court to consider the question of frustration which, on the law as this court must apply it, could not apply to a lease.

(2) That the service of a notice of retention was a right exercised under the Landlord and Tenant (War Damage) Act, 1939, and, as section 10 of the Act specifically provided that the service of a notice should keep the lease in existence subject to certain modifications, it was a contradiction in terms to say that ipso facto the service of the notice in exercise of a right conferred by the Act would introduce an illegality which would lead to the destruction of the lease.

(3) That section 10 (1) of the Act, on its fair construction, connoted that, if a notice of retention was served, the tenant's obligation to pay rent remained except in so far as he was relieved by subsection (1) (*b*), namely, during the period which must elapse while he was carrying out the obligation to render the land fit, which he had voluntarily assumed; that it could not have been the intention of the legislature, having created two statutory options, disclaimer or retainer, to create a third course whereby a tenant could disclaim all the burden and retain the benefit; and that since, in the present case, the notice of retention was served by the lessees, not with the intention of performing the covenant implied in the section, but with the certain knowledge that it could never be performed, it was a nullity ab initio.

"tenant may serve on the landlord "either—(*a*) a notice (hereafter ". . . referred to as a 'notice of "'disclaimer') stating that he elects "to disclaim the lease; or (*b*) a "notice (hereafter . . . referred to "as a 'notice of retention') stating "that he elects to retain the lease "on the terms hereafter specified in "this Act."

S. 10: "(1) Where a notice of "retention is served . . . in respect "of a lease, then . . . the lease shall "have effect subject to the following "modifications:—(*a*) There shall be "implied in the lease . . . a "covenant by the tenant with the "landlord that the land comprised in "the lease shall be rendered fit as "soon as is reasonably practicable "after the date when the notice was "served . . . (*b*) Subject to the "powers of the court under the "following provisions of this sub-"section, no rent shall be payable "by the tenant under the lease in "respect of the period beginning with "the date when the notice was served ". . . and ending with the date on "which the land is rendered fit:"

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ACTION.

The plaintiffs, Sir William Robert Dermot Cusack-Smith, Bt., Elizabeth Dora Allworth and Rosa May Cohen (hereinafter referred to as "the trustees"), were the present trustees of the estate of Arnold Jones, deceased, and owners of the fee simple of land and commercial property at 69, Ludgate Hill in the City of London. By a lease dated June 23, 1925, the trustees' predecessors in title demised the property to lessees for a term of 75 years at a rent of £750 per annum and by a registered transfer dated March 11, 1940, the residue of the term became vested in Hampton & Sons Ltd. (hereinafter referred to as "Hamptons"). On May 10, 1941, the buildings on the site were completely destroyed by enemy action. Nevertheless, Hamptons continued to pay the rent due under the lease. On February 9, 1950, Hamptons applied to the Corporation of the City of London, the planning authority under the Town and Country Planning Act, 1947, for planning permission to rebuild on the site, but the application was refused on the ground that the rebuilding of the premises was wholly inconsistent with the proposed scheme of development for the City of London. On August 17, 1950, Hamptons served a purchase notice on the corporation under section 19 of the Town and Country Planning Act, 1947, requiring the corporation to purchase their interest in the lease. The purchase notice was confirmed by the Minister of Town and Country Planning on November 9, 1950. On November 27, 1951, at the instigation of the Corporation, Hamptons served on the trustees a notice of retention under the Landlord and Tenant (War Damage) Act, 1939,[1] in respect of the lease. At that time Hamptons, having served the purchase notice, which had been confirmed by the Minister, had no beneficial interest in the property. By a transfer dated December 19, 1951, the corporation took over the lease, paying to Hamptons the sum of £71,250.

On March 24, 1952, the trustees applied to the corporation for planning permission to rebuild the premises, but on April 4 they were informed by the corporation that planning permission had already been refused, and a purchase notice confirmed, and that it was not proposed to take any action on their application. On June 3, 1952, the trustees appealed to the Minister under section 16 (1) of the Town and Country Planning Act, 1947, against the corporation's failure to give notice of their decision within two months of the application. The corporation, in observations made on July 31, 1952, in connexion with the appeal, stated that permission for the development of the site had in fact been refused on May 2, 1950, and, as a planning decision enured for the benefit of the land, no useful purpose would be served in issuing a fresh decision, particularly as a purchase notice had been confirmed in respect of the leasehold interest consequent upon the refusal, and such interest had now been acquired by the corporation. The corporation agreed that the land had become incapable of reasonably beneficial use in its existing state as the

site would, in accordance with the plan forwarded to the Minister on August 17, 1950, be wholly absorbed by street improvements. On August 22, 1952, the Minister dismissed the trustees' appeal. On September 1, 1952, the trustees served a purchase notice on the corporation under section 19 of the Act of 1947 requiring the corporation to purchase their interest in the land, namely, the fee simple. On December 31, 1952, the Minister confirmed the purchase order, whereupon the corporation applied to the Divisional Court of the Queen's Bench Division for an order of certiorari to quash the Minister's decision and succeeded in so doing, the court holding that the trustees were not "owners" under section 19 of the Act of 1947, and were not entitled to serve the notice and that therefore the notice was a nullity.[2] The Court of Appeal allowed an appeal by the trustees,[3] but the House of Lords,[4] reversing the Court of Appeal, restored the decision of the Divisional Court.

In this action the trustees claimed that by giving notice of retention under the Landlord and Tenant (War Damage) Act, 1939, Hamptons elected to retain the lease upon the terms specified in the Act; that by reason of the service of the notice the terms of the lease were modified as provided by section 10 (1) (*a*) and (*b*) of the Act in that (a) there was implied in the lease a covenant by the lessees that the land should be rendered fit and the building reinstated as soon as reasonably practicable after the service of the notice, and (b) that no rent should be payable until the land had been rendered fit and the building reinstated; that planning permission was required for the rebuilding and had been refused; and that on March 7, 1955, the Minister of Housing and Local Government had approved the development plan for the County of London in which the site at 69, Ludgate Hill was shown as being in a comprehensive development area and as part of a new roadway which was to be constructed. In those circumstances they claimed that the covenant by the lessees under the lease was no longer capable of being performed and that it would be illegal and contrary to the Act of 1947 to perform it at the present time, nor would it be possible for it to be performed in the foreseeable future, or ever, with the result that no rent was now or would be in the foreseeable future or ever payable under the lease, and that as a result the lease had been frustrated.

In the alternative, the trustees claimed that the service of the notice of retention had rendered the lease illegal and void as its effect was to import into the lease the covenant referred to in section 10 (1) (*a*) of the Landlord and Tenant (War Damage) Act, 1939, to render fit the building, which covenant it was then, and would in the foreseeable future be, illegal to perform. In the

[2] [1953] 2 Q.B. 83; [1953] 2 W.L.R. 1083; [1953] 2 All E.R. 80.

[3] [1954] Q.B. 140; [1954] 2 W.L.R. 103; [1954] 1 All E.R. 88.

[4] [1955] A.C. 337; [1955] 2 W.L.R. 363; [1955] 1 All E.R. 302.

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further alternative, the trustees contended that in the circumstances existing it was not competent for Hamptons to serve the notice of retention and therefore the notice was a nullity and of no effect. Accordingly, they claimed a declaration (a) that the lease had been frustrated; alternatively, that it had become void for illegality and in either case was no longer valid or effective and that they, the trustees, held the fee simple interest free therefrom; (b) in the alternative, that the notice of retention was a nullity and of no effect.

By their defence the corporation admitted that it was not reasonably practicable at the present time to render fit the land comprised in the lease but they did not admit that no rent would be in the foreseeable future or ever become payable under the lease. They claimed that part of the land comprised in the lease was capable of beneficial occupation and was in fact being beneficially occupied, namely, as a car park. They did not admit that the lease had been frustrated or that it was no longer valid or effective. They admitted that the effect of the notice of retention was to import into the lease the covenant referred to in section 10 (1) (*a*) of the Landlord and Tenant (War Damage) Act, 1939, to render fit the building, but did not admit that it was then, or would in the foreseeable future continue to be, illegal to perform the covenant. Neither did they admit that the service of the notice rendered the lease illegal or void, or a nullity and of no effect.

H. Heathcote-Williams Q.C. and *John Plume* for the trustees.

Harold Williams Q.C. and *G. D. Squibb Q.C.* for the Corporation.

The following cases, other than those referred to in the judgment, were cited in argument: *Bank Line Ltd.* v. *Arthur Capel & Co.*[5]; *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*[6]; *Wm. Cory & Son Ltd.* v. *City of London Corporation.*[7]

STABLE J. This case involves a dispute between the plaintiffs, who are the trustees in whom the freehold of the property of 69, Ludgate Hill, London, is vested, and the Corporation of the City of London. I venture to think that the issues which are raised in this case can find no parallel in the law reports of this country, or, indeed, I suppose, in the law reports of any other country. [His Lordship stated the facts and continued:]

It is perfectly plain that, certainly as from August 18, 1950, if not before, the corporation recognised that no development of the site whatsoever would be capable of satisfactory integration with proposals for development of the area as a whole. The position of the trustees in 1955 as a result of the litigation is that they were back where they started from with, no doubt, a

[5] [1919] A.C. 435; 35 T.L.R. 150.
[6] [1944] A.C. 265; 60 T.L.R. 419; [1944] 1 All E.R. 678.
[7] [1951] 2 K.B. 476; [1951] 2 T.L.R. 174; [1951] 2 All E.R. 85.

substantial amount of costs to pay. One cannot help feeling that it is a reflection on our system that so much time and money should be fruitlessly expended in trying to obtain an answer to two fairly simple questions: (1) in the event of what has happened, has the lease gone? (2) if the answer to that is "No" and the term still subsists, does the obligation to pay the rent to the landlords still survive? In 1956 the parties are not much nearer to the final determination of those two questions than they were some four, five, or even six years ago.

The plaintiffs claim, first, a declaration that this lease has been frustrated; or alternatively that, if not frustrated, it has become void for illegality and that, in either case, the lease is no longer valid or effective, with the result that the plaintiffs hold the fee simple free from the term created by the lease. Alternatively, they claim that the notice of retention given by the lessees on November 27, 1951, under the Landlord and Tenant (War Damage) Act, 1939, is a nullity and of no effect.

Dealing first with the question of frustration, in *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.*[1] the House of Lords decided that the facts of that case did not amount to frustration if the doctrine of frustration had been applicable to a lease. That rendered it unnecessary for the House to decide the question whether the doctrine of frustration ever could be applicable to a lease, and different opinions were expressed. Lord Porter was more or less neutral; Lord Goddard and Lord Russell held the view that frustration never could apply to a lease, and Lord Simon and Lord Wright took the contrary view. That case was considered and discussed in the Court of Appeal in *Denman* v. *Brise*.[2] The passage in Tucker L.J.'s judgment[3] makes it quite plain that the question whether the doctrine of frustration can ever apply to a lease on the now existing authority was not open to the Court of Appeal, and, a fortiori, is not open to me sitting as a court of first instance. Everybody is agreed here that, under the law as I must apply it, the doctrine of frustration does not apply to a lease. Whether the facts here would amount to frustration if the doctrine was applicable is a matter on which one can only very tentatively express a view. It is just as difficult to apply an entirely hypothetical and non-existent law to a state of ascertained facts as it is to apply a well-recognized principle of law to a situation in which none of the facts are ascertained. Speaking for myself, I do feel that there would be some difficulty in applying the doctrine of frustration to the very peculiar facts of this case, and for this reason, that the impasse now reached really represents an accumulation of events combined with two wholly different and distinct streams of legislation. The property was physically destroyed on May

[1] [1945] A.C. 221; 61 T.L.R. 202; [1945] 1 All E.R. 252.

[2] [1949] 1 K.B. 22; 64 T.L.R. 335; [1948] 2 All E.R. 141.

[3] [1949] 1 K.B. 22, 26, 28.

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10, 1941, but obviously the doctrine of frustration cannot be invoked in relation to that event; indeed it has not been suggested that it can be, because the Landlord and Tenant (War Damage) Act, 1939, provides a code designed to cover that situation. Equally, although no doubt the Town and Country Planning Act, 1947, has substantially interfered with the user of this site, one cannot say that such interference amounts to frustration because, after all, that is what the Act is intended to do, namely, to restrict and curtail people in the development and use of their property.. I venture to think here that one has to look to the Town and Country Planning Act, 1947, which provides a code which is designed or intended to provide the necessary adjustments. As regards the notice of November 27, 1951, served under the Landlord and Tenant (War Damage) Act, it is difficult to see how that could possibly operate as a frustration of a contract because it has been decided that a party to a contract cannot, by his own act, frustrate the contract, since frustration must be some event which, as it were, comes in from outside.

On the other hand, Mr. Heathcote Williams argued that if this lease has not been frustrated in the ordinary acceptance of the word, what is left of it? The answer is: "Very little, if, "indeed, anything." The contemplation of the parties was that the site should be occupied and the buildings used, and, in the ordinary course of commerce, that was the advantage derived by the tenant. The lessors, in their turn, had the benefit of the repairing covenants and the benefit of the rent. Today the buildings have disappeared, the site is permanently sterilized, no buildings will ever be erected on it again so far as it is possible to forecast the future, and, as matters stand, if the notice under the Landlord and Tenant (War Damage) Act has the effect which the corporation claim, no rent is at present, or ever will be, payable to the lessors in relation to their property.

The result is that, in place of a commercial building, there will be a street area or, perhaps, a roundabout, and the lessors, in receipt of nothing in respect of rent, waiting for the reversion to fall in.

But the plaintiffs rely on two alternative grounds. They claim that the issue of the notice of retention by Hamptons at the instigation of, and for the benefit of, the corporation either ipso facto introduced a covenant into the lease which made it illegal and accordingly void, or, as a further alternative, that the issue of that notice in November, 1951, was a nullity and of no effect from the very beginning.

Mr. Harold Williams dealt with the intricacies of the Town and Country Planning Act, 1947, a measureless ocean upon which I have never, until this case, had to embark. I approached the task with a certain amount of misgiving. Section 5 of the Act provides for development plans. Section 12 imposes an obligation on the owners to obtain permission for the development

of their land. Whether permission is given or refused must depend on whether the development proposed is in accordance with the broad lines of development contemplated by the plan. Section 14 provides for applications to be made to the planning authority, and section 36 provides that: "Where . . . a local "planning authority are required to have regard to the pro- "visions of the development plan in relation to the exercise of "any of their functions, then, in relation to the exercise of those "functions during any period before such a plan has become "operative with respect to the area of that authority, that "authority shall have regard to any directions which may "be given to them by the Minister as to the provisions to be "included in such a plan, and subject to any such directions "shall have regard to the provisions which in their opinion will "be required to be so included for securing the proper planning "of the said area."

The position as regards the development plan is this: the plan was first published on December 31, 1951, although it is quite plain that it had been in existence long before that date and was, as it were, the guiding star which regulated the decision of the corporation when they had to consider an application for the development of a particular piece of property within the area. There was a public inquiry which was not closed until July, 1953. Mr. Harold Williams said that there were as many as 5,000 objections to the original plan as published. On March 7, 1955, the plan was approved by the Minister. That date is important because the approval by the Minister of that plan on that date is relied on by the plaintiffs as the event which frustrated the contract. It is plain that until the plan was approved by the Minister, the situation was more or less in a state of flux. One cannot say, as a matter of absolute finality, that, until the plan had been approved by the Minister, it would be for all time illegal or impossible to carry out a piece of development. It is, I suppose, within the bounds of possibility that the Minister might, in the light of the public inquiry, scrap the whole plan and inaugurate something entirely different. Even when the plan is approved by the Minister that, in itself, does not mark absolute finality. There is a quinquennial revision, and no doubt under any planning scheme something of the kind is essential. Who knows what the position in the City of London will be in 20 years' time? It appears therefore that in all these planning regulations there is, at no stage of the proceedings, what one may call absolute finality, but in the present case the nearest approach to finality was reached on March 7, 1955.

Section 1 of the Landlord and Tenant (War Damage) Act, 1939, relieves the tenant from the obligation to perform his repairing covenants in cases where the damage calling for repair comes under the heading of war damage. The Act was designed to cover a variety of different conditions. In some cases property had been wholly destroyed; in other cases very seriously damaged;

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and in still other cases the damage might have been comparatively trivial and capable of repair. Section 4 of the Act gives the tenant an option: he need not have recourse to the Act if he does not wish to and he is entitled to come to any agreement he chooses with his landlord. But the Act does enable him to serve on his landlord either a notice disclaiming the lease or a notice retaining it. If he disclaims the lease, the effect for all practical purposes is that he surrenders the term and loses the right to any interest in the property. He is freed from his obligations under the covenants and from his obligation to pay rent, and the property reverts back to the landlord in whatever condition it happens to be. There is provision to which I need not more particularly refer which gives the landlord the right, if the tenant seeks to disclaim, to require him to retain the lease, at the same time imposing on the landlord an obligation to restore the property and absolving the tenant from the obligation to pay rent during the interim period while the property is being restored. If Hamptons had disclaimed the lease of this property, the effect would simply have been that the reversion would have been accelerated and the property would, by the notice of disclaimer, have reverted to the trustees.

Section 10, which is the vital section for the purposes of this case, provides: "(1) Where a notice of retention is served . . . "the lease shall have effect subject to the following modifica- "tions." It is important to stress those words—". . . the lease "shall have effect subject to the following modifications." Quite obviously, under the terms of that section, the lease is treated as continuing in existence subject to the modifications. By subparagraph (*a*): "There shall be implied in the lease . . . "a covenant by the tenant with the landlord that the land com- "prised in the lease shall be rendered fit as soon as is reasonably "practicable after the date when the notice was served or is "deemed to have been served:" There is a proviso dealing with the position of guarantors and then subparagraph (*b*) provides: "Subject to the powers of the court under the following provisions "of this subsection, no rent shall be payable by the tenant under "the lease in respect of the period beginning with the date when "the notice was served or is deemed to have been served and "ending with the date on which the land is rendered fit: "(c) Where the court is satisfied, on the application of the land- "lord made at any time before the land has been rendered fit, "that part of the land is capable of beneficial occupation, the "court may direct that there shall be payable by the tenant such "rent, at such times and in respect of such period as the court "may fix:" Under section 24, the definition section, "land" means "land of any tenure, and includes any buildings or works "situated on, over or under land;" and "fit" is defined as the opposite of "unfit." "'Unfit' means—(*a*) in relation to build- "ings or works . . . unfit for the purpose for which those "buildings or works were used or adapted for use immediately

" before the occurrence of the war damage in question . . ." There are, I believe, decisions on exactly what the obligation to render fit requires, but for the purposes of this case it is sufficient, though possibly not precisely accurate, to say that, broadly speaking, it means the restoration of the status quo ante.

It is to be observed that the service of a notice of retention is entirely optional on the tenant. He need not retain if he does not want to. He can disclaim if he wishes. There is nothing in the Act which compels a tenant to serve a notice of retention but the substantial effect of serving it is that the tenant voluntarily accepts the obligation of an additional covenant in his lease to restore the property to the status quo ante as soon as is reasonably practicable.

The provision in section 10 (1) (*b*) which, during this interim period, suspends the obligation to pay rent, is ancillary to the provision in subsection (1) (*a*). It says, in effect, " you have " undertaken to restore the status quo ante as soon as is reason- " ably practicable, but, until that has happened, while the " property is of no use to you, you are absolved from paying " your rent." Subsection (1) (*c*) provides, as I understand it, simply this, that before the work of restoration has been completed or, indeed, before the work of restoration has been even begun, it may be that the landlord discovers that part of the land is capable of some beneficial occupation, and, in that event, the court may direct that there shall be payable by the tenant to the landlord a portion of the rent equivalent to that beneficial occupation. Subsection (1) (*d*), which is not altogether uninteresting, provides: " Where a court is satisfied, on the application " of the landlord made at any time, that there has been unreason- " able delay on the part of the tenant in rendering the land fit, " the court may direct that there shall be payable by the tenant " such rent (not exceeding the rent reserved by the lease) at such " times and in respect of such period as the court may fix." That subsection reinforces the view that section 10 contemplates an intention by the tenant to restore the status quo ante, his ability to do so, and his readiness to accept a legal obligation so to do. Everything else in the section, in my judgment, seems to me to be ancillary to that.

What was the position on November 27, 1951, when Hamptons, on behalf of the Corporation, served the notice under the section? Application for leave to develop had been refused. The corporation regarded that decision as a planning decision enuring for the benefit of the land, and although it was within the bounds of possibility that the whole development plan might have been revolutionized, the position was really this, that for all practical purposes, as far as anything can be certain, on that date, to quote the words of the Corporation, " no development of the site " whatsoever would be capable of satisfactory integration with " proposals for development of the area as a whole." There was not the slightest possibility that the covenant implied by section

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10 (1) (*a*) of the Landlord and Tenant (War Damage) Act, 1939, could ever be performed. Further, as matters then stood, its performance would have been illegal. There might conceivably have been a change in the situation, but until that change took place, that is to say, until the planning decision refusing development was reversed, it would have been an illegal act to put one single brick on top of another on that site.

Mr. Heathcote-Williams contends that that being the case, if one reads into the lease as a result of the service of the notice of November 27, 1951, a covenant by Hamptons (on behalf of the Corporation) to rebuild the premises at 69, Ludgate Hill, they were covenanting to do (a) something that they knew to be absolutely impossible, and (b) something which they knew was or would be illegal.

Mr. Williams' answer to the plea of illegality is a formidable one. He argues that the Corporation have done nothing other than exercise power conferred on them by the statute. When I say "the Corporation," I should, strictly speaking, say "Hamptons," but the act of Hamptons in serving the notice was really the act of the Corporation. Having served the notice, the inclusion of the covenant into the lease was something that the statute itself required, and therefore, said Mr. Williams, it cannot be contended that inserting in a lease what an Act of Parliament requires to be inserted can render the lease void for illegality.

The situation is utterly Gilbertian. Section 10 of the Landlord and Tenant (War Damage) Act provides that ". . . the lease "shall have effect subject to the following modifications . . ." If the modification is of such a kind as to render the lease void for illegality the effect of serving the notice and setting the wheels of the section in motion is to strike the lease down at the very moment when the modification is introduced into it. It would reduce the section to an absurdity to say that by serving the notice and so introducing a particular covenant into the lease, the lease is, at that moment, automatically rendered illegal, void and of no effect. I confess that I do feel the force of that argument. If Hamptons, on behalf of the Corporation, can effectively serve a notice of this kind then the Act provides that the exercise of that right shall keep the lease in existence with certain modifications, and it seems to me to be a contradiction in terms to say that, ipso facto, the exercise of that right introduces an illegality into the transaction resulting in the destruction of the term and everything connected with it.

That leads to the question whether, on the facts as they existed on November 27, 1951, Hamptons could effectively serve the notice of retention. It is important to emphasize that section 10 is a section of an Act of Parliament which operates only if it is deliberately invoked, that is to say, it only comes into operation if the tenant deliberately elects to set it in motion.

He has an option whether to serve the notice to retain or not. If he regards the obligations under the lease as onerous he can disclaim, and thus rid himself of the burden as well as the benefit. He is perfectly entitled to do that. Here, in effect, the tenant (in this case the Corporation) is seeking to retain the benefit of the occupation of this land for the next half century and has got rid of every obligation created by the lease either to pay rent or otherwise. That, in itself, seems to strike at the very conception of rent which is something which issues out of the term created by the lease. Section 10, as it seems to me, on its fair construction, clearly connotes that if the notice of retention is served, the obligation to pay rent must remain and does remain except to the extent that the tenant is relieved by subsection (1) (*b*), and the interim period covered by that subsection is simply the period which must elapse while the tenant is carrying out the obligation of the covenant which he has voluntarily assumed.

In the present case when the notice of retention was given it was, for all practical purposes, certain that performance of that implied covenant could never take place. It would never have occurred to Hamptons that they were themselves personally undertaking to perform a covenant, the performance of which they knew to be impossible and illegal. Indeed, the notice was served, not with the idea of performing the covenant, but with the certain knowledge that it could never be performed.

Having regard to the scope of the Act, it seems to me to be a fantastic conclusion to arrive at to say that the legislature, which created two statutory options, disclaimer or retainer, could conceivably have intended a third course whereby the lessee could disclaim all the burden and retain the benefit. I have come to the conclusion, rightly or wrongly, that the notice given under the then existing conditions was a nullity ab initio, so that the position today is just as though that notice had never been given. The result is that the trustees are entitled to a declaration that the notice of retention is and always has been a nullity and of no effect.

It is not easy to formulate a legal principle which covers the facts of the present case, but as the facts are, so far as I am aware, entirely without precedent, it is not altogether surprising that nobody has, by some process of intelligent anticipation, devised a legal principle into which the facts could be fitted. So far as one can formulate a principle, I think perhaps one might state it in two ways: one, the old principle that one cannot "blow hot and cold," and the other that Hamptons, on behalf of the Corporation, were estopped or, if one does not like that legalistic word, precluded from giving a notice which, as they knew perfectly well, could not possibly operate to achieve any part of the result which the legislature intended and required

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when it created in a tenant the right to take that particular course. I think that is as near to a principle as I can get.

Judgment for the plaintiffs.
Declaration that the notice of retention issued on November 27, 1951, was a nullity and of no effect.

Solicitors: *Boxall & Boxall; Comptroller and City Solicitor.*

E. M. W.

[PROBATE, ETC., DIVISION.]

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June 27, 28; *July* 18.

Lord Merriman P. and Collingwood J.

* ROE *v.* ROE.

Husband and Wife—Condonation—Revival for all purposes—Whether revived adultery constructive desertion — Test of condonation—"Complete reconciliation."

Husband and Wife — Desertion — Constructive desertion — Adultery, revived after condonation.

A husband whose wife had gone back to live with him after his admitted adultery of some five years' standing treated her with a calculated course of callous indifference and taciturnity, rejected her advances towards intercourse, and made a practice of returning home late at night without giving her any explanation of his absence. After some three weeks the wife again left home and obtained an order on the ground of the husband's desertion. The justices found that the wife had condoned the adultery but that it had been revived by subsequent misconduct. They further found that that misconduct in itself gave the wife sufficient grounds for withdrawing from the matrimonial home. On the husband's appeal:—

Held, (1) that the husband's conduct was of such a character as to revive the adultery if the justices had rightly found that it had been condoned.

Richardson v. *Richardson* [1950] P. 16; 65 T.L.R. 613; [1949] 2 All E.R. 330 followed.

(2) That if condoned adultery was revived, it was revived for all purposes; the contention that even if the adultery were revived, it was not revived so as to justify a finding of constructive desertion could not be substantiated, and accordingly the wife was justified in leaving the matrimonial home.

Lloyd v. *Lloyd and Hill* [1947] P. 89; 63 T.L.R. 110; [1947] 1 All E.R. 383 and *Beigan* v. *Beigan* [1956] 3 W.L.R. 281; [1956] 2 All E.R. 630 applied.

Per curiam. The test of condonation is complete reconciliation.

Keats v. *Keats and Montezuma* (1859) 1 Sw. & Tr. 334 and *Mackrell* v. *Mackrell* [1948] 2 All E.R. 858; [1948] W.N. 193 n. followed.

Dictum of Evershed M.R. in *Perry* v. *Perry* [1952] P. 203, 214; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076 considered.

APPEAL from an order of April 23, 1956, of the justices for the petty sessional division of Whitehaven, made on the ground of desertion.

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The parties, who were married on December 9, 1946, were both 34 years old at the date of the hearing, and there was one child, a girl, born on February 19, 1954.

About 1946 or 1947 the wife was away from home for twelve months suffering from tuberculosis, and she said in her evidence before the justices that in the year following her return "every-"thing seemed to go wrong." Matters got worse until May, 1955, when she taxed her husband with carrying on an association with a girl after finding contraceptives and a photograph of the girl in his wallet. At first he denied it, but he finally admitted that he had been taking the girl—an assistant in his shop—out to dinner and dances. The wife threatened to leave him, but he asked her to forgive him and she did so. Afterwards she became suspicious that the association was continuing—one of the grounds for her suspicion being the state of his underclothing from time to time—and in the summer of 1955 she found a letter from the girl to him.

In the course of the quarrels to which this state of affairs gave rise the husband hit the wife on several occasions. On one, when he had been drinking, he struck her head, making her neck bleed, and threatened to kill her. She returned to her parents' home and asked her husband to come and see her there, and at an interview he expressed contrition for the wrong he had done, said that he wanted to start again, and that he would get rid of the girl when he returned to the shop. On his volunteering these assurances the wife returned to him. He did not, in fact, dismiss the girl, though whenever his wife raised the question he repeated that he was going to do so, and on December 8, 1955, the wife again returned to her parents.

Her husband visited her there on several occasions, endeavouring to induce her to return to him—they went out together once or twice, and on one occasion intercourse took place between them in the husband's car. He admitted having committed adultery with the girl, saying that he had been going with her for five years, but he assured his wife that he was no longer associating with her, and begged her to return and "make a go "of it." The wife once more agreed to return, provided that the girl left the shop first. He kept postponing her dismissal, excusing this on the ground that he could not send her away until she had obtained other employment. He admitted at the hearing of the wife's complaint that his adulterous association continued until towards the end of January, 1956. Finally, however, the girl left on February 4, 1956, and on the following day the wife returned to the matrimonial home, after an absence of over eight weeks.

The wife's evidence as to the homecoming and her husband's subsequent behaviour was as follows: "He called, and we" [that is the wife and child] "went back to live with him. He "did not speak on the journey home. He unpacked the luggage "from the car about 7.20 p.m.; about 9 p.m. he said he must

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" go out to post, and then see his mother. He returned before " 10 p.m. We slept together, but no intercourse. I suggested " it—he said nothing. He said ' In a few weeks we will settle " ' down.' He would not speak to me unless he answered " questions. After a week he grumbled about lack of help in " the shop. I said it was his own fault. He said he would " torture us. He went out at nights, returning 11 to 12 p.m., " not saying where he had been."

After three weeks of this behaviour the wife consulted her doctor, who gave her some prescription for her nerves, a tonic and sleeping tablets. On Monday February 27, 1956, she told her husband that she had had enough of it and had decided to leave him, and on the following day she did so, going to her parents.

In cross-examination the husband said: " The situation as " described by my wife when she returned is a fair one. There " was no intercourse on her return (even though parted so long, " and I said I loved her so much) because I did not feel like it." He added: " After I said I would dismiss the girl I got no " co-operation—how far is one expected to go to restore a " marriage? Had time been given, without the incident of the " assault, I think something might have come of it so far as I " was concerned." (The reference to the " assault " was to an incident on February 19, 1956, when the wife's brother struck him—an attack which the husband attributed to retaliation for his having struck his wife.) The husband's evidence concluded: " I suppose I knew my wife was of the nervous type, who might " feel strongly about such a situation which was difficult for her. " Her description of my attitude and behaviour when we came " together again is quite true."

On this evidence the justices found: (a) That the husband had committed adultery; (b) that the husband had, apart from the adultery, given the wife sufficient grounds for withdrawing from the matrimonial home; (c) that there had been condonation by the wife of the adultery but that his behaviour after the condonation was sufficient to revive the matrimonial offence.

In their reasons for so finding the justices stated: " (a) That " adultery had been committed by the husband for a long period, " ceasing about the end of January, 1956. (b) That apart from " any adultery the conduct of the husband towards his wife had " been such that, in our opinion, the wife would have been " justified in withdrawing from cohabitation on that ground " alone when she did towards the end of 1955. (c) That on the " return of the wife in February, 1956, she returned with full " knowledge of the adultery and went back to the husband " prepared to make a fresh start to the marriage in the hope " that his promises would be better fulfilled than they had been " in the past. (d) That after the return the wife did not find " that the husband's behaviour towards her improved a great " deal and there appeared to be no great change in his attitude

" towards her which we consider she was entitled to expect. It " did not appear to us from his behaviour after the reconciliation " that the husband was as eager to mend the marriage as the " wife was. Having seen both parties give evidence we con- " sidered that the husband was somewhat selfish and appeared " to consider that the wife should have been more patient with " him than he with her, even though it appeared all the faults " were on his side. In our view it certainly cannot be said that " he treated her with that kindness she was entitled to expect " or that was consistent with his matrimonial duty. We consider " the husband should have gone to far greater lengths to restore " and preserve the marriage instead of behaving as though all " would come well in time."

The justices then made an order on the ground of desertion, and against this order the husband appealed. The grounds of the appeal are stated in the judgment of the court.

L. J. Antelme for the husband, appellant.
St. John Harmsworth for the wife, respondent.

The cases cited in argument are those referred to in the judgment.

Cur. adv. vult.

July 18. LORD MERRIMAN P. The judgment which Collingwood J. is going to read is the judgment of the court.

COLLINGWOOD J. This is a husband's appeal from an order of the justices of the petty sessional division of Whitehaven, made on April 23, 1956, whereby the appellant husband was adjudged to have deserted his wife, and was ordered to pay to her the weekly sum of £3 10s. 0d. for her maintenance, together with £1 10s. 0d. for the maintenance of the child of the marriage, of whom she was granted the custody.

The amount of the order is not questioned; the grounds of appeal are that upon the evidence it was not open to the justices to find that the appellant had deserted his wife, that they were wrong in law in so holding, and that they were wrong in law in holding that his conduct had been such as to revive adultery which had been condoned.

[His Lordship then stated the facts substantially as set out above and continued:] It was contended on behalf of the appellant husband that the justices were wrong in holding that the husband's conduct during the period between the wife's return on February 5, 1956, and her leaving him on February 28, 1956, was of such a character as to revive his previous offence of adultery. In support of this it was urged that they were together for a comparatively short time—not sufficiently long to afford the husband a reasonable period in which to settle down and readjust himself, and that his behaviour was merely a natural

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reaction to the inherent difficulties of the position in which he was placed.

The question as to what conduct is sufficient to revive condoned adultery was considered in *Richardson* v. *Richardson*,[1] where a number of previous decisions were reviewed. Bucknill L.J., in the course of his judgment,[2] after pointing out that condonation is conditional forgiveness, quoted from the judgment of Sir John Nicholl, Dean of Arches, in *Durant* v. *Durant*[3]: "The plainer reason and the good sense of the implied condition "is that 'you shall not only abstain from adultery, but shall in "'future treat me—in every respect treat me (to use the words "'of the law) with "conjugal kindness." ' " He referred[4] also to the judgment of Sir Francis Jeune P. in *Houghton* v. *Houghton*,[5] where he said: "'The principle is as clear as possible. "'When the law speaks of condonation and revival, it means "'that the offence is condoned on the condition that there shall "'be in the future a proper compliance with the matrimonial "'decencies and duties, and a person who goes back to live with "'his or her guilty spouse goes back on that implied condition "'alone.'" Bucknill L.J. continues[6]: "One finds, therefore, a "number of expressions dealing with the kind of offence which "will revive condoned adultery. I think one has to approach "the matter with some care because I cannot believe that if "adultery has been condoned, say for seven years, that a wife "is entitled to say it is revived because the husband has on one "occasion slapped her face or has come home drunk, or has "done something else which may amount to 'matrimonial "'misconduct' or 'a breach of conjugal kindness.' I think that "the proper test to apply is one which is indicated by the words "of Sir Francis Jeune P. to which I have just referred,[7] that "the conduct of the spouse must be such as to make decent "married life together impossible. That is putting it as broadly "as I can. I think a matrimonial offence means an offence "against the vows of marriage. The vows of marriage are pretty "well known. Desertion is certainly one offence, and cruelty "as defined by the law is another. The conduct of the wife in "*Russell* v. *Russell*,[8] though it did not amount to cruelty, made "married life impossible and the result was the refusal of a "decree of restitution of conjugal rights."

Denning L.J. said[9]: "I agree. If a husband should commit "adultery and the wife should take him back, then in order "to revive the condoned adultery it is not necessary that the "fresh conduct of the guilty husband should be such as of "itself to be a sufficient ground for a judicial separation or a

[1] [1950] P. 16; 65 T.L.R. 613; [1949] 2 All E.R. 330.
[2] [1950] P. 16, 19–21.
[3] (1825) 1 Hag.Ecc. 733, 762.
[4] [1950] P. 16, 20.
[5] [1903] P. 150, 152; 19 T.L.R. 505.
[6] [1950] P. 16, 21.
[7] [1903] P. 150, 152.
[8] [1895] P. 315; 11 T.L.R. 579; [1897] A.C. 395; 13 T.L.R. 516.
[9] [1950] P. 16, 22.

"divorce. A good deal less is sufficient. After all, the innocent "wife does a praiseworthy thing to take back the guilty husband, "and should not be penalized for so doing. If the guilty "husband, after being taken back, does not behave properly, "and the marriage breaks down afresh by reason of his conduct, "without any fault of the innocent wife, she is entitled to rely "on his original guilty act as a ground for divorce. Any other "view would greatly hamper attempts at reconciliation, for no "innocent party would be inclined to take a guilty party back "if it meant being tied for ever to an unhappy marriage.

"The subsequent conduct may consist of harshness of "behaviour short of cruelty, but if it breaks up the marriage "that is sufficient to revive the adultery. That was made clear "by Lord Stowell in the sentence in *D'Aguilar* v. *D'Aguilar*[10] "as appears from the judgment of Sir John Nicholl in *Durant* "v. *Durant*[11]: 'It is held that words of heat and passion, of "'incivility or reproach, are not alone sufficient for an original "'cause; nor harshness of behaviour; but I cannot but think "'that their operation would be stronger in condonation.'

"Sir John Nicholl accepted that statement as good law in "*Durant* v. *Durant*,[12] and put the matter in his own words "thus[13]"—and Denning L.J. then quoted the passage to which reference has already been made, and continued[14]: "He would "be a bold man who would doubt the authority of those two "great judges on this subject. Scott L.J., in *Beard* v. *Beard*,[15] "clearly accepted what they said as authoritative, and I do the "same. In the result, therefore, harshness, or neglect of a real "and substantial kind which is such as to be likely to inflict "misery on the innocent party, and does indeed lead to a "breakdown of the marriage, is sufficient to revive the original "offence."

Applying these tests to the present case, one finds not merely isolated acts of unkindness (such as a slap in the face or coming home drunk on one occasion), but a calculated course of callous indifference and taciturnity, which had its inception on the homeward journey and continued rejection of the wife's advances towards intercourse, and, added to this, a succession of late nights, with no explanation forthcoming from a man who had been committing adultery up to within a few days of his wife's return.

Further, the more serious the original offence, the less grave need be the subsequent act required to revive it: *Cooper* v. *Cooper*[16]; and see *per* Lord Merriman P. in *Jamieson* v. *Jamieson*.[17] In the present case a long course of adultery was accompanied by treatment which, in the opinion of the justices,

[10] (1794) 1 Hag.Ecc. 773.
[11] 1 Hag.Ecc. 733, 765.
[12] Ibid. 762.
[13] Ibid.
[14] [1950] P. 16, 22.
[15] [1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306.
[16] [1950] W.N. 200.
[17] [1952] A.C. 525, 546; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

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would of itself have justified the wife in leaving the matrimonial home when she did in December, 1955.

The husband's attitude towards his wife after her return is clearly reflected in his own evidence, to which we have already referred—an attitude which drew from the justices the comment that he appeared to consider that the wife should have been more patient with him than he with her, though all the faults were on his side. Finally, his treatment had already affected her health when she left him at the end of February, 1956. For these reasons there was, in our opinion, evidence to support the justices' finding that the husband's conduct was of such a character as to revive the adultery which they have found to have been condoned.

It was further argued, on behalf of the husband, that, assuming the adultery was revived by the husband's conduct, it was not revived so as to justify a finding of constructive desertion.

In our opinion the authorities show that if condoned adultery is revived, it is revived for all purposes. Thus in *Lloyd* v. *Lloyd and Hill* [18] it was held that revival of condoned adultery operated against both respondent and co-respondent, and that the petitioner was therefore entitled to ask for an order against the co-respondent for costs and damages. Hodson J. said [19]: "I "see no reason to doubt that in any event, if the condonation "goes it goes for all purposes." Again, in *Beigan* v. *Beigan* [20] (a case of adultery revived by subsequent desertion), Denning L.J. said [21]: "He [the husband] deserted his wife when he left "the house that night. His desertion revived the condoned "adultery . . . As such, when he came back the next day or "a day or two later, the wife was not bound to take him back "any more than a wife is bound, when she first finds out about "her husband's adultery to take him back"; and he referred to *Pearson* v. *Pearson* [22] and *Lloyd* v. *Lloyd and Hill.* [23] And Parker L.J. said [24]: "Once the act of desertion is proved, it "seems clear that the adultery previously condoned is revived, "and is revived for all purposes; and, accordingly, when the "husband did come back a day or two or three days later to the "matrimonial home, I think that the wife was perfectly entitled "to refuse to negotiate with him, or to have him back, just as "she would have been immediately after the original adultery."

It follows that on the husband's being guilty of conduct which revived his previous adultery, the wife was justified in leaving the matrimonial home—any other conclusion would have the effect of rendering the wife herself a deserter: *Thomas* v. *Thomas*, *per* Warrington L.J. [25]

[18] [1947] P. 89; 63 T.L.R. 110; [1947] 1 All E.R. 383.
[19] [1947] P. 89, 94.
[20] [1956] 3 W.L.R. 281; [1956] 2 All E.R. 630.
[21] [1956] 3 W.L.R. 281, 286.
[22] [1948] W.N. 225; 64 T.L.R 445.
[23] [1947] P. 89.
[24] [1956] 3 W.L.R. 281, 290.
[25] [1924] P. 194, 201; 40 T.L.R 250.

This is sufficient to dispose of the appeal. It was, however, contended alternatively on behalf of the wife that, on the evidence already referred to, the justices should not have found condonation by her, in that there was lacking the element of complete reconciliation, the necessity for which has been emphasized in many cases. For example, in *Keats* v. *Keats and Montezuma*,[26] Lord Chelmsford L.C. said[27]: "... the forgiveness which is "to take away the husband's right to a divorce must not fall short "of reconciliation." But reconciliation in turn would seem to import the element of mutuality, and in *Perry* v. *Perry*[28] Evershed M.R. said[29]: "... in my judgment with the question "aye or no has there been condonation on the part of the "injured spouse? 'bilateral' (by which I understand is meant "'common' or 'mutual') intention has nothing to do." If this pronouncement was not obiter dictum by reason of the opinion expressed by the Master of the Rolls earlier in the judgment[30] that the doctrine of condonation does not apply to desertion as a ground for divorce, and if it was intended to have an application wider than to the particular example of condonation dealt with in *Henderson* v. *Henderson and Crellin*,[31] referred to in the following sentence of the Master of the Rolls's judgment,[32] we would point out that it appears to conflict with the essence of the matter as described by Lord Simon in the latter case,[33] and with the decision of the Court of Appeal in *Mackrell* v. *Mackrell*,[34] in which Denning L.J.,[35] following Lord Chelmsford's opinion quoted above, said that reconciliation was the test of condonation.

It is unnecessary for us to attempt to resolve this apparent conflict of opinion, as we think that the appeal fails for the reasons we have already given.

Appeal dismissed.

Solicitors: *Broughton & Co., for Milburn & Co., Workington; Lees, Smith & Crabb for Sumner & Singleton, Whitehaven.*

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[26] (1859) 1 Sw. & Tr. 334.
[27] Ibid. 357.
[28] [1952] P. 203, 214; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076.
[29] [1952] P. 203, 214.
[30] Ibid. 213.
[31] [1944] A.C. 49; 60 T.L.R. 113; [1944] 1 All E.R. 44.
[32] [1952] P. 203, 214.
[33] *Henderson* v. *Henderson and Crellin* [1944] A.C. 49, 52.
[34] [1948] 2 All E.R. 858; [1948] W.N. 193n.
[35] [1948] 2 All E.R. 858, 861.

[CHANCERY DIVISION.]

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Oct. 17.

Danckwerts J.

* DAVIDSON *v.* DEEKS (INSPECTOR OF TAXES).

Revenue — Income tax — Schedule A — Deductions — "Maintenance, "repairs, insurance and management"—Relief claimed by owner of adjoining land in respect of sum paid for road works carried out by local authority—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57)*—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 94, 101 (1) (2).

A taxpayer claimed to be entitled to an allowance under section 101 of the Income Tax Act, 1952,[1] in respect of a sum paid by him for road works carried out by a local authority on a road on which his property abutted. He appealed from a decision of the general commissioners, who held that he was not entitled to claim maintenance relief under that section, on the grounds (a) that he was not the owner (or lessee) of the land on which the expenditure was incurred, (b) that the land was not assessed to tax under Schedule A and (c) that the expenditure was incurred by virtue of the taxpayer being the owner (lessee) of land fronting

[1] Income Tax Act, 1952, s. 101: "(1) If the owner of any land "(inclusive of farmhouses and other "buildings, if any) or of any houses, "being land or houses the assessment "on which is reduced for the purposes of collection, shows that the "cost to him of maintenance, repairs, "insurance and management, according to the average of the preceding "five years, has exceeded, in the "case of land, one-eighth part of the "annual value of the land as adopted "under Schedule A, and, in the case "of houses, the authorised reduction "as defined by the last preceding "section, he shall, in addition to "the reduction of the assessment, be "entitled, on making a claim for the "purpose, to repayment of the "amount of the tax on the excess: "Provided that—(*a*) no repayment of "tax shall be made under this section "in respect of the cost of maintenance, repairs, insurance or "management if or to such extent "as that cost has been otherwise "allowed as a deduction in computing income for the purposes of "income tax; and (*b*) a claimant "shall not be entitled to relief under "this section in respect of any income "the tax on which he is entitled to "charge against any other person, "or to deduct, retain or satisfy out "of any payment which he is liable "to make to any other person.

"(2) For the purposes of this "section, 'maintenance' shall include the replacement of farmhouses, farm buildings, cottages, "fences and other works, where the "replacement is necessary to maintain the existing rent, and shall "also include additions or improvements to farmhouses, farm buildings or cottages, but only if no "increased rent is payable in respect "of the additions or improvements, "and in so far as they are made in "order to comply with the provisions "of any statute or the regulations or "by-laws of a local authority. . . ."

S. 94: "(1) The following deductions and allowances shall also be "made under Schedule A—(*a*) the "amount of the land tax, if any, "which remains chargeable on lands, "tenements, hereditaments and heritages under Part V of the Finance "Act, 1949; (*b*) the amount charged "on lands, tenements, hereditaments "and heritages by a public rate or "assessment in respect of draining, "fencing or embanking; (*c*) the "amount expended by the landlord "or owner of the lands on an average "of the 21 preceding years, in the "making or repairing of sea walls or "other embankments necessary for "the preservation or protection of the "lands against the encroachment or "overflowing of the sea or any tidal "river, although the sums expended "may not have been charged on the "lands by a public rate or assessment. (2) The allowances granted "under this section shall (unless the "payments to which they relate, or "any part thereof, be made by a "tenant) be made from the assessment on the property concerned."

and abutting on the roadway and assessed to tax under Schedule A:—

Held, dismissing the appeal, that, on the terms of the Act, an allowance could not be claimed for expenditure which was on other land, though the taxpayer had been charged, by virtue of his ownership or occupation of the particular land.

APPEAL from the Commissioners for the General Purposes of the Income Tax for the Division of Howes in the County of Cambridge.

The question for the determination of the commissioners was whether the appellant was entitled to an allowance under section 101 of the Income Tax Act, 1952, in respect of a sum of £70 6s. 11d. paid by him for road works carried out by the Cambridge City Council under the Private Street Works Act, 1892.

The appellant was the lessee of a plot of ground and dwelling-house known as 32, Sedley Taylor Road, Cambridge, having a frontage of approximately 60 feet to Sedley Taylor Road, under a lease granted by Trinity College, Cambridge, for 99 years at a rent of £11 a year.

The road was constructed in 1926 and 1927 by the college on land of which the college was the freehold owner. It was taken over in 1950 by the corporation under the Private Street Works Act, 1892, and the work of making it up was begun in 1951 and finished in 1952.

On April 8, 1953, the council gave notice to the appellant of its final apportionment of the cost of the works, the appellant's liability thereunder being the said sum of £70 6s. 11d. The appellant claimed to be entitled to an allowance under section 101 of the Income Tax Act, 1952,[1] in respect of that sum. He was assessed to Schedule A tax in respect of the plot of ground and dwelling-house for the year ending April 5, 1954, and was the "owner" thereof for the purposes of that section.

The case, after setting out the facts, stated as follows: "4. The appellant contended that as owner of his house he was "made to pay for works of repair and maintenance carried out "on the road under the Private Street Works Act, 1892, which "statute refers to frontagers as owners without distinction "between freehold and leasehold owners and he claimed that "as he had to pay for the work as owner of the house he should "be similarly regarded when seeking relief. Further, the expense "incurred was on account of extensive repairs to the road by "which access is obtained to the house (without the road free "access is not possible) and was an expenditure allowable as any "other expenditure relating to the house and land under section "101 of the Income Tax Act, 1952. The appellant stated that "he had been unable to find anything which said that the works "on which relief was claimed must be on or limited to the actual "property. He quoted section 94, relating to relief on expendi-"ture on draining, fencing, embanking and sea walls. The

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" appellant also quoted section 101 (2) and suggested that ' and " ' other works ' would bring his claim within the section.

" The owner of a house site was liable to pay in certain cases " for works outside the actual house site as in the case of repairs " and maintenance to communicating pipes for the water supply " from the water main and to the connecting drain from the " house drain to the public sewer.

" 5. It was contended for the Crown: (1) An allowance under " the said section 101 was to be granted only if the road was " charged under Schedule ' A '; as there was no such charge no " relief could be given; (2) an allowance under the said section " 101 could only be granted (if at all) to the owner of the road " and not to the owner of adjoining land; (3) the claim should " be refused.

" 6. We the Commissioners who heard this appeal determined " as follows:—

" That the appellant was not entitled to claim maintenance " relief under section 101 of the Income Tax Act, 1952, in respect " of the amount paid by him for road making on the grounds " (a) that he was not the owner (or lessee) of the land upon " which the expenditure was incurred; (b) that the said land was " not assessed to tax under Schedule ' A '; and (c) that the " expenditure was incurred by virtue of the appellant being the " owner (lessee) of land fronting and abutting upon the roadway " and assessed to tax under Schedule ' A.'

" Accordingly we disallowed the appeal.

" 7. The appellant immediately after the determination of " the appeal expressed his dissatisfaction with our determination " and in due course we were required to state a case for the " opinion of the High Court. . . .

" 8. The question of law for the opinion of the High Court is " whether on the evidence and facts before us our decision as set " out in paragraph 6 above was correct in law."

The appellant taxpayer appeared in person.

B. L. Bathurst Q.C. and *Sir Reginald Hills* for the Inspector of Taxes.

The cases cited in argument are referred to in the judgment.

DANCKWERTS J. This is an appeal by Mr. Walker Wheatley Davidson, who appears in person, against the dismissal of an appeal by him to the Commissioners for the General Purposes of the Income Tax for the Division of Howes in the County of Cambridge relating to a claim for relief which he made.

Mr. Davidson is tenant of the land and house known as 32, Sedley Taylor Road, Cambridge, under lease for some 99 years from 1929, at a rent of £11 a year, and he claims to be entitled to relief against Schedule A tax in respect of a sum of £70 6s. 11d. which he had to pay for road works carried out by the City Council of Cambridge under the Private Street Works Act, 1892.

The land in question of which he is tenant apparently is assessed to Schedule A tax at £68 per annum gross and £54 5s. per annum net. He has to pay Schedule A tax, and is unable to recover it from his landlord because he is paying less than the rack-rent of the property.

He claims that he is entitled to an allowance in respect of the sum of £70 6s. 11d. by reason of the provisions relating to allowances for repairs contained in section 101 of the Income Tax Act, 1952, which re-enacts the provisions of Rule 8 of No. V of Schedule A to the Income Tax Act, 1918. He claims that he has paid this by reason of his occupation of the land in question, and, therefore, it ought to be an allowable claim under section 101 for maintenance under the provisions of that section.

The case put against him is that it is not maintenance of the land of which he is tenant, but maintenance, if it is maintenance at all, of the land representing the site of a road on which his property fronts, and, therefore, it is not within the terms of section 101. That, very shortly, is the issue.

When one looks at the Private Street Works Act, 1892, under which the work was done by the local authority and under which the charge on the appellant arises, it is plain that he is not assessed with the sum which he has had to pay by reason of any ownership of the road, or as owner of the road in any way whatever, but simply because he is owner of the land of which he is tenant and the fact that the land fronts on the road in question. It is plain that the charge against him has been made by apportionment under the terms of that Act of 1892 by the local authority, and he is charged as owner of the land occupied by him and in respect of which he is assessed to Schedule A tax. I have, therefore, considerable sympathy for the appellant in his claim that he ought to receive relief in respect of this payment, which obviously affects the land and the amenities and value of his land, but, of course, I have to find whether it is within the terms of the statute, bearing in mind that this is not a claim by the Revenue to tax, but a claim by the subject for exemption or relief in respect of tax. I have to find whether it is within the terms of the section to enable him to make the claim. In other words, the onus is on the appellant to show that the words of section 101 do confer upon him a right to claim a further allowance against Schedule A tax.

Turning to section 101 the only subsections which I need read are subsections (1) and (2).

[His Lordship read subsections (1) and (2) and continued:] The appellant says that the words "and other works" in particular in subsection (2) are apt words to refer to the works which have been done by the local authority, the cost of which, in part at any rate, has been charged against him, and, therefore, he comes within the words of that subsection.

One has, however, to read the section as a whole, and, although the opening words are vague enough, "If the owner of

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"any land," it is plain, I think, from the terms of the whole subsection that what it is referring to in those words is the owner of any land which is the subject of Schedule A tax and who is making a claim for a further allowance in respect of repairs. Having received some relief already under sections 99 and 100 he is here being given some further relief in respect of the expenses of the maintenance, repairs, insurance and management. I think it is impossible to avoid the conclusion that all those words must relate to maintenance, repairs, insurance and management in respect of the land which is under consideration and is charged to Schedule A. Therefore it is maintenance of that land, repairs of that land, and insurance and management of that land only which is being referred to; and in the same way I think it is fairly plain that in the enlarged meaning given to "maintenance" in subsection (2)—"farmhouses, farm "buildings, cottages, fences and other works"—it must all relate to the Schedule A tax, the piece of land on which the owner is claiming that, as he is assessed to Schedule A, he should receive further relief. Therefore, prima facie, any other sum expended on land which is not the subject of the particular assessment is not material.

The appellant has pointed out, quite correctly, that in section 94 of the Act there are certain reliefs given which plainly will include works done on other lands apart from that which is the subject of the Schedule A assessment in question; for instance, "the amount charged on lands, tenements, hereditaments and "heritages by a public rate or assessment in respect of draining, "fencing or embanking" may well include charges in respect of other land. Embanking is something which may be necessary to preserve the land which is subject to Schedule A tax and which may be done on different land. In the same way at (*c*) there is an allowance given in respect of the amount expended by the landlord or owner of the land on an average over 21 years in making or repairing sea walls or other embankments necessary for the preservation or protection of the lands against the encroachment or overflowing of the sea or any tidal river, although the sums expended may not have been charged on the lands by a public rate or assessment. That is relief in respect of expenditure by him which may well, in the case of a sea wall, be on land which is some distance from the land in question charged to Schedule A, but necessary for the preservation of that land.

Of course, the natural observation made by the Revenue with regard to that section is that there one finds specific cases of relief being given by the Taxing Act, though the expenditure has in fact been made on other land. Therefore, the fact that the Act has allowed a specific case to be brought into consideration in regard to Schedule A tax, though the expenditure is on other land, is not necessarily any argument for the construction of section 101.

I have been referred to two cases, neither of which are really of great assistance to me. But there is an observation of Atkinson J. in *Pearce* v. *Doulton* [1] that the provision about "maintenance, repairs, insurance" (which was the point in that case) "and management" obviously relates to the land subject to the assessment to Schedule A, and that does seem to me to be the principle which has to be applied in the present case.

The other case was *Inland Revenue* v. *Wilson's Executors*,[2] which is a case showing that expenditure of a capital nature in any case cannot be the subject of relief against an income claim under Schedule A under the terms of those provisions at all. That may be so, and it may be that possibly the making up of a road, even though it is, in a sense, maintenance, is a charge once and for all which is of a capital nature; but it is unnecessary for me to decide that point, because I am reluctantly brought to the conclusion that on the terms of the Act an allowance cannot be claimed for expenditure which is on other land, though the appellant has been charged by virtue of his ownership or occupation of the particular land, for the purposes of section 101 of the Income Tax Act, 1952.

Accordingly, it seems to me that the appellant's appeal must be dismissed, although, as I have said, I think there is some sympathy certainly to be felt for him, as it is expenditure which he has to make by reason of his occupation of the land in question. The appeal will be dismissed.

Appeal dismissed.

Solicitor: *Solicitor of Inland Revenue.*

J. L. D.

[1] [1947] 1 All E.R. 378; 27 T.C. 405, 408.

[2] (1934) 18 T.C. 465, 476; 1934 S.C. 244.

[CHANCERY DIVISION.]

*INLAND REVENUE COMMISSIONERS *v.* HOBHOUSE.

Revenue — Income tax — Covenant — Construction — Deed of covenant, dated May 5, 1953, by taxpayer in favour of son—Covenant to pay "annual sum"—First payment due forthwith—Subsequent payments on "first day of May in each year" during period not exceeding eight years—Whether convenantor bound to pay annual sum on May 1, 1954.

By a deed of covenant, dated May 5, 1953, a taxpayer covenanted with his son "to pay him henceforth during the continuance of "this covenant the annual sum of £450 less income tax thereon "at the current rate for the time being the first payment to be "due forthwith and the subsequent payments on the first day of "May in each year."

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By clause 2 it was provided that the covenant should continue in operation until the happening of the first to occur of the following events or dates: (1) the death of the grantor; (2) the death of the son; (3) the bankruptcy of the son; (4) the execution by the son of any assignment or charge on the annuity; (5) the expiration of eight years from the date thereof.

The special commissioners allowed an appeal by the taxpayer against an assessment to surtax made on him for the year 1954–1955, in which he contended that the deed imposed on him an obligation to make a payment of £450 to his son on May 1, 1954, and that the said payment was an annual payment which should be deducted in arriving at his total income for surtax purposes for the year 1954–1955. On appeal:—

Held, dismissing the appeal, that clause 1 created an obligation to make a payment on May 1, 1954; that its clear terms were not overridden by the terms of clause 2 (5), and that the payment made on May 1, 1954, was an annual payment which should be deducted in assessing surtax for the year 1954–1955.

APPEAL from the Special Commissioners for the purposes of the Income Tax Acts.

The Crown appealed from a decision of the Special Commissioners, who held that a payment of £450 made by Sir John Richard Hobhouse to his son on May 1, 1954, was an annual payment payable by virtue of a home-made deed of covenant made by him in favour of his son, and was to be deducted in computing his total income for purposes of surtax for the year 1954–1955. The taxpayer had appealed against an assessment to surtax made upon him for that year in the sum of £21,201.

By a deed of covenant, dated May 5, 1953, Sir John Richard Hobhouse covenanted with his son "to pay him henceforth during "the continuance of this covenant the annual sum of £450 less "income tax thereon at the current rate for the time being the "first payment to be due forthwith and the subsequent payments "on the first day of May in each year.

"2. This covenant shall continue in operation until the "happening of the first to occur of the following events or dates, "viz.:—(1) the death of the grantor; (2) the death of the son; "(3) the bankruptcy of the son; (4) the execution or attempted "execution by the son of any assignment or of any charge on "the said annual sums payable hereunder; (5) the expiration of "eight years from the date hereof."

The case, after setting out the facts and the question for determination, stated as follows:

"4. It was contended on behalf of the respondent that the "deed of covenant imposed upon him an obligation to make a "payment of £450 to his son on May 1, 1954, and that the said "payment was an annual payment which should be deducted in "arriving at the respondent's total income for surtax purposes "for the year 1954–1955.

"5. It was contended on behalf of the appellants:—(1) that, "having regard to clause 2 (5) of the deed, the term 'year' in "clause 1 meant a year commencing with the commencement of

" the deed, and not a calendar year; (2) that since, in the absence " of express provision, an annuity did not fall due for payment " until the end of the year in respect of which the annuity was " payable, the first year's annuity would not, but for the pro- " vision that it was to be paid forthwith, have been payable until " May 4, 1954, and the second year's annuity would not have " been payable until May 4, 1955; (3) that therefore the direction " in clause 1 of the deed to make the subsequent payments on " May 1 in each year meant, in relation to the payment of the " second year's annuity, May 1, 1955, and not May 1, 1954; " (4) that, consequently, the deed of covenant imposed on the " respondent no obligation to make any payment to his son in the " year ended April 5, 1955; and (5) accordingly, that no deduction " was allowable in computing the respondent's liability to surtax " for the year 1954–1955.

" 6. We, the commissioners, who heard the appeal gave our " decision as follows: In this appeal we are faced with the " construction of a home-made deed. On the face of it, clause 1, " which provides for ' payments on the first day of May in each " ' year,' quite clearly, in our view, provides for a payment on " May 1 in each calendar year. It was argued for the Crown " that in view of the provisions of clause 2 (5) of the deed the " phrase ' each year ' in clause 1 should be construed as each " year ended on May 1, and that following the first payment on " the execution of the deed on May 5, 1953, no further payment " was due thereunder until May 1, 1955. We are unable to " accept this contention. We hold that clause 1 which imposed " the obligation to pay an annuity is clear in its terms and created " an obligation to make a payment of £450 on May 1, 1954; and " that the terms of clause 2 (5), which are part of the provisions " defining the limit of the covenant, do not override the clear " terms of clause 1.

" If we are wrong as regards this and there is ambiguity as to " the obligation imposed on the respondent, then we hold that " the deed must be construed against the respondent, who was " the covenantor, and in favour of the beneficiary.

" On either ground we hold that the payment made by the " respondent was an annual payment made by virtue of an " obligation imposed upon him by the deed of covenant. We are " reinforced in this decision by the consideration that, unless " compelled by the clear terms of the deed, we should be loth " to accept an interpretation which had the result that an annual " allowance from a father to his son was paid on May 5, 1953, " and did not become due again until May 1, 1955, i.e., nearly " two years later.

" We accordingly allowed the appeal and reduced the surtax " assessment made upon the respondent for the year 1954–1955 " to £20,751.

" 7. The representative of the appellants, immediately after

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" the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a case for the opinion of the High Court. . . .

" 8. The question of law for the opinion of the High Court is whether on a proper construction of the deed of covenant of May 5, 1953, we were right to hold that the respondent was under an obligation to make an annual payment of £450 on May 1, 1954."

Sir Harry Hylton-Foster Q.C., S.-G., and *Sir Reginald Hills* for the Crown.

John Pennycuick Q.C. and *Eric Griffith* for the respoondent.

No cases were cited in argument.

DANCKWERTS J. I need not trouble you, Mr. Pennycuick.

On this appeal, it seems to me that the decision of the commissioners, which was in favour of the taxpayer, was perfectly correct. It relates to a deed made on May 5, 1953, by which the respondent to this appeal covenanted to pay what is described as an " annual sum of four hundred and fifty pounds less income " tax " to his son.

The terms of the deed, so far as material, are as follows: " The grantor hereby covenants with the said son to pay him " henceforth during the continuance of this covenant the annual " sum of £450 less income tax thereon at the current rate for the " time being the first payment to be due forthwith and the " subsequent payments on the first day of May in each year." At that point, certainly, I should have thought plainly " the first " day of May " meant that day in each calendar year. It would not be natural to think anything else.

Then comes clause 2: " This covenant shall continue in " operation until the happening of the first to occur of the " following events or dates, viz.:—(1) the death of the grantor; " (2) the death of the son; (3) the bankruptcy of the son; (4) the " execution or attempted execution by the son of any assignment " or of any charge on the said annual sums payable hereunder," and then this is the most important one, " (5) the expiration of " eight years from the date hereof." It is argued on behalf of the Inland Revenue that " eight years " in subclause (5) must mean eight years calculated not as years from January 1, but of years beginning from May 5, 1953, and, of course, that is perfectly true. It means that the period of the covenant will expire on May 4, 1961. It is said, therefore, that this was contrary to the provisions contained in clause 1 of the deed, and that the year is a year of the same kind, dating from May 5 in each year and not from January 1.

I cannot see why that should be so at all. The result of the construction which is sought to be put on the deed apparently

means that on May 1, 1954, the son would not get any money from his father under the covenant, which seems a very odd result.

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It seems to me that the way the commissioners have put the matter is perfectly correct. They say: "On the face of it, "clause 1, which provides for 'payments on the first day of May "'in each year' quite clearly, in our view, provides for a pay- "ment on May 1 in each calendar year. It was argued for the "Crown that in view of the provisions of clause 2 (5) of the "deed the phrase 'each year' in clause 1 should be construed "as each year ended on May 4, and that, following the first "payment on the execution of the deed on May 5, 1953, no "further payment was due thereunder until May 1, 1955" (which I should have thought would have been a great shock to the son). "We are unable to accept this contention. We hold "that clause 1, which imposed the obligation to pay an annuity, "is clear in its terms and created an obligation to make a pay- "ment of £450 on May 1, 1954; and that the terms of clause 2 "(5), which are part of the provisions defining the limit of the "covenant, do not override the clear terms of clause 1." That seems perfectly correct, and I agree with it. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Alsop, Stevens & Co.*

J. L. D.

[CHANCERY DIVISION.]

* *In re* DONALD KENYON LTD.

1956
Oct. 22.

Roxburgh J.

[No. 00597 of 1956.]

Company—Registration—Restoration to register—Statute barred debts —Proviso in order to protect creditors between dissolution and restoration to the register—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 353 (6).

A petition for the restoration to the register, of a company which had not traded since 1940 and had been struck off in 1949 pursuant to section 353 (6) of the Companies Act, 1948, and for its subsequent winding-up contained a statement: "It is appre- "hended that all the debts of the company at the time of its "dissolution have since become statute barred":—

Held, that there should be inserted in the order for restoration to the register a proviso that in the case of creditors who were not statute barred at the date of the dissolution, the period between that date and the restoration of the company to the register should not be counted for the purposes of any Statute of Limitations.

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Dicta in *Tyman's Ltd.* v. *Craven* [1952] 2 Q.B. 100; [1952] 1 T.L.R. 601; [1952] 1 All E.R. 613 applied.

PETITION.

The petition, so far as material, provided: Donald Kenyon Ltd. was incorporated on July 14, 1937, under the Companies Act, 1929, as a private company limited by shares and was dissolved pursuant to section 353 of the Companies Act, 1948,[1] in 1949.

The nominal capital of the company was £1,000 divided into 1,000 shares of £1 each, all of which shares had been issued and were paid up or credited as paid in full. The amount of the capital paid or credited as paid up was accordingly £1,000.

The objects for which the company was established were, inter alia, to carry on generally the trades or businesses of builders, bricklayers and stone masons.

The petitioner, Mabel Kenyon, was the registered holder of 500 of the shares in the capital of the company, all such shares having been allotted to her on the incorporation of the company. The remaining issued shares in the capital of the company were allotted to and remain registered in the name of her son Donald Kenyon, who died on August 1, 1942, and accordingly, since that date the petitioner had been the only member and the only director of the company. No administration had hitherto been taken out to the estate of Donald Kenyon.

The company carried on business as house builders until 1940, when the Marsden Building Society as mortgagees entered into possession of the houses which were then in process of being built by the company. The building society completed the construction of such houses and realized their security by the sale thereof in the ensuing years. The building society now held the sum of £2,049 18s. 11d. (which appeared to be surplus to their requirements as mortgagees), and but for the dissolution of the

[1] Companies Act, 1948, s. 353 (3): "If the registrar either receives "an answer to the effect that "the company is not carrying on "business or in operation, or does "not . . . receive any answer [to "letters sent by him], he may "publish in the Gazette . . . a "notice that at the expiration of "three months . . . the name of the "company . . . will, unless cause "is shown to the contrary, be struck "off the register and the company "will be dissolved.... (6) If a com-"pany or any member or creditor "thereof feels aggrieved by the com-"pany having been struck off the "register, the court on an applica-"tion made by the company or "member or creditor before the "expiration of 20 years from the "publication in the Gazette of the "notice aforesaid may, if satisfied "that the company was at the time "of the striking off carrying on "business or in operation, or other-"wise that it is just that the com-"pany be restored to the register, "order the name of the company to "be restored to the register, and "upon an office copy of the order "being delivered to the registrar for "registration the company shall be "deemed to have continued in "existence as if its name had not "been struck off; and the court may "by the order give such directions "and make such provisions as seem "just for placing the company and "all other persons in the same posi-"tion as nearly as may be as if the "name of the company had not been "struck off."

company such amount of £2,049 18s. 11d. would now be payable to the company.

The company had not carried on business since its remaining properties were taken over by the building society in 1940. The company had no other assets at that time, and so far as the petitioner was aware had acquired none since. In or about January, 1941, Donald Kenyon joined His Majesty's Forces, and thereafter the company (having no assets and no staff) was regarded by the petitioner for all practical purposes as defunct.

On or about March 1, 1949, the Registrar of Companies, pursuant to section 353 of the Companies Act, 1948, struck the name of the company off the register of companies kept by him under the Act. Notice thereof was published by him in the London Gazette on March 1, 1949, and accordingly, the company was by virtue of section 353 dissolved on that date.

The company had, in addition to the mortgage to the building society, created and issued a debenture for the sum of £2,000 secured by a floating charge to a trade creditor of the company. That creditor was a limited company which was subsequently wound up and dissolved on or about August 5, 1941.

It was stated in the petition: "It is apprehended that all "the debts of the company at the time of its dissolution have "since become statute barred." His Lordship interpreted that as a suggestion that there might well have been debts of the company which were not statute barred at the time of its dissolution.

The petition further stated: " . . . and that, after paying the "costs of the liquidation, there should be a substantial surplus "available for distribution amongst the contributories of the "company."

The court was asked accordingly: (1) That the name of Donald Kenyon Ltd. might be restored to the register of companies; (2) that Donald Kenyon Ltd. might be wound up by the court under the provisions of the Companies Act, 1948.

Cases cited in argument are referred in the judgment.

R. H. Hunt for the petitioner.

ROXBURGH J., having stated the facts, continued: The only question, and it is one upon which there is at present no authority, is whether I ought to put in the order certain words for the protection of creditors who had not become statute-barred at the date of the dissolution.

The section under which this application is made is subsection (6) of section 353 of the Companies Act, 1948. [His Lordship read section 353 (6) and continued:] There is no direct authority on the question which I am considering. The only relevant authority on this subsection is *Tyman's Ltd.* v. *Craven*,[1]

[1] [1952] 2 Q.B. 100; [1952] 1 T.L.R. 601; [1952] 1 All E.R. 613.

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although there is, as appears from that case, which I am going to refer to in detail, an important decision of the House of Lords, *Morris* v. *Harris*,[2] on a former subsection which was not in the same terms.

The question which arose before the Court of Appeal in *Tyman's Ltd.* v. *Craven*[3] was different from the present question, and counsel has mentioned that the question of the Statute of Limitations was not referred to, to which I would reply that it had no relevance in that case; but, in the course of the argument each member of the Court of Appeal made a reference to the purpose of the words at the end of subsection (6), to which I will return later.

In that case the majority consisted of the Master of the Rolls and Hodson L.J., and the minority of Jenkins L.J. I may perhaps be right, therefore, in paying particular regard to the dictum of the Master of the Rolls, who was one of the majority in that case. He said this[4]: "On the other hand, some sensible "content must be given to the final words of the subsection; "and this problem at first seemed to me to create a difficulty in "the company's way. Without, however, attempting to define "the scope of the words exhaustively,"—and I stress that— "Mr. Caplan was able to give instances in answer to the question "put to him; during the period of the company's suspended "animation, the company, as well as third parties, might well "have abstained from taking those steps—a step in an action, or "the exercise of some contractual right—for which the proper "time might have in the meantime expired. In my judgment, "the final words of the subsection can properly and usefully be "regarded as intended to give to the court, where justice requires "and the general words would or might not themselves suffice, "the power to put both company and third parties in the same "position as they would have occupied in such cases if the "dissolution of the company had not intervened. More generally "the final words of the subsection seem to me designed, not by "way of exposition, to qualify the generality of that which "precedes them, but rather as a complement to the general "words as to enable the court (consistently with justice) to "achieve to the fullest extent the 'as-you-were position,' which, "according to the ordinary sense of those general words, is prima "facie their consequence."

Jenkins L.J.[5] did not put the matter quite so broadly.

Then Hodson L.J. said[6]: "For my part, I think the words "of section 353 (6) are clearly designed to produce an 'as-you-"'were' position, and think that the latter part of the subsection "is complementary and intended to provide for cases where "provision is necessary in order to clarify an obscure position

[2] [1927] A.C. 252.
[3] [1952] 2 Q.B. 100.
[4] Ibid. 111.
[5] Ibid. 118.
[6] Ibid. 126.

"or give back to the company an opportunity which it might "otherwise have lost." He then gives an example.

Looking at the subsection with that assistance, I notice first of all that any creditor may apply before the expiration of twenty years. I am not prepared to say that it is not possible to visualize a creditor who would not be statute barred after the expiration of twenty years from the dissolution, but they must be very rare indeed, and I hardly feel that if I do nothing about the statute I am giving full rein to what I suspect was the intention in giving creditors twenty years within which to make an application. Moreover, what I have to do is to put all other persons—not only the company, but all other persons—in the same position as nearly as may be as if the name of the company had not been struck off.

At the date of the dissolution, the creditors (because, as I have already explained, I am only considering creditors who were not statute barred at the date of dissolution) could have stopped the statute running by issuing, perhaps possibly serving, a writ. Mr. Hunt contends that the creditor could have also applied to restore the name of the company to the register and then have issued his writ. Of course he could, but that is not the same position, nor is it, in my judgment, the nearest that can be done to get to the "as-you-were position"; and it seems to me that, when a company has been dissolved and therefore nobody can sue it without getting it restored to the register, it is only common fairness that, if the contributories for purposes of their own, want to get it restored to the register years afterwards, the period between the dissolution and the restoration to the register should be disregarded for the purposes of the Statute of Limitations.

I do not think that Mr. Hunt really suggested that by doing this I was violating the Statute of Limitations. He did suggest I was violating the policy of that Act, but this case does not seem to have been envisaged by that statute at all. What I am endeavouring to do is to apply, in the light of the direction given by the Act of Parliament and the decision of the Court of Appeal, the jurisdiction conferred upon me by section 353 (6) and nothing else, and the field is, except for the assistance of the Court of Appeal, which has indirectly been given to me, entirely free from authority. Common justice requires that some such provision should be inserted. It is said that it has never been done before, but as far as I know the point has never been considered or argued before. There is no record of it in the books. It is true to say that I am giving perhaps some slight benefit to the creditors as against the company, but it will be observed that the section says "as nearly as may be," contemplating that the precise equation may be unattainable, and in my judgment I am much nearer precise equation if I put some stipulation in the order than I should be if I did not.

Accordingly, I propose to put a proviso in the order that in the case of creditors who were not statute barred at the date of dissolution the period between the date of dissolution and the

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date of restoration to the register shall not be counted for purposes of any Statute of Limitations.

Order accordingly.

Solicitors: *Bentleys, Stokes & Lowless.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

1956
Oct. 17.

Lord Goddard C.J., Hallett and Donovan JJ.

* McKAY AND ANOTHER *v.* GILLIES.

Gaming — Lottery — Lottery tickets — Large stocks printed for sale to promoters of private lotteries—Tickets sold to purchaser who used them for illegal lottery—Not promoted or proposed at time when tickets printed or sold—Printing tickets for use in lottery—"The "lottery"—Meaning—Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *ss.* 22 (1) (*a*) (*b*), 30 (3).

The appellants were printers who for some years had printed and carried stocks of tickets appropriate for use in lotteries, legal and illegal, which they sold to various societies who used them to promote private lotteries. In June, 1955, they sold some tickets to a café proprietor, who used them in an illegal lottery promoted among his customers between September 12 and October 31, 1955. On December 1, 1955, the police executed a search warrant on the appellants' premises and seized their whole stock of tickets. In January, 1956, the appellants were summoned (1) for printing tickets for use in that lottery, contrary to section 22 (1) (*a*) of the Betting and Lotteries Act, 1934 [1]; (2) for having in their possession on December 1, 1955, for the purpose of sale, tickets in lotteries, contrary to section 22 (1) (*b*); and (3) distributing, between September 25 and November 1, 1955, tickets in connexion with the lottery, contrary to section 22 (1) (*b*). The magistrate convicted and fined the appellants and ordered the destruction of their complete stock of tickets. Quarter sessions dismissed their appeals against conviction and sentence:—

Held, that having regard to the opening words of section 22 (1) paragraph (*a*) meant "prints any tickets for use in the lottery "promoted or proposed to be promoted." It therefore referred to a definite lottery, and as the tickets were printed prior to their sale as part of the appellants' stock and not in relation to any particular lottery promoted or proposed, there was no evidence to support the first charge.

Held, further, that the lottery referred to in paragraph (*b*) bore the same meaning as in paragraph (*a*), and as there was no evidence that any particular lottery was promoted or proposed at the time when the appellants were found to be in possession of stocks of

[1] Betting and Lotteries Act, 1934, s. 21: "Subject to the provisions of "this Part of this Act, all lotteries "are unlawful."

S. 22: "(1) Subject to the provisions of this section, every person who in connection with any "lottery promoted or proposed to be "promoted either in Great Britain "or elsewhere—(*a*) prints any tickets "for use in the lottery; or (*b*) sells "or distributes, or offers or advertises "for sale or distribution, or has in "his possession for the purpose of "sale or distribution, any tickets or "chances in the lottery; . . . shall "be guilty of an offence."

tickets, or that they had distributed tickets other than by the sale in June, 1955, there was no evidence to support the charges made under section 22 (1) (*b*), and, accordingly, all three convictions must be quashed.

Case stated by the Appeals Committee of London Sessions.

The appellants, Douglas and John McKay, were summoned on January 26 and February 15, 1956, at Clerkenwell metropolitan magistrates' court upon informations laid by the respondent, Superintendent Frank Gillies, which alleged (1) that on a day unknown between August 1 and October 31, 1955, at 72/74, Camberwell Road, London, they printed tickets for use in a lottery promoted at 94, Farringdon Road, London, in relation to the results of greyhound races, contrary to section 22 (1) (*a*) of the Betting and Lotteries Act, 1934; (2) that, on December 1, 1955, at the same address they had in their possession for the purpose of sale tickets in lotteries, contrary to section 22 (1) (*b*) of that Act; and (3) that on a day unknown between September 25 and November 1, 1955, they distributed tickets in a lottery promoted at 94, Farringdon Road, London, in relation to the results of greyhound races, contrary to section 22 (1) (*b*) of the Act.

The magistrate found the appellants guilty and fined each of them £60 upon the first offence and £20 upon each of the second and third offences respectively, and ordered each to pay £10 10s. costs. All the tickets seized were ordered to be destroyed. The appellants appealed to quarter sessions against their convictions and sentences, but their appeals were dismissed on March 14, 1956, with costs of £15 15s. against each appellant.

Upon the hearing of the appeal the following facts were proved. The appellants, who were brothers, carried on business in partnership as general printers at 72/74, Camberwell Road. Since 1938 they had printed and sold, and, since 1954, had widely advertised for sale, large quantities of tickets similar to those the subject-matter of the present summonses without any prior complaint. Their annual turnover was now about £25,000, of which the sale of such tickets represented between one-third and one-half. The appellants sold such tickets to philanthropic, sporting, social, political and other clubs and societies who used them for the purpose of promoting private lotteries. To print individual names of clubs and promoters on such tickets [which the appellants did not do, leaving a blank space where these particulars could be filled in] would treble their price and put them out of the financial reach of many such clubs and societies, or render them unremunerative.

In May or June, 1955, one Edo Enrico, who had acquired a café at 94, Farringdon Road, and who had from time to time during the previous three years, as secretary of a football club, purchased tickets from the appellants personally or by post for sale to the members of the football club, bought from the appellants at their premises 20 sets of tickets relating to greyhound

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races at 1s. 6d. a set. He gave no name and address and did not say why he wanted the tickets. Between September 12 and October 31, 1955, Enrico used the tickets to promote unlawful lotteries among the customers of his café at 94, Farringdon Road. Finding these lotteries unprofitable he gave them up of his own accord at the end of October, 1955.

On October 22, 1955, a police sergeant in plain clothes went to the appellants' premises and bought 12 sets of tickets for which he paid 18s. He asked if he could have a receipt. The first appellant asked his name and wrote out a receipt. The sergeant said on leaving: "The price is 1s. 6d. a set no matter how many "sets you want, is it?" and the first appellant replied: "No, "the more you buy the cheaper they are; here is a brochure that "gives all the prices." The appellants made no inquiries about the purchaser's identity nor about his intentions in the promotion and conduct of lotteries for which they had printed and were then distributing tickets, nor as to the conditions to be observed in connexion with the promotion and conduct of them. The transaction concerning the police sergeant was not the subject of a summons but was relied upon by the respondent to show the method followed by the appellants in the conduct of their business.

On December 1, 1955, police officers executed a search warrant at the appellants' premises and seized their entire stock of 92,448 cards, worth approximately £350. The stock was the subject of the second summons for being in possession of tickets. While the police were removing the seized tickets, the first appellant said to them: "It's up to the people who buy them "to put the name of the club on them or anything else that is "needed. If I sell a pack of playing cards and they are used "for gambling that does not make me liable." A police sergeant answered: "The circumstances are not the same. Do you "acquaint people who purchase tickets with the particulars "required by law?" The first appellant said: "I am not "interested in what they do with them." The seized tickets were of six different types, entitled (1) "What is the girl's "name?"; (2) "Choose your football team"; (3) Grand Weekly Football Competition; (4) Initial Doubles; (5) Weekly free Greyhound Prize Scheme; (6) Wills of the Week.

The appellants in their business of printing and selling the tickets possessed no order book. Their receipt book showed a large number of cash sales to private persons but no connexion was shown between such persons and any societies whatsoever. The receipt book also showed a large number of cash sales to persons with the name or initials also of societies, but nothing appeared nor was there evidence available to show that these societies were conducted for purposes not connected with gaming, wagering or lotteries, or that the sale of tickets was confined to persons all of whom worked or resided on the same premises, or that the purchaser was a person in those categories or was

authorized in writing by the governing body of the society named on the receipt to promote a lottery.

It was contended on behalf of the appellants, as to the first summons, (a) that the 20 sets of cards concerned must have been printed at some time before May or June, 1955, when Enrico purchased them; (b) that when the cards were printed, which was the material time, there was no evidence of any specific lottery promoted or proposed to be promoted in connexion with which they were printed; (c) that the cards when and as printed were inchoate documents, which required to be allocated to a specific greyhound racing track and to a specific date before they could become tickets in a lottery; (d) that the cards when and as printed were capable of legitimate use by clubs for lawful private lotteries, and that the appellants could not be made retrospectively guilty of an offence when one of their customers later decided to misuse the tickets; (e) that it was not incumbent upon the appellants to ensure that their customers observed the law. As regards the second summons, it was contended (a) that the stock of cards seized by the police were all capable of legitimate use by clubs for lawful private lotteries; (b) that there was no evidence of any lottery promoted or proposed to be promoted in connexion with which the appellants had the stock in their possession; (c) that the stock ought not to be destroyed. As to the third summons, it was contended, in addition to the foregoing, that evidence of a single sale of cards to Enrico in May or June, 1955, did not justify the conviction of the appellants for distributing tickets in a lottery promoted at 94, Farringdon Road between September 25 and November 1, 1955.

The respondent contended that there was evidence to support all the convictions.

The appeals committee, being of the opinion that there was evidence to support all the convictions, dismissed the appeals. The appellants appealed to the Divisional Court.

Dudley Collard for the appellants.
Victor Durand for the police.

The following cases were cited in argument: *Ranson* v. *Burgess* [2]; *Stacey* v. *Wilkins*.[3]

Lord Goddard C.J. read the charges set out above and continued: The magistrate convicted and sessions have upheld the conviction, and I am not surprised that they felt that these were cases in which there ought to be convictions; but the court has come to the conclusion that they are bound to give effect to the arguments adduced by Mr. Collard and quash the convictions for reasons I will state, although the appellants' merits are not only inconspicuous but might be said to be conspicuously absent, because they were doing things of which the statute disapproves

[2] (1927) 43 T.L.R. 561.

[3] [1946] K.B. 271; 62 T.L.R. 243; [1946] 1 All E.R. 293.

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although it has not, by the use of certain words, actually prevented it.

The circumstances show that these printers had devised a method of printing tickets which can be used by anybody promoting a lottery, legal or illegal. It is rather an ingenious scheme by which somebody must win on greyhound racing or on picking the name of a boy or girl, or something of that sort; I need not go into the details. It seems that one of their customers was a café proprietor by the name of Enrico. He had a café in Farringdon Road and was promoting a lottery. The facts show that in May or June, 1955, Enrico bought some of these tickets from the appellants. The tickets were designed for, and if used would have been appropriate to, a lottery. The sale to Enrico was in May or June, and obviously, from the facts of the case, these documents had been printed before that. The appellants actually stock them so that anybody could go into their premises and say: "I am going to run a lottery; give me "two hundred tickets." The first charge put forward was that on a date unknown between August 1 and October 31, 1955, the appellants printed tickets for use in the lottery promoted at Farringdon Road. I am bound to say there does not seem to be any evidence of that. Enrico's lottery, the only one about which we have been told, was held between September 12 and October 31, but these lottery tickets must have been printed a long time before. At any rate, they were sold in June, and the main difficulty which has been discussed in this appeal arises on the construction of the Act.

Section 21 provides: "Subject to the provisions of this Part "of this Act, all lotteries are unlawful." There follow provisions which enable certain lotteries to be held. Section 22 provides: "Subject to the provisions of this section, every person who "in connection with any lottery promoted or proposed to be "promoted either in Great Britain or elsewhere—(*a*) prints any "tickets for use in the lottery" commits an offence. That subsection must be read as meaning "prints any tickets for use in "the lottery promoted or proposed to be promoted." If other words had been used, if the word "the" had been "any" or even "a," it might have been different; but, speaking for myself, I can only read it as referring to a definite lottery or to a case where a man says: "I am going to promote a lottery"; or, "there is going to be a lottery on the Grand National; I want "some tickets for it," or "I have promoted a lottery, I want you "to print tickets for it." The lottery referred to here is a lottery which was held at Farringdon Road between September 12 and October 31, 1955, but when these tickets were printed they did not refer to any proposed lottery at all. They were printed as part of the appellants' stock and not in respect of any particular lottery or any particular proposed lottery. The use of the word "the" in the subsection creates the difficulty, and Mr. Collard's argument must prevail. As Donovan J. pointed out in the course

of the argument, the matter is reinforced when one looks at section 30 (3), under which the magistrate ordered the whole of the appellants' stock to be destroyed. That subsection provides: "The court before which a person is proved to have committed "any offence under Part II of this Act in relation to a lottery "or proposed lottery shall order to be forfeited any coins and "bank notes produced to the court which are shown to the "satisfaction of the court to represent the price of tickets or "chances, or prize money, or prizes in the lottery"—that is obviously the definite lottery—"and shall order to be destroyed "all documents (other than bank notes) produced to the court "which are shown to the satisfaction of the court to relate to the "promotion or conduct of the lottery." That obviously speaks of some definite lottery, such as a lottery on the Grand National or the Derby or one confined to the members of a football club. I think, therefore, that it follows that there was no evidence to support the first charge.

The second charge alleges that on December 1, 1955, the appellants had in their possession for the purpose of sale tickets in lotteries contrary to section 22 (1) (*b*). December 1 was the day of the raid on the premises under a search warrant; but there is no evidence that any lottery was at that time promoted or that anyone was proposing to promote a lottery. These were all tickets which the appellants had in their possession for the purpose of selling to anybody who was going to promote a lottery; but here, again, the words of the Act create a difficulty because section 22 (1) provides: ". . . every person who . . . (*b*) sells or "distributes, or offers or advertises for sale or distribution, or has "in his possession for the purpose of sale or distribution, any "tickets or chances in the lottery." That throws us back again to the first part of section 22 (1), which refers to a lottery promoted or proposed to be promoted.

The third information relates to distributing tickets in a lottery "promoted at 94, Farringdon Road, E.C.1, in relation to "the results of greyhound races," but is charged between September 25 and November 1, 1955. That again refers to Enrico's lottery, but I cannot see that there is any evidence that the appellants distributed tickets in that lottery except in the sense that they sold and handed the tickets to Enrico, but they did that in June. Therefore, I do not think that there is any evidence to support the third charge.

For these reasons, I think one must say that there was no evidence to support these three charges and the appeal must be allowed with costs here and below.

Hallett J. So far as the result of these appeals is concerned, I agree with that which has been proposed by the Lord Chief Justice, although I do so with considerable reluctance having regard to the merits of the matter. On the other hand, as regards one of the matters mentioned, I hesitate to agree.

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Hallett J.

I do not derive the assistance from section 30 (3) of the Act which has been derived by the other members of the court. [His Lordship read the subsection and continued:] To my mind, the words "the lottery" refer back to the lottery in respect of which there has been a conviction, and that is the only effect of the use of the definite article. On the other hand, with regard to section 22 (1), I feel great difficulty in putting forward any view other than that put forward by the Lord Chief Justice. If that subsection had read: "Subject to the pro- "visions of this section, every person who prints any tickets for "use in a lottery," there would be no doubt as to its meaning. I have been trying to find some function to give to the words "in connexion with any lottery promoted or proposed to be "promoted either in Great Britain or elsewhere." If the decision at which this court has arrived is correct, it seems to me that the inclusion of those words in the section has provided a loophole through which those who make the promotion of lotteries easier, such as these appellants have done, will escape; but the fact that the words provide an undesirable loophole does not seem to me to be any reason for ignoring them, and since I can find no other function than that proposed by the Lord Chief Justice, I agree with both the reasoning and the result which he has already stated.

Donovan J. I agree. With regard to section 30 (3) though the words "the lottery" refer back to the lottery in respect of which there has been a conviction, that reinforces, in my view, the conclusion that "the lottery" refers to a specific lottery in being or proposed. If this be the meaning in section 30 (3) as it clearly is, the same words can hardly bear a different meaning in section 22 (1). The prosecution succeeded in persuading the magistrate to make an order to destroy the appellants' whole stock of tickets merely because they might be used in some lottery to be brought into existence hereafter but which, at this moment, is neither promoted nor proposed to be promoted. It is because the words "the lottery" must bear, as I think, the same meaning in both sections that one does get support for the construction of section 22 (1) from the language of section 30 (3).

Lord Goddard C.J. I should like to add, on further consideration, that I agree with the other members of the court as to the construction of section 30 (3). Their judgments express what I meant, but make it clearer than I did.

Appeals allowed.
Convictions quashed.

Solicitors: *Lewis Barnes, Wheeler & Co.; Solicitor, Metropolitan Police.*

E. M. W.

[COURT OF APPEAL.]

*G. L. BAKER LTD. *v.* BARCLAYS BANK LTD. AND OTHERS.

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Oct. 15.

[1956 G. 1610.]

Lord Evershed M.R., Birkett and Romer L.JJ.

Practice and Procedure—Writ—Indorsement—"Liquidated demand"—Claim for money fraudulently converted, or tracing order—Judgment in default of appearance — Whether claim for "liquidated demand"—Whether "liquidated demand only"—R.S.C., Ord. 3, r. 7; Ord. 13, r. 3.

The plaintiffs issued a writ indorsed with claims for specified sums of money alleged to have been fraudulently converted by the defendants, or, alternatively, that each sum, being the plaintiffs' property traceable in equity, should be repaid by the defendants to them. Two of the five defendants failed to enter an appearance and the plaintiffs obtained judgment in default of appearance and proceeded to levy execution against them. The defendants applied successfully to Upjohn J. to have the judgments against them set aside. He ordered the plaintiffs to pay the defendants' costs. The plaintiffs appealed:—

Held, that the claims indorsed on the writ were liquidated demands within the meaning of R.S.C., Ord 13, r. 3, but did not come within Ord. 3, r. 7,[1] not being for a liquidated demand only. Accordingly, the judgments obtained against the two defendants were regular, and the order as to costs should be varied to the extent of providing that the costs of the motion to set aside the judgments should be costs in the cause.

Decision of Upjohn J. reversed.

APPEAL from Upjohn J.

On September 13, 1956, the plaintiffs, G. L. Baker Ltd., issued a writ against Barclays Bank Ltd., Denton and Jutsum Ltd., Sterling Moulding Materials Ltd., Harrow Investment Trust Ltd., and Associated Resin Products Ltd. The claim indorsed on the writ, which was not specially indorsed, was:

[1] R.S.C., Ord. 3, r. 7: "(1) Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, besides stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state that the defendant can pay the amount claimed and costs, (*a*) into court if the plaintiff . . . is resident outside the scheduled territories . . . or (*b*) in all other cases to the plaintiff. . . ."

Ord. 13, r. 3: "Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants, if more than one, fail, to appear thereto, the plaintiff may . . . enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any) or (if no rate be specified) at the rate of five per cent. per annum, to the date of judgment and costs. . . ."

R. 4: "Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and there are several defendants, of whom one or more appear to the writ, and another or others of them fail to appear, the plaintiff may enter final judgment, as in the preceding rule, against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with the action against such as have appeared."

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" (1) Against the first defendant for the sum of £38,705 16s. 3d. " the property of the plaintiffs, whereof the plaintiffs lawfully " demanded the same by letter dated August 10, 1956. (2) Against " the second defendant for the sum of £10,600 the plaintiffs' " property fraudulently converted by the second defendant. " (3) Against the third defendant for the sum of £10,648 the " plaintiffs' property fraudulently converted by the third defen- " dant. (4) Against the fourth defendant for the sum of £1,000 " the plaintiffs' property fraudulently converted by the fourth " defendant. (5) Against the fifth defendant for the sum of " £1,500 the plaintiffs' property fraudulently converted by the " fifth defendant. (6) Alternatively, that each sum being the " property of the plaintiffs traceable in equity be repaid respec- " tively by the defendants to the plaintiffs. (7) Further or other " relief. (8) Costs."

The third and fourth defendants, who at all material times appeared by the same solicitor, did not enter an appearance to the claim, and on September 24, the plaintiffs obtained judgments against them in default of appearance for the sums claimed.

Shortly afterwards the plaintiffs proceeded to levy judgment against the two defendants, who then applied to have the judgments set aside. The applications were each supported by an affidavit sworn by the solicitor, who said that the failure to enter an appearance was his fault. The applications came before Upjohn J. and he ordered that the two judgments should be set aside, and that the plaintiffs should pay the costs of the motion and other costs appropriate thereto of both defendants. The plaintiffs applied ex parte to the Court of Appeal for leave to appeal and were directed to give notice to the defendants. On the second occasion the defendants were represented, and the parties expressed their willingness to have the appeal decided if the court was of opinion that leave to appeal ought to be granted.

Neil McKinnon for the plaintiffs.
Michael Eastham for the third and fourth defendants.
The other defendants did not appear and were not represented.

The following cases were cited in argument: *Lagos* v. *Grunwaldt*[2]; *Knight* v. *Abbott*[3]; *Galli* v. *Mongruel*.[4]

Lord Evershed M.R. This is, so far as my experience goes, an unusual case, raising unusual points. [His Lordship stated the facts set out above and continued:] The order which the judge made seems at first sight to be a somewhat strong one; and, as Mr. Eastham pointed out to us, it proceeded upon three grounds. In the first place, it was the judge's view that the judgment which had been obtained in default was irregular for reasons which I will come back to explain. Secondly, that

[2] [1910] 1 K.B. 41.
[3] (1882) 10 Q.B.D. 11.
[4] (1865) L.R. 1 C.P. 46.

even if it was not irregular as being outside the scope of Ord. 13, r. 3, still the writ itself had failed in compliance with the directions of Ord. 3, r. 7. In a sense, the second point goes to the same general point as the first. Thirdly, the judge—whether he was right or wrong on the first two points, or either of them—took, apparently, a very strong view adverse to the behaviour of the plaintiffs, putting it briefly, in that they had made this claim after a very considerable delay when the Statute of Limitations might very well have run against them; they had taken this step of issuing the writ in the long vacation without giving any previous warning to either of the defendants, or their solicitors or advisers; and the judge felt that they had improved upon that performance by similarly giving no notice of having obtained a judgment. So that the arrival of the sheriff's officers in due course came as a surprise and shock to the two defendants. The judge thought that these actions were not creditable to the plaintiffs, acting against two companies who are, apparently, companies of standing and repute.

In a matter of this kind, of course, the judge plainly has (and has always been conceded to have) a wide measure of discretion in the question of costs. But if this court were to come to the conclusion that, on the face of it, the judgment obtained by the plaintiffs was regular, it would, to my mind, be unjust (and I think Upjohn J. would agree) to make the plaintiffs pay the costs in circumstances such as those, merely because they had acted, to put it no higher, with a marked lack of courtesy and consideration. I must, therefore, look at the two matters of substance.

The foundation for the view that the judgment itself was irregular depends upon whether, within the terms of Ord. 13, r. 3, this is a writ of summons indorsed for a liquidated demand. Mr. Eastham has argued that, as the writ has been indorsed, it is a claim founded on the tort of conversion; and that though, in the classic phrase, the plaintiffs might, Godlike, have waived the tort and sued for money had and received, they did not do so; and consequently, their proper relief was by way of damages. Further, although the sum claimed as damages might be, for all practical purposes, absolutely certain, nevertheless the claim was not one for a liquidated demand within the rule, but remained a claim for damages for which, in default of appearance, the remedy was an interlocutory judgment, with an inquiry as to the amount of damages.

I have come to the conclusion that it would not be right to give to the phrase "liquidated demand" so narrow and technical a significance. If I look at the writ, and take the case of the third defendants by way of illustration, it is quite plainly, according to the language and in its context, a claim to recover the sum of £10,648 exactly, that sum being, as the writ alleges, the plaintiffs' money or property which had been fraudulently converted by the third defendants. That view of the matter is

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supported, I think, by the reference to the first claim against Barclays Bank, which I read: "Against the first defendants for "the sum of £38,705 16s. 3d. the property of the plaintiffs." It is, of course, not suggested that Barclays Bank did any fraudulent conversion; that is a claim for money demanded, and not paid. But the phrase "the property of the plaintiff" is common to both; and I think it is inescapable, as a matter of English, that this is a claim for £10,648; and the addition of the words "fraudulently converted" does not prevent the sum claimed being a liquidated demand. I can find nothing in the rules (and no authority has been cited) which prevents me coming to that conclusion as a matter of common sense.

A difficult question at first sight arises under the second head of the matter as formulated by Mr. Eastham. The terms of Ord. 3, r. 7, impose upon a plaintiff, who makes a claim for a liquidated demand only, certain formal requirements. He must, for example, state the amount claimed for costs, and must add to the indorsement a statement that the defendant can pay the amount claimed and costs in one or other of the ways indicated in the rule. I think it is quite plain (and Mr. Eastham has not argued to the contrary) that that rule applies only if the indorsement is for a liquidated demand only. It may seem at first sight a little capricious that, if you add some other claim to the writ, not being a liquidated demand, then you are excused from the requirements I have mentioned. But I think there are substantial reasons for what appears at first sight to be an anomaly. However, so the rules run, and the question, therefore, remains: Is this a claim for a liquidated demand only? That, I think, really turns upon the presence in the indorsement of the sixth paragraph, which—putting it quite briefly by way of repetition—is an alternative claim to trace the £10,648 (I take the case of the third defendant illustratively) in equity into the assets of the third defendant. It is pointed out by Mr. McKinnon, in my judgment rightly, that even though the sum asked for in the end of all remains the fixed amount, still this particular form of claim —the relief here invoked—is the equitable relief of a tracing order which cannot properly be described as a mere claim for a liquidated demand.

It appears to me, therefore, that this indorsement has contrived successfully to sail between Scylla and Charybdis, represented by Ords. 3 and 13. It remains a writ for a liquidated demand without getting on the rocks of one indorsed for a liquidated demand only. If that is so, then, as I said at the beginning of my judgment, it would appear to me, with all respect to the judge, to be manifestly unjust that the plaintiffs should have to pay the whole of the costs of obtaining what, I think, was a perfectly regular judgment against each of these two defendants; and I do not think that the actions of the plaintiffs, which I have sufficiently narrated already, could fairly be regarded as justifying such an order as to costs. Indeed, I am

quite satisfied that had the judge taken the view which I have of the rules, he would not have made the order which he did make as to costs.

But since these matters of costs are questions of discretion, and since plainly the judge did take (and I do not say without justification) a somewhat severe view, in all the circumstances, of the conduct of the plaintiffs, I think that the justice of the case is met, and proper respect paid to the views of Upjohn J., if the order that he made is varied to this extent only, that the costs which he ordered that the plaintiffs should pay should be costs in the action in both cases.

Mr. McKinnon, on the appeal, and in his notice of appeal, has not sought (and could not properly or fairly do so) to have the order wholly set aside so as to be able to stand on the judgments he has obtained. Both counsel now are willing that we should go further than merely give leave, and that we should deal with the appeal. I would, therefore, deal with it by substituting the order as to costs which I have indicated for the order which the judge in fact made.

Birkett L.J. I am of the same opinion, and in view of what my Lord has said, I cannot think there is very much more that can usefully be added. But this is a very unusual case, and we are in one respect differing from the judge in the court below, and I think, therefore, that I should state my own conclusions shortly.

I confess that at first sight it seems a very strong order to make the plaintiffs pay the costs on a motion of this kind when they have sued for a specific sum—whatever the form in which they have stated their claim—and there has been default in appearance, and the judgment has been signed. Mr. McKinnon put the matter very clearly when he sail that the plaintiffs were without blame, and that the judge himself had treated the proceedings upon the basis that the judgment had been obtained irregularly. It is true that Mr. Eastham added a little more on the other side about the judge's view; but it seems to me fairly plain that without that first finding by the judge that this was an irregular judgment, all that followed would not have followed as it has done. Although Mr. Eastham conceded in his very frank and clear argument that what we were really dealing with were technicalities, yet I ought to say that my own view about this matter is that this indorsement on the writ of the plaintiffs' claim as against the third defendant and the fourth defendant for the sums specified there, is a claim for a liquidated demand. I need not trouble now with the arguments which were put on the one side and the other; I merely state my conclusion.

Mr. Eastham then frankly admitted that if that is right—that it is indeed a liquidated demand—then his only defence would be upon Ord. 3, r. 7, and the use of the word "only"—"a "liquidated demand only"—and he said in his argument: "This

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"is such a case; it comes precisely within Ord. 3, r. 7." Mr. McKinnon, on the other hand, said: "No; if you read Ord. 13, "r. 4, there is no mention of the word 'only.'" He argued that paragraph 6 in the indorsement on the writ—"Alternatively "that each sum being the property of the plaintiffs traceable in "equity be repaid respectively by the defendants to the plain-"tiffs"—allows him to say that that takes it out of Ord. 3, r. 7, that paragraph 6 shows that the indorsement is not a claim for a liquidated demand only. I agree with that submission, and therefore the result which has been declared by my Lord in his judgment would seem to follow.

One is never quite sure, of course, of all that passed through the mind of the judge in the court below; but he would seem to have been a little indignant with the plaintiffs in taking what I regard myself as a very extreme course in making them actually pay the costs. As my Lord has already said, if the judge had not taken the view that this was a judgment irregularly obtained, for my own part I do not think that he would have come to the conclusion which he did.

I, therefore, agree with the judgment of my Lord that the order of Upjohn J. should be varied in the manner indicated.

Romer L.J. I also agree. The two points upon which Mr. Eastham relied, and which he argued with such persuasiveness, are highly technical; but I have come to the conclusion that his argument ought not to prevail for the reasons given by Lord Evershed M.R., which I completely adopt for myself, and I desire to add nothing further.

Appeal allowed.

Solicitors: *Bell & Ackroyd; Kingsley Napley & Co.*

E. D.

[CHANCERY DIVISION.]

1956
Oct. 17.
Upjohn J.

* *In re* RIGLAR, DECD.
RIGLAR *v.* SIBLEY AND OTHERS.

[1956 R. 148.]

PRACTICE NOTE.

Family Provision — Practice — Title of proceedings — Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45)—*Intestates' Estates Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 64), *Sched. IV.*

ADJOURNED SUMMONS.

On the hearing of an application under the Inheritance (Family Provision) Act, 1938, in a case in which the testator

had died in 1955, and the amendments made by the Intestates' Estates Act, 1952, therefore applied, attention was called to the fact that the originating summons was intituled not only "In the "matter of the estate of . . . deceased and in the matter of the "Inheritance (Family Provision) Act, 1938," but also "In the matter of the Intestates' Estates Act, 1952."

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RIGLAR, *In re.* DECD.,

Nigel S. S. Warren for the plaintiff.
Oliver Lodge for the defendants.

UPJOHN J. said that Schedule IV to the Act of 1952 set out the full text of the Act of 1938 as amended, and provided, in section 6, that it was to be cited as "the Inheritance (Family "Provision) Act, 1938." It was therefore incorrect to intitule these applications in the matter of the Intestates' Estates Act, 1952; but, as there might for some time be cases coming before the court to which the Act of 1938 in its original form still applied, it would be convenient that cases to which the amended Act applied should be intituled "In the matter of the estate of ". . . deceased and in the matter of the Inheritance (Family "Provision) Act, 1938, as amended."

Solicitors: *Charles Russell & Co., for Kitson & Trotman, Beaminster; Clement G. Lawrence, for Geare & Williamson, Crewkerne; Stunt & Son.*

K. R. A. H.

[QUEEN'S BENCH DIVISION.]

*REGINA *v.* FLINTSHIRE COUNTY COUNCIL COUNTY LICENSING (STAGE PLAYS) COMMITTEE. *Ex parte* BARRETT.

1956
Oct. 17.

Lord Goddard C.J., Hallett and Donovan JJ.

Theatre — Licence — Rules — Condition prohibiting the sale of liquor and tobacco in theatre—Theatre continuously licensed for sale of liquor and tobacco—Application for renewal of licence on same terms as before—Proximity of licenced premises to theatre—Whether distinction between application for renewal and application for grant of licence for first time—Proximity of licensed premises a factor to be taken into account—"Rules for ensuring order and "decency"—Prohibition of sale of tobacco—Theatres Act, 1843 (6 *& 7 Vict. c.* 68), *ss.* 5, 9.

By section 9 of the Theatres Act, 1843: "The . . . justices ". . . shall make suitable rules for ensuring order and decency at "the several theatres licensed by them within their "jurisdiction. . . ."

Each year since its opening in 1901 a theatre in Rhyl, the Queen's Theatre, was licensed as a theatre. Rule 3 of the Theatrical Licences Rules, to which the annual licence was subject, provided that "no spirituous liquors, wine, ale, beer, porter, cider, "perry or tobacco shall be sold or disposed of in the theatre," but

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that rule had each year been deleted from the conditions attached to the licence so that for over 50 years the theatre had been continuously licensed for the sale of intoxicating liquor and tobacco. There was no suggestion of any misconduct at the theatre and in February, 1956, application was made for the renewal of the theatrical licence in respect of the Queen's Theatre under the same terms and conditions as before, namely, with the deletion of rule 3. The county licensing committee for stage plays granted a theatrical licence in respect of the theatre subject to compliance with rule 3, taking particularly into account the fact that there were adequate drinking facilities at licensed premises near by. On an application by the manager of that theatre for an order of mandamus requiring the committee to hear and determine the application according to law, or alternatively to delete rule 3 from their order on the grounds, inter alia, that the committee, in imposing the prohibition had been actuated by extraneous considerations:—

Held, (1) that the same considerations applied to an application for the renewal of an annual licence as to an application for the grant of such a licence for the first time, because in each case the application was, in effect, an application for the grant of a licence for a particular year, and, therefore, the fact that the theatre had always held an unrestricted licence was no more than one of the factors to be taken into account by the committee.

Sharpe v. *Wakefield* [1891] A.C. 173 applied.

(2) That (the court were bound by authority to hold) the proximity of a licensed house was a matter which the committee might take into account in considering whether or not to allow the sale of liquor in a theatre; and that although, in the circumstances, no question of the ensuring of order and decency arose, that was a good ground in law for imposing the restriction; accordingly the committee had heard and determined the application according to law and mandamus would not lie.

Reg. v. *West Riding of Yorkshire County Council* [1896] 2 Q.B. 386; 12 T.L.R. 454 followed.

Reg. v. *Sheerness Urban District Council* (1898) 14 T.L.R. 533; 62 J.P. 563 considered.

Per curiam. Section 9 of the Theatres Act, 1843, contemplated the making of rules for the purpose of ensuring order and decency at the theatre, and although a rule forbidding the sale of intoxicating liquor in a theatre might well be made for such purpose, it was difficult to see how prohibition of the sale of tobacco was directed to the preservation of order and decency.

APPLICATION for an order of mandamus.

The following facts appear from the affidavits filed in support of the motion. A theatre in Rhyl, now known as the Queen's Theatre, was first opened in 1901, and from then until March, 1956 (save for a short period in 1907 when it was being rebuilt after destruction by fire), the theatre was continuously licensed as a theatre and/or cinema. Rule 3 of the Theatrical Licences Rules,[1] to which the annual licence was subject, provided that

[1] Theatres Act, 1843, s. 5: "The justices of the peace within every county . . . in which application shall have been made to them for any such licence as is hereinafter mentioned, shall, within 21 days . . . hold a special session . . . for granting licences to houses for the performance of stage plays . . ." S. 9 "The . . . justices

"no spirituous liquors, wine, ale, beer, porter, cider, perry or "tobacco shall be sold or disposed of in the theatre"; but that rule had each year been deleted from the conditions attached to the licence granted to the Queen's Theatre so that from 1901 until March, 1956, the theatre had been continuously licensed for the sale of intoxicating liquor and tobacco. The last occasion on which any objector had appeared to oppose the grant of a licence with permission to sell liquor in respect of the Queen's Theatre was in March, 1951, when the Free Church Council opposed the application but expressly stated that there was no suggestion of misconduct at the theatre. In subsequent years the objection by the Free Church Council was not renewed and it was expressly stated on the council's behalf in March, 1954, that the churches did not object to the grant of permission in respect of the Queen's Theatre because it had been granted for many years and the churches had to be reasonable. On February 11, 1956, the manager of the Queen's Theatre applied to the Flintshire County Council Licensing (Stage Plays) Committee for the renewal of the theatrical licence at the theatre under the same terms and conditions as the previous year, namely, inter alia, with the deletion of rule 3. The application was heard by the committee on March 9, 1956, together with a similar application in respect of another theatre in Rhyl, the Pavilion Theatre. The Pavilion Theatre, which had never had permission to sell intoxicating liquor (save for the period April, 1939, to September, 1940), also asked that rule 3 be deleted from the conditions attached to their licence. At the hearing no objector opposed the application for the deletion of rule 3 from the licence in respect of the Queen's Theatre, but the Free Church Council, as in previous years, did make such objection in the case of the Pavilion Theatre, and the committee, having heard both applications, retired to consider their decision. Upon retiring, according to the affidavit sworn by the chairman, the committee " . . . "were advised by the clerk of the committee that we should "consider each application separately and on its own merits; "that we had a discretion to allow or refuse the application "to delete . . . rule 3 from the conditions attaching to the grant "of a theatrical licence in either or both cases; but that our "discretion must be exercised properly in a judicial and reasoned "way. The committee first considered the application relating "to the Pavilion Theatre . . . and most of the members of the "committee were of the opinion that it was unnecessary and

"shall make suitable rules for insuring order and decency at the several theatres licensed by them within their jurisdiction . . ."

Local Government Act, 1888, s. 7: "There shall be transferred to the county council . . . the business of the justices of the county out of session—(*a*) in respect of the licensing of houses or places for the public performance of stage plays. . . ."

Local Government Act, 1933, s. 85 (1): "A local authority may appoint a committee for any . . . general or special purpose . . . and may delegate to a committee so appointed . . . any functions exercisable by the local authority. . . ."

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" undesirable to provide drinking facilities at this theatre because " there were adequate facilities already provided at nearby " licensed premises. It was decided by a substantial majority " that this application be granted but that . . . rule 3 should " not be deleted from the conditions attached to the theatrical " licence for this theatre. The committee thereupon con- " sidered . . . the application [in respect of the Queen's Theatre] " and the view was expressed that the grounds upon which the " committee had refused to delete . . . rule 3 from the conditions " attaching to the theatrical licence for the Pavilion Theatre . . . " (which is situated a short distance from the Queen's Theatre " . . .) applied with even greater force to the Queen's Theatre " in that it was known to members of the committee that a large " hotel with a number of bars adjoined the Queen's Theatre and " that patrons of this theatre could obtain access thereto by " crossing a narrow covered arcade. It was pointed out by me " and the clerk of the committee that the Queen's Theatre had " hitherto been granted theatrical licences with rule 3 deleted " from the conditions attached thereto, but it was felt by " members of the committee that this did not fetter their dis- " cretion in considering the present application. Members " expressed the view that, whatever had been done in the past, " it was their duty to consider the present application on its " merits as they saw them and that their decisions must be " consistent if justice was to be done as between applicants. It " was unanimously agreed that the . . . application [in respect " of the Queen's Theatre] to delete . . . rule 3 from the conditions " attaching to the grant of a theatrical licence should be " refused. . . . "

The committee accordingly granted a theatrical licence in respect of the Queen's Theatre, subject, inter alia, to compliance with rule 3.

The applicant, Thomas Wesley Barrett, the accountant and secretary of Rhyl Entertainments Ltd. (the proprietors of the Queen's Theatre) and the actual and responsible manager of the theatre, applied for an order of mandamus directed to the committee commanding it to hear and determine according to law the application of February 11, 1956, for the grant of a theatrical licence in respect of the Queen's Theatre under the same terms and conditions as before or, alternatively, commanding the committee to delete rule 3 from its order, on the grounds that the committee had failed to hear and determine the application according to law; that the committee had failed to act judicially in accordance with the rules of reason and justice; that the committee had failed properly to exercise the discretion vested in it by the county council under section 5 of the Theatres Act, 1843, section 7 (*a*) of the Local Government Act, 1888, and section 85 (1) of the Local Government Act, 1933; that the committee, in purporting to determine the application, was

actuated by or purported to be actuated by extraneous considerations, namely, its desire to adopt a general policy of uniformity in regard to the licensing of theatres; and that the committee, in seeking to adopt that general policy and impose uniformity had prejudged the application and/or failed to determine it on the merits of the particular case.

Daniel Brabin Q.C. and *R. G. Waterhouse* for the applicant.

The respondent committee did not appear and were not represented.

The following case, in addition to the cases mentioned in the judgment, was cited in argument: *Rex* v. *Torquay Licensing Justices, Ex parte Brockman.*[2]

LORD GODDARD C.J. Mr. Brabin moves for an order of mandamus directed to the Licensing Committee for Stage Plays for the County of Flint who, on an application by the Queen's Theatre, Rhyl, for an unrestricted licence to enable them to sell intoxicating liquor in the theatre have imposed a condition, rule 3 of the Theatrical Licences Rules, which prohibits them from selling intoxicating liquor or tobacco. If a theatre has an unrestricted licence, that is, a licence to perform stage plays without this condition, then without any further justices' licence they can obtain an excise licence; as long as they have a licence to perform stage plays they can get an excise licence for liquor unless there is a condition that they shall not. This theatre has had an unrestricted licence for a great number of years to perform stage plays and to sell tobacco and intoxicating liquor in the bars. At the meeting of the committee which was held this year a renewal was asked for, and at the same time a licence was asked for by another theatre, the Pavilion Theatre, which also had held a licence for some time, but which had always held a restricted licence, and the committee granted licences to both theatres but in each case imposed the condition to which I have referred.

The case is one of considerable importance, and it is perhaps unfortunate that we have not had argument on both sides. Mr. Brabin has argued this case not only with clarity and ability, but has called our attention to the material authorities which seem to the court to show that whatever opinion we might have come to, we are hampered by previous decisions.

The chairman of the committee has put in an affidavit, and let me say that I welcome this as it is the first occasion for a considerable time that advantage has been taken of the Review of Justices' Decisions Act, 1872, which, without making them parties to the litigation, enables justices to put in an affidavit and to file it without stamp or fee, stating the reasons for their decision. The chairman's affidavit is helpful because he has

[2] [1951] 2 K.B. 784; [1951] 2 T.L.R. 652; [1951] 2 All E.R. 656.

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made perfectly clear what was the reason for the committee's decision.

[His Lordship read the paragraphs of the chairman's affidavit set out above and continued:] It is clear that in considering these two applications the committee took into account the fact that the theatres were very close to licensed premises and they considered that the facilities for drinking afforded by the licensed premises were enough, and therefore they resolved to keep in rule 3 which would prohibit the sale of intoxicating liquor in the theatres.

Mandamus would only lie if this court considered that the committee had not heard and determined the application according to law; that is what mandamus orders them to do. If they have heard and determined according to law, that is to say, if they applied their minds to the right considerations and have not taken into account considerations which have no bearing on the matter, or substituted their own prejudices for a determination on the merits, this court cannot interfere.

Mr. Brabin has argued very strenuously that a distinction should be drawn between the Queen's Theatre and the Pavilion Theatre because the Queen's Theatre was asking for the renewal of a licence on the same terms as they had always had, whereas the Pavilion Theatre was not in the same position, as they had, except for a very short time some years ago, never had an unrestricted licence. Mr. Brabin argues that there is all the difference in the world between applying for a new licence for a theatre and a renewal. I feel great difficulty in giving effect to that argument except to this extent, that no doubt the fact that the theatre always had had an unrestricted licence could fairly and properly be taken into account by the committee, and in this case they did so because the chairman says that he pointed out this fact to the committee. But I cannot agree that as a matter of law there is any difference between granting a new licence and renewing a licence because in effect it is in each case the grant of a licence for a particular year. We need not go into the matters which relate to the granting of renewals under the various Licensing Acts, but it is worth while to refer to a case which is very often cited, *Sharpe* v. *Wakefield*,[1] where Lord Herschell said[2]: "the sole question for decision in this case is, whether "where a licence is applied for, by way of renewal, by one who "already holds a licence for the sale of intoxicating liquors, the "licensing authorities are entitled to take into consideration the "wants of the neighbourhood and the remoteness of the premises "from police supervision, or whether their inquiry must be "limited to the character and conduct of the applicant, and they "can only refuse the applicant on the ground of his personal "unfitness." Lord Macnaghten said[3]: "I also am of opinion "that it is clear beyond the possibility of doubt or question that

[1] [1891] A.C. 173.
[2] Ibid. 185.
[3] Ibid. 187.

" the Act of 1828 "—that was the old Alehouse Act—" conferred " upon the licensing justices the same discretion in the case of " an application for what is now termed a renewal, as in the case " of a person applying for a licence for the first time." In other words, when you are applying for a licence which is an annual licence, whether you call it a renewal or a new licence, the same considerations apply, and the justices are entitled to take into account exactly the same considerations on an application for renewal, which is an application to be allowed to carry on the same business, as for an application for a licence for the first time.

The difficulty which arises in the present case is that when we turn to the Theatres Act, 1843, we find that section 9 provides: " The said justices of the peace, at a special licensing " session, or at some adjournment thereof, shall make suitable " rules for ensuring order and decency at the several theatres " licensed by them within their jurisdiction, and for regulating " the times during which they shall severally be allowed to be " open." The jurisdiction given to the justices is now exercised by a committee of the county council so that the jurisdiction of the committee to make rules to which the grant of the licence is subject is that they are to ensure order and decency. I suppose no one could doubt that the committee could say in any particular case: " To ensure order and decency we are not going to " allow intoxicating liquor to be sold on the premises," but in this particular case it was admitted that no complaint had ever been made against order and decency in the conduct of the theatre, and Mr. Brabin has argued, with a good deal of force, that it cannot be said that in attaching a condition to this licence prohibiting the sale of intoxicating liquor the committee were doing that for the purpose of ensuring order and decency at the theatre. The Act gives power to the committee to make suitable rules for order and decency. That obviously means that the committee can make rules which might be applicable to all theatres. Whether they should apply the rules to the particular theatre or not is another matter.

Section 9 appears to contemplate that general rules may be laid down because it provides that " a copy of all rules which " shall be in force for the time being shall be annexed to every " such licence," but it is clear that the section contemplates the making of rules for ensuring order and decency at the several theatres within their jurisdiction. I do not suppose it could be denied that a rule forbidding the sale of intoxicating liquor in a theatre could be made by the committee for the purpose of ensuring order and decency, but what is said is that no question of order and decency arises here, and the reason which the committee have given, namely, that people can if they wish get drink outside, is not directed to order and decency for it is a consideration simply with regard to the drinking facilities in the neighbourhood and not a consideration with regard to the proper conduct of the particular theatre. I think that there is a great

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deal to be said for that argument, and it appeals to me very much, but at the same time there are authorities which prevent this court from giving effect to that argument whatever we might think of it.

In *Reg.* v. *West Riding of Yorkshire County Council* [4] this court held that the justices were entitled to take into account the proximity of licensed premises to the theatre and to say there were adequate drinking facilities. Cave J., who delivered the first judgment, said [5]: "In this case it has been left to the "committee to have regard to the circumstances of each par- "ticular case which comes before them. They had here to "consider a variety of circumstances. The propriety of allowing "the sale of liquor in a theatre may vary very much according "to the locality in which the theatre is situate, or the character "of the theatre itself. It is a matter which might very properly "be taken into consideration that there was a place where liquor "could be obtained within a few yards of this very theatre." That is exactly what has happened here; within a few yards of this theatre there is an hotel and full facilities for obtaining intoxicating liquor. Wills J. said [6]: "One of the grounds upon "which it is well recognised that justices may fairly refuse a "licence to a public-house is that there are already too many "public-houses in the immediate neighbourhood. There is "already a public-house within twenty yards of this theatre. If, "then, an unconditional licence were granted to the theatre, the "effect would be to multiply facilities for drinking, and it is a "neighbourhood in which it is not desirable to do so. If that is "not a good ground for the exercise of their discretion by the "committee in the way they have done, I cannot conceive "what is." In that case the court was distinctly laying down that the presence of licensed premises in the immediate neighbourhood of the theatre is a ground for imposing this restriction.

Reg. v. *West Riding of Yorkshire County Council* [7] was quoted to the Court of Appeal in *Reg.* v. *Sheerness Urban District Council.* [8] There it was argued that the rule prohibiting the sale of intoxicating liquor in the theatre was ultra vires, but the court held that it was not ultra vires and that the justices could impose that condition. It is true that that case was decided on a different ground, simply that the rule was intra vires and that the justices had applied their minds to the proper considerations. A. L. Smith L.J., giving judgment, said [9]: "I do not think it necessary for "this decision to discuss *Reg.* v. *West Riding of Yorkshire* "*County Council,*[10] and, furthermore, I am of opinion that the "case of *Reg.* v. *Sylvester* [11] has no application to this case, as "there the justices refused to hear any application unless the

[4] [1896] 2 Q.B. 386; 12 T.L.R. 454.
[5] [1896] 2 Q.B. 388.
[6] Ibid. 389.
[7] [1896] 2 Q.B. 386.
[8] (1898) 14 T.L.R. 533; 62 J.P. 563.
[9] 62 J.P. 563, 564.
[10] [1896] 2 Q.B. 386.
[11] (1862) 31 L.J.M.C. 93.

"rules had been conformed with." That is the report in Justice of the Peace, but the report of his judgment in The Times Law Reports stated [12]: "As regards the case *Reg.* v. *West Riding of Yorkshire County Council*,[13] he was inclined to think that that decision was right, but it was not necessary to express any opinion upon it."

In these circumstances, I suppose it would be still open to the Court of Appeal and ex hypothesi the House of Lords to hold that the rule is ultra vires. I should doubt if they could possibly hold that the part of the rule with regard to supplying intoxicating liquor was ultra vires, but it might be argued in another court that the committee must not consider the presence of nearby licensed premises as one of the grounds on which they can base their decision because that does not go to any question about order and decency in the theatre itself. It is not open to this court to accept that argument because of the definite decision by the Divisional Court in the year 1896 in the *West Riding* case [14] that the proximity of a licensed house is a material matter which justices may take into account, and I think that is an answer to the application for mandamus in this case. That is the point which has weighed with the committee, and in the *West Riding* case [14] the court said that it was a point to which justices may pay attention, and therefore I think that it is shown that the committee have heard and determined this matter without taking into account matters they were not entitled to consider, and therefore that is a sufficient answer to mandamus.

There is one other matter, however, to which I should like to call attention; that is that rule 3, which is apparently a standard rule which applies, not only in the county of Flint, but in other parts of the country as well, and which was approved by the Secretary of State, actually deals with the sale of tobacco. How prohibition of the sale of tobacco has anything to do, at any rate in these days, with decency and order, I confess I fail to see, and if the committee had been asked at the hearing to delete the words "and tobacco" they might have done so. I should think that when these words "and tobacco" were originally put in, it was probably as a precaution against fire. Everybody knows that at the present time cigarette ends are a frequent cause of fire, but I do not think that that could be the object nowadays of putting in "and tobacco," and it may be that the committee in the future would consider whether they will not delete the words "and tobacco." If the committee had been asked to delete those words while leaving in the rest, and they had refused, unless they had given good reasons for it, the court might have asked them to reconsider the matter, but they were not asked to do so. Therefore, I think that it is difficult for us to say that the committee might have retained rule 3 except for the words "and tobacco," and as a matter of discretion the court would not

[12] 14 T.L.R. 533.
[13] [1896] 2 Q.B. 386.
[14] [1896] 2 Q.B. 386.

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order the case to go back for that point to be considered. For these reasons mandamus must be refused.

HALLETT J. I agree. Whether this court if it had been in the position of the committee would have considered rule 3 to be a suitable rule for ensuring order and decency at the theatre in question seems to me to be entirely beside the point. It seems clear from the decisions which have been referred to, that this court ought not to interfere in the matter by way of mandamus unless it can clearly see that the committee have exercised the discretion entrusted to them improperly, in the sense that they have allowed considerations to influence their decision which they ought not to have done. Having regard to the cases to which my Lord has already referred, it seems to me impossible to say that the consideration of the proximity of other facilities for drinking was a consideration which the committee ought not to have taken into account. What effect should be given to that consideration if it was a proper consideration is a matter for them and not for this court.

I should like to add that I share the feeling my Lord has expressed as to the difficulty of understanding why a prohibition on selling tobacco as distinct from smoking should now be attributed to the preservation of good order and decency. However, that is a matter which, as my Lord has explained, cannot be canvassed on this occasion.

DONOVAN J. I agree, with much regret. Speaking for myself, I cannot see how order and decency are preserved or advanced by telling the patrons of this theatre that they can drink next door instead of in the theatre itself. It is to preserve order and decency alone at the theatre that a restriction upon the sale of liquor inside the theatre can be imposed. That comes from section 9 of the Theatres Act, 1843; but it has already been held by decisions binding this court and referred to by the Lord Chief Justice that the existence of neighbouring drinking facilities is a relevant consideration to be taken into account by justices under that section. Mr. Brabin strenuously contended that those decisions are so old and deal with such a different state of society that they ought not to be followed. I wish I could accede to that argument, but, on a question of construction, I do not feel able to do so. The result is that the committee were entitled in law to take into account the drinking facilities next door, though speaking for myself I feel it was a very harsh decision to do so in this particular case in view of the fine record this theatre had enjoyed for over fifty years, during which time order and decency had been preserved to everybody's satisfaction, but that is not a matter for this court.

It is also, as has been pointed out by the Lord Chief Justice, another result of the committee's decision that no tobacco can be sold inside the theatre. You may take your own pipe and

cigarettes in and smoke them, but you must not buy them inside the theatre. That, of course, is a wholly unreal and unnecessary restriction, and the committee do not say otherwise; they do not mention it at all. But the application was to delete rule 3 as a whole, and that being so, and since the application was, in my view, properly dealt with by the committee, it is not possible to single out tobacco and grant relief in respect of that alone. For the rest, I agree entirely with what has fallen from the other members of the court.

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Application dismissed.

Solicitors: *George Thatcher & Son for J. Kerfoot-Roberts, Son & Griffiths, Holywell.*

J. F. L.

[CHESTER ASSIZES.]

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Hallett J.

Factory—Definition—Omnibus depot—Not a "factory"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (1) (vi).

Per curiam. If an omnibus depot did not constitute a factory within the meaning of the Factories Act, 1937, s. 151 (1), para. (vi), being simply "premises used for the purpose of housing . . . "vehicles where only cleaning, washing, running repairs or minor "adjustments are carried out," it could not be contended that it nevertheless constituted a factory within the meaning of the general definition in section 151 (1) in the sense that it consisted of "premises in which . . . persons are employed . . . in any pro- "cess for or incidental to . . . the . . . repairing . . . cleaning, or "washing . . . of any article."

ACTION.

The plaintiff, who was employed as a cleaner at the defendants' bus depot at Johnstown, Denbighshire, was engaged in cleaning the rear window of a bus, having first mounted a ladder provided by the defendants to enable him to reach the necessary level. The ladder slipped backwards, causing the plaintiff to fall therefrom and sustain injury. The plaintiff claimed damages at common law and also alleged that the defendants were in breach of section 25 (4) of the Factories Act, 1937, which provides that "All ladders shall be soundly constructed and properly main- "tained." The defendants contended that the bus depot where

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[Reported by H. EIFION ROBERTS, Esq., Barrister-at-Law.]

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the accident occurred did not constitute a factory within the meaning of section 151 (1) (vi).*

Hallett J. found that the accident occurred owing to the condition of the ladder, and held the defendants liable in negligence to the plaintiff as they had failed to take any steps to ensure that the ladder was in an efficient state and in good repair. The case is only reported on the obiter dictum of the judge on whether the depot constituted a factory under the Factories Act, 1937.

H. Emlyn Hooson for the plaintiff.
Geoffrey Howe for the defendants.

HALLETT J. stated the facts and continued: The statement of claim alleges that the garage where the buses were kept "constituted premises which were a factory within the meaning "of the Factories Act, 1937." If that position could be made good, then it is not disputed that section 25 (4) of the Factories Act, 1937, would apply. The requirements of that subsection are absolute; they cannot be fulfilled by the occupier merely taking all practicable steps to see that the ladder is in an efficient state and in good repair: see *Cole* v. *Blackstone & Co. Ltd.*,[1] approved in *Galashiels Gas Co. Ltd.* v. *O'Donnell.*[2] Theoretically it is important for the plaintiff to establish, if he can, that these premises were premises to which the Factory Acts apply. I doubt, however, if in the present case it makes any practical difference whether the plaintiff relies upon the statutory requirement or upon the common law obligation of an employer to do what is reasonable to take steps in every respect to secure the safety of his employees, because if the occupiers did not take all practicable steps to see that the ladder was in an efficient state and in good repair, they would be liable at common law, and the absolute obligation under section 25 (4) would not be required. I am prepared to hold that the defendants did not take all

* Factories Act, 1937, s. 151 (1): "Subject to the provisions of this "section, the expression 'factory' "means any premises in which, or "within the close or curtilage or "precincts of which, persons are em- "ployed in manual labour in any pro- "cess for or incidental to any of the "following purposes, namely:—. . . "(*b*) the altering, repairing, orna- "menting, finishing, cleaning, or "washing, or the breaking up or "demolition of any article . . . being "premises in which, or within the "close or curtilage or precincts of "which, the work is carried on by "way of trade or for purposes of "gain . . . And (whether or not they "are factories by reason of the fore- "going definition) the expression "'factory' also includes the follow- "ing premises in which persons are "employed in manual labour, that is "to say:—. . . (vi) any premises "in which the construction, recon- "struction or repair of locomotives, "vehicles or other plant for use for "transport purposes is carried on as "ancillary to a transport undertaking "or other industrial or commercial "undertaking, not being any premises "used for the purpose of housing loco- "motives or vehicles where only clean- "ing, washing, running repairs or "minor adjustments are carried "out . . ."

[1] [1943] K.B. 615; 59 T.L.R. 374.
[2] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.

practicable or, indeed, any steps to see that the ladder was in an efficient state and in good repair, and therefore there is a liability under common law. For that reason I desire to say very little about the legal point.

The first part of section 151 (1) of the Factories Act, 1937, provides: "Subject to the provisions of this section, the expres- "sion 'factory' means any premises in which, or within the "close or curtilage or precincts of which, persons are employed "in manual labour in any process for or incidental to any of the "following purposes, namely— . . . (*b*) the . . . repairing . . . "cleaning, or washing . . . of any article . . ."

Mr. Hooson says, rightly, that these garage premises were premises in which the plaintiff was employed in manual labour in the process of washing the buses, that a bus is an article, and that, therefore, if the matter stopped there, there could be no doubt that these premises were a factory.

The subsection continues: ". . . being premises in which . . . "the work is carried on by way of trade or for purposes of gain . . ." Whether here the work of, for instance, washing the windows of the buses is carried on by way of trade or for the purposes of gain I should have thought, apart from authority, was at least extremely doubtful. What this bus company is doing by way of trade for the purposes of gain is carrying passengers. To say that the work of washing the windows of the buses before they set out on their journey and after they come back is work carried on by way of trade seems to me rather difficult. The words "for purposes of gain" are alternative to the words "by way "of trade." If the matter were free from authority, I should feel some diffidence in saying they were washing those windows for the purposes of gain. They were washing the windows to make the bus fit to go out on the road without discredit to its owners, and when it goes out on the road the conductor would collect fares and so it would be used for purposes of gain.

Mr. Hooson contended that the view that I have been indicating was wrong, having regard to the fact that certain cases, where it was suggested that the gain must be direct, have now been disapproved by a higher authority; in particular, counsel reminded me that *Nash* v. *Hollinshead*[3] and *Curtis* v. *Shinner*[4] were dealt with in such a way as to make them no longer authoritative. There are cases, dealing with derating, which are to be found in *Bailey* v. *Potteries Electric Traction Co. Ltd.*[5] (in which the occupiers were a transport company). In *Turpin* v. *Bailey*[5] the occupier was a garage proprietor. There is no doubt that some of those cases, especially the two I have just mentioned, throw light upon the matters I have to consider, although in those cases to succeed the occupiers had to

[3] [1901] 1 K.B. 700; 17 T.L.R. 352.

[4] (1906) 95 L.T. 31; 22 T.L.R. 448.

[5] [1931] 1 K.B. 385; 46 T.L.R. 601.

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have not merely a factory, but a factory which was an industrial hereditament as defined, and it is in connexion with that second requirement that difficulties more particularly arose. There is in the Rating and Valuation (Apportionment) Act, 1928, reference to a " freight transport hereditament." None the less, I recognize that some assistance may often be derived from these rating cases. I observe that the views expressed by Devlin J. in *Thurogood* v. *Van den Berghs and Jurgens Ltd.*[6] did not meet with approval in the Court of Appeal in that case.

Section 151 (1) continues: " . . . And (whether or not they are " factories by reason of the foregoing definition) the expression " ' factory ' also includes the following premises . . . ," which are then categorized. I have not examined all those categories in detail, but I think I can safely say that the one or two specimens I have examined all appear to be directed to dealing with difficulties which have been felt by the courts in various reported cases in deciding whether the foregoing part of the subsection had rendered a particular type of premises a factory. For instance, paragraph (ix) is concerned with the question, which has given difficulty in the past, whether people who make nets for fishermen are conducting work which results in the premises where the work is done being a factory. When one comes to paragraph (vi) of the categories one finds provisions which are expressly designed to deal with the use of premises in connexion with the business of a transport undertaking, and ancillary to the main purpose of the undertaking. The difficulties that might arise in that connexion are contemplated by (vi), and whether or not premises would, by reason of what I will call the basic definition, be regarded as a factory, it is provided in (vi) that they shall be so regarded if they are " premises in which the " construction, reconstruction or repair of locomotives, vehicles " or other plant for use for transport purposes is carried on as " ancillary to a transport undertaking . . ." That part of the paragraph is bringing in something which might otherwise arguably not have been included. But, says Mr. Hooson, it does not exclude anything which would otherwise have been included by virtue of the main definition, and he points to the words " (whether or not " they are factories by reason of the foregoing definition) " and the words " also includes " as showing that what these 13 paragraphs are doing is to bring in something which otherwise would be, or might be, left out.

I take the view that unless the words in section 151 (1) (vi), " not being any premises used for the purpose of housing loco- " motives or vehicles where only cleaning, washing, running " repairs or minor adjustments are carried out," have the effect of excluding something which might otherwise arguably be included, they are completely useless. Those words show what will not be included as a factory. I think one must always go

[6] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

back to the words, "work is carried on by way of trade or for "purposes of gain," and although the explanation, that it must be directly for the purposes of gain, is now rejected as not warranted by the language of the section, I think that in a case to which (vi) applies it may be that there has been, by statutory authority, reversion to some extent to what I have described as the older view.

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JONES v. CROSVILLE MOTOR SERVICES LTD.

Hallett J.

I derive considerable encouragement in the view which I take from *Griffin* v. *London Transport Executive*,[7] which raised the question whether a transport depot belonging to the London Transport Executive was a factory. That case has enabled me to see whether the operations carried on at the defendants' depot would put them in the same position as the London Transport Executive. I am very far from satisfied that anything was done at the defendants' depot beyond housing vehicles and cleaning, washing and carrying out running repairs or minor adjustments.

Therefore, having regard to the provision of the second part of paragraph (vi), I think these premises were not a factory, section 25 (4) of the Act did not apply, and if the plaintiff had been compelled to rely solely on the breach of statutory obligation, he would have failed. In my judgment, however, the plaintiff has established a breach of common law duty, and, accordingly, he is entitled to recover. [His Lordship then considered the quantum of damages, and gave judgment for the plaintiff for the sum of £437 15s. 9d.]

Judgment for the plaintiff.

Solicitors: *Cyril Jones, Son & Williams, Wrexham; Laces & Co., Liverpool.*

[7] [1950] 1 All E.R. 716.

[QUEEN'S BENCH DIVISION.]

* WALTER WILSON & SON LTD. *v.* SUMMERFIELD.

1956 *Oct.* 19.

Lord Goddard C.J., Hallett and Donovan JJ.

Dock—Regulations—Safe means of access—Gangway—Breakage of gangway during unloading of ship—Ladder sole means of access—No steps taken by employers of stevedores to provide gangway—Whether "reasonably practicable" to provide gangway—Prima facie failure by ship to comply with regulation—Onus of proof—Dock Regulations, 1934 (*S.I.* 1934, *No.* 279), *regs.* 9 (*a*) (*b*), 50.

The Docks Regulations, 1934, provide that it shall be the duty of the owner, master, or officer in charge of a ship to comply with, inter alia, regulation 9. By regulation 9, "If a ship is lying at a wharf "or quay for the purpose of . . . unloading . . . there shall be safe

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"means of access for the use of persons employed" passing from ship to shore or from shore to ship "as follows—(*a*) Where reasonably practicable the ship's accommodation ladder or a gangway ". . . (*b*) In other cases a ladder of sound material and adequate "length . . . properly secured. . ." By regulation 50: "If the "persons whose duty it is to comply with regulations 9, 10 and 12 "fail so to do, then it shall also be the duty of the employers of "the persons employed for whose use the means of access and the "lights are required, to comply with the . . . regulations within "the shortest time reasonably practicable after such failure."

From February 13 to February 20, 1956, the defendants, master stevedores, were engaged in unloading a cargo of timber from the *S.S. Torun* lying in Surrey Commercial Docks, and were employing workmen for that purpose. In order to unload the ship was lying alongside a dumb barge which had been inserted between the ship and the quay after the ship was moored to the quay. From February 13 until February 16 the ship's gangway was used as a means of access to the ship for the persons employed in the unloading, but on the morning of February 16 the gangway broke and thereafter the sole means of access was a ladder of sound material and adequate length. The defendants did not possess a gangway or ship's accommodation ladder of their own and they took no steps to provide one; there was evidence that they knew rigging companies whom they could have approached to obtain a gangway, but no evidence as to whether or not a gangway was actually available, or as to the time it would have taken to procure one, or the cost of doing so. The defendants, on being charged with having failed to carry out their duty under regulation 50 of the Docks Regulations, 1934, thereby being guilty of an offence contrary to section 130 (1) of the Factories Act, 1937, contended, inter alia, that in that a safe means of access which complied with regulation 9 (*b*) had been provided, it was for the prosecutor to prove that it was reasonably practicable to provide a ship's accommodation ladder or gangway, and that, therefore, no breach of regulation 9 had been made out:—

Held, (1) that notwithstanding that there was a dumb barge lying between the side of the ship and the quay, the ship was a ship lying at a wharf or quay for the purposes of unloading within the meaning of regulation 9.

(2) That a ladder might only be used as a means of access if it was not reasonably practicable to provide a ship's accommodation ladder or a gangway and the onus of showing that the case came within the exception in rule 9 (*b*) was on those whose duty it was to provide a means of access; that primarily the duty of providing a ship's accommodation ladder or gangway was on the ship and, since the qualification in regulation 9 (*b*) had not been shown to apply, there was a prima facie failure on the part of the ship to comply with the whole of regulation 9; that if the ship failed in that primary duty the burden of providing a safe means of access was transferred to the employers of the stevedores, and that, therefore, if the employers failed to provide a gangway, the onus was on them of showing that it was not reasonably practicable to do so. The defendants, accordingly, having failed to show that it was not reasonably practicable to provide a gangway, had failed to answer a prima facie case of breach by them of regulation 50, and were guilty of the offence charged.

O'Brien v. *Granford* (*Owners*) [1951] 1 Lloyd's Rep. 414 applied.

Callaghan v. *Fred Kidd & Son* (*Engineers*) *Ltd.* [1944] 1 K.B. 560; 60 T.L.R. 409; [1944] 1 All E.R. 525 and *Marshall* v. *Gotham Co. Ltd.* [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937 considered.

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CASE STATED by the Tower Bridge metropolitan magistrate.

An information was preferred by Allen Leslie Summerfield, an inspector of factories, against the defendants, Walter Wilson & Son Ltd., master stevedores, for that they, on February 16, 1956, at Canada Dock, Surrey Commercial Docks, were employers of employed persons carrying on processes to which section 105 of the Factories Act, 1937, and the Docks Regulations, 1934, applied, namely, unloading the s.s. *Torun* at Canada Dock, that on that date there were not safe means of access as required by regulation 9,[1] and that they failed to carry out their duty under regulation 50 whereby they were guilty of an offence contrary to section 130 (1) of the Factories Act, 1937.

The following were among the facts found by the magistrate: At all material times the defendants were engaged in unloading a cargo of timber from the s.s. *Torun* in the Surrey Commercial Docks and were employing workmen for that purpose. For the purpose of unloading the ship was lying alongside a dumb barge which had been inserted between the ship and the quay after the ship was moored to the quay. Unloading started on Monday, February 13, 1956, and from the start until some time between 8.30 and 9.30 a.m. on Thursday, February 16, there was a safe means of access to and from the ship, namely, a gangway provided by the owner, master or officer in charge of the ship which complied with regulation 9 (*a*) of the Docks Regulations, 1934. At some time between 8.30 and 9.30 a.m. on Thursday, February 16, the gangway became fractured and was no longer safe to use. It was then taken away and at 11 a.m. on the same day, when the inspector of factories visited the ship, the sole means of access to and from the ship was a wooden ladder 20 inches wide with a 1-inch diameter metal handrail, 2 inches clear of the ladder and bolted to it, running along one side of the ladder for about nine-tenths of its length. The ladder was of sound material and adequate length. Thereafter, until the unloading was finished on February 18, 1956, the ladder was the sole means of access to and from the ship.

At the time when the inspector visited the ship the ladder

[1] Docks Regulations, 1934, Duties: "(*b*) It shall be the duty of the "owner, master, or officer in charge "of the ship to comply with Part II "of the regulations."

Part II, reg. 9: "If a ship is lying "at a wharf or quay for the purpose "of loading or unloading or coaling, "there shall be safe means of access "for the use of persons employed at "such times as they have to pass "from the ship to the shore or from "the shore to the ship as follows: "(*a*) Where reasonably practicable "the ship's accommodation ladder or "a gangway . . . properly secured "length . . . properly secured . . ." Reg. 10: "If a ship is alongside "any other ship, vessel, or boat, and "persons employed have to pass "from one to the other, safe means "of access shall be provided for "their use . . ." Reg. 50: "If the "persons whose duty it is to comply "with regulations 9, 10 and 12 fail "so to do, then it shall also be the "duty of the employers of the "persons employed for whose use the "means of access . . . are required, "to comply with the said regulations "within the shortest time reasonably "practicable after such failure."

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was resting against the ship's side, having been placed there to enable him to come aboard. Later in the morning, at or about 11.30 a.m., it was secured to the ship's side by means of clips and properly secured to prevent slipping. On February 16 the defendants reasonably believed that they would finish unloading from the ship on that or the following day. Like many stevedores operating in the London docks the defendants did not possess at the material time a gangway or ship's accommodation ladder of their own; the inspector at the time of his visit requested them to provide another gangway, but they took no steps to provide another gangway or a ship's accommodation ladder on February 16, or at any time until the unloading was finished on February 18. The workmen employed by the defendants had occasion from time to time to pass from the ship to the shore and from the shore to the ship, and at all material times after the gangway had broken the only means available for that purpose was the ladder.

There was evidence given by a witness called on behalf of the defendants that they could have taken steps on the morning of February 16 to obtain a gangway and that they knew three or four rigging companies whom they could have approached for that purpose, but there was no evidence as to whether or not a gangway was actually available, or as to the time it would have taken to procure one, or as to the cost of doing so.

It was contended on behalf of the defendants that the ship was not lying at a wharf or quay but alongside another ship, vessel or boat, and that, therefore, regulation 9 had no application to the case; that it was for the prosecutor to prove that the owner, master or officer in charge of the ship had failed to comply with regulation 9, and that he had failed to discharge the onus upon him in that a safe means of access had been provided which complied with regulation 9 (*b*), and there was no evidence before the court to show that it was reasonably practicable for the owner, master or officer to provide another gangway or accommodation ladder which complied with regulation 9 (*a*); that it was for the prosecutor to prove that the defendants had failed to comply with regulation 9 within the shortest time reasonably practicable after the owner, master or officer of the ship had failed to do so, and that he had failed to discharge the onus on him in that there was no evidence before the court to show (a) when (if at all) the owner, master or officer had failed to comply with regulation 9, or (b) what was the shortest time reasonably practicable thereafter for the defendants to comply with the regulation; that since a safe means of access had been provided which complied with regulation 9 (*b*) it was for the prosecutor to prove that it was reasonably practicable for the defendants to provide on February 16 another gangway or accommodation ladder which complied with regulation 9 (*a*), and that he had failed to discharge the onus on him in that there was no

evidence before the court to show that it was reasonably practicable for the defendants to provide a gangway or accommodation ladder which complied with regulation 9 (*a*) on February 16 or at all; and, alternatively, that, if the onus of proving that it was not reasonably practicable for them to provide such gangway or accommodation ladder was upon the defendants there was evidence to show that, in that (a) until the loading was unfinished on February 18 the means of access to the ship was a ladder provided by the owner, master or officer in charge of the ship which was of sound material and adequate length and properly secured to prevent slipping; (b) the defendants believed that they would finish unloading on February 16 or on the following day, and (c) the defendants did not know if it was possible to obtain a gangway or accommodation ladder, or if it was, how long it would take to obtain one or other of them or the cost thereof, and the test of whether or not it was reasonably practicable for the defendants to provide such a gangway or accommodation ladder was not simply whether it was practicable as a matter of engineering but depended on a consideration of the whole of the circumstances of the case.

It was contended on behalf of the prosecutor that the ship was lying at a wharf or quay within the meaning of regulation 9; that there was a failure of the owner, master or officer in charge of the ship to comply with regulation 9 (*a*); that it then became the duty of the defendants to provide a gangway or ship's accommodation ladder and put it into position within the shortest time reasonably practicable; that it would have been reasonably practicable for the defendants to provide a gangway or ship's accommodation ladder and put it into position during the course of that day; that the onus was on the defendants to show that it would not have been reasonably practicable to provide a gangway or ship's accommodation ladder and put it into position during the course of that day; that the defendants had not discharged that onus, and, further, had made no attempt whatever to provide a gangway or ship's accommodation ladder.

The magistrate was of the opinion that the ship was lying at a wharf or quay within the meaning of regulation 9; that after the gangway had broken, and before 11 a.m. on February 16, there was prima facie a failure of the owner, master or officer in charge to comply with regulation 9 (*a*); that before the men finished work on February 16 there was prima facie a failure on the part of the defendants to comply with regulation 50; that it was not for the prosecutor to prove that a gangway or accommodation ladder was available to the defendants, and that the onus was on the defendants to prove that it was not reasonably practicable for them to comply with regulation 9 (*a*); and that, having taken no steps whatever to provide a gangway or ship's accommodation ladder, and having failed to call any evidence that it was not possible to obtain a gangway or ship's accommodation ladder on February 16, the defendants had failed to answer a

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prima facie case of failure to comply with regulation 50, and had failed to discharge the onus of proof.

Accordingly, the magistrate convicted the defendants and fined them £5.

The defendants appealed.

Victor Durand for the defendants.

Walter Gumbel for the prosecutor.

The following cases were cited in argument: *Callaghan* v. *Fred Kidd & Son (Engineers) Ltd.*[2]; *Edwards* v. *National Coal Board*[3]; *O'Brien* v. *Granford (Owners)*[4]; *Marshall* v. *Gotham Co. Ltd.*[5] and *McCarthy* v. *Coldair Ltd.*[6]

LORD GODDARD C.J. This is a case stated by the magistrate sitting at the Tower Bridge Magistrates' Court, before whom the defendants were summoned "for that they on February 16, 1956, "at Canada Dock, Surrey Commercial Docks, were employers "of employed persons carrying on processes to which section 105 "of the Factories Act, 1937, and the Docks Regulations, 1934, "applied, to wit, unloading the s.s. *Torun* at Canada Dock, "that on the said date there were not safe means of access as "required by regulation 9 of the said regulations and that they "failed to carry out their duty under regulation 50 of the said "regulations whereby they were guilty of an offence contrary "to section 130 (1) of the Factories Act, 1937." The magistrate convicted. He has stated the case with the care and clarity with which we always find this learned magistrate does state a case, and he has set out the facts, which can be shortly stated. The s.s. *Torun* was lying alongside the quay at Canada Dock and was moored to the quay. It is true that there was a dumb barge lying between the side of the ship and the quay but, in the opinion of the court, that does not prevent the ship being a ship lying at a wharf or quay for the purposes of unloading within the meaning of regulation 9. She was unloading a cargo of timber, and the defendants are the stevedores who were employed in unloading the ship. During the course of the unloading, the ship's gangway which had been used for the means of access for the dockers to get on to the ship, broke, and when the inspector came on the scene on February 16, after the break had occurred, he found that the means of access provided for the dockers was a ladder, and the whole question is whether there was a breach of the Dock Regulations, 1934.

Regulation 9, which is a regulation for the protection of the dockers or stevedores who are employed in loading or unloading.

[2] [1944] 1 K.B. 560; 60 T.L.R. 409; [1944] 1 All E.R. 525.

[3] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.

[4] [1951] 1 Lloyd's Rep. 414.

[5] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

[6] [1951] 2 T.L.R. 1226; [1951] W.N. 590.

provides: "If a ship is lying at a wharf or quay for the purpose of "loading or unloading or coaling, there shall be safe means of "access for the use of persons employed at such times as they "have to pass from the ship to the shore or from the shore to the "ship as follows—(*a*) Where reasonably practicable the ship's "accommodation ladder or a gangway or a similar construction" is to be provided, and "(*b*) In other cases a ladder of sound "material and adequate length which shall be properly secured to "prevent slipping."

The ladder, therefore, is only to be provided if it is not reasonably practicable for a ship's accommodation ladder or a gangway of the specified dimensions to be provided.

Regulation 50 provides: "If the persons whose duty it is to "comply with regulations 9, 10 and 12 fail so to do, then it shall "also be the duty of the employers of the persons employed for "whose use the means of access and the lights are required, "to comply with the said regulations within the shortest time "reasonably practicable after such failure." The primary duty is on the ship to provide an accommodation ladder or gangway for the purpose of unloading, but if the ship does not provide that, then the burden is shifted on to the employers of the dock labourers or stevedores, as the case may be, to provide the means of access themselves. The ship has, where reasonably practicable, to provide an accommodation ladder or gangway. If it does not when it is reasonably practicable, the onus is to be upon the employers of the dock labourers. On the plain construction of regulation 9, a ladder can only be used in cases where it is not reasonably practicable to provide an accommodation ladder or a gangway. Therefore, if the inspector finds that a ladder is provided, it seems to me that he is entitled to say: "Why have "you not provided an accommodation ladder or a gangway?" If the answer is: "Because it is not practicable to do so," then clearly the onus is upon the ship in the first instance to show that it was not practicable. The ship knows the facts. The ship can say whether they had a gangway on board or whether they could have got a gangway and, if they have not provided one, prima facie unless they can show that it was not practicable, they are in default. If they are in default, the employers of the stevedores or labourers have to step into their shoes, and there is a duty upon them to provide it, because they may only use a ladder in "other cases," that is to say, where it is not reasonably practicable for the ship's accommodation ladder or gangway to be used. I think, therefore, the magistrate was perfectly right in holding that there was a default on the part of the ship and that that default had to be filled by the defendants. They were in the same position as the ship; they did not use an accommodation ladder or gangway, and they failed to show that the case had arisen in which they were entitled to use a ladder.

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Lord Goddard C.J.

In *O'Brien* v. *Granford (Owners)* [1] this very point arose. The trial judge, Donovan J., held [1] "that the onus was on defendants "to prove that it was not reasonably practicable to provide a "gangway and that they had failed to discharge it." That was an action against the owners of the steamship. If the onus was on the steamship owners, it follows for the reasons I have given that the onus would be on the employers of the workpeople who were at work in discharging the goods. In the Court of Appeal, where the judgment was upheld on different grounds, Asquith L.J. said [2]: "I might say in passing that, if it had been necessary "to decide the first point—that is, on whom the onus lies—I "should have thought myself that it lay on the defendants," and he quoted the dictum of Scott L.J. delivering the judgment of the Court of Appeal in *Callaghan* v. *Fred Kidd & Son (Engineers) Ltd.*[3]: "If it were necessary to decide the question of onus, "the obvious fact that the difficulty or ease of doing what is "necessary to maintain safety is so much more within the know-"ledge of the management than of their workpeople makes us "disposed to hold that it is for the defence, whether in a prosecu-"tion or an action, to establish the proposition of fact involved "in the words of limitation of the section." Denning L.J. said much the same thing in *McCarthy* v. *Coldair Ltd.*[4] and Lord Tucker, in *Marshall* v. *Gotham & Co. Ltd.*,[5] although it is true that he preferred to put the matter on the question of the construction of the regulations, saying: "I do not consider that "the fact that 'the difficulty or ease of doing what is necessary "'to maintain safety is so much more within the knowledge of "'the management than of their workpeople' . . . is in itself a "sufficient justification for shifting an onus which normally lies "on a plaintiff," held, on the construction of the regulations, that the onus was on the defendants.

I feel no difficulty at all in holding that in a case such as the present the onus must be on the defendants because they are only entitled to use a ladder if it is not reasonably practicable to use an accommodation ladder or a gangway. I cannot see that anyone can prove that it was not reasonably practicable for a ship's accommodation ladder or a gangway to be used except the defendants. It is true there might be a case where the inspector could say that there was a gangway lying on the quay and, of course, there would be no answer to that, but in this case I think that the magistrate was quite justified in his findings: "That after the said gangway broke, and before 11 a.m. on "February 16"—when the inspector arrived—"there was prima "facie a failure of the owner, master or officer in charge to "comply with regulation 9 (*a*) of the said regulations"—because the ship had not provided a gangway—"that before the

[1] [1951] 1 Lloyd's Rep. 414.
[2] Ibid. 417.
[3] [1944] K.B. 560, 565; 60 T.L.R. 409; [1944] 1 All E.R. 525.
[4] [1951] 2 T.L.R. 1226, 1228; [1951] W.N. 590.
[5] [1954] A.C. 360, 374; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

" men finished work on February 16 there was prima facie a " failure on the part of the [defendants] to comply with " regulation 50 "—that is because of the failure of the ship the duty fell on the defendants—" that it was not for the [inspector] " to prove that a gangway or accommodation ladder was available " to the [defendants] and that the onus was on the [defendants] " to prove that it was not reasonably practicable for them to " comply with regulation 9 (*a*). That having taken no steps " whatever to provide a gangway or ship's accommodation ladder, " and having failed to call any evidence that it was not possible " to obtain a gangway or accommodation ladder on February 16, " the [defendants] had failed to answer a prima facie case of " failure to comply with regulation 50 and had failed to discharge " the said onus of proof."

I agree with those conclusions of the magistrate because it seems to me that the defendants could only show justification for the use of the ladder if it was not reasonably practicable for the ship's accommodation ladder or a gangway to be provided. I do not think that they were justified on the proper construction of the regulations in using the ladder. The magistrate came to a right decision, and this appeal fails.

HALLETT J. I agree with the result proposed by my Lord, and I only desire to add a few words. It seems to me that the dictum of Scott L.J. at the conclusion of his judgment in *Callaghan* v. *Fred Kidd & Son (Engineers) Ltd.*,[6] is capable of having very widespread results if it be applied generally, and I observe that in *O'Brien* v. *Granford (Owners)*[7] Donovan J. based himself upon that dictum, and so, it appears, did Asquith L.J.[8] in the Court of Appeal. Again, in *McCarthy* v. *Coldair Ltd.*[9] Denning L.J. was basing himself on the dictum of Scott L.J.[10] That being so, for my own part, I would prefer rather to decide this case in the light of the suggestion made by Lord Tucker in *Marshall* v. *Gotham Co. Ltd.*,[11] which was decided in 1954, the other two cases having been in 1951. But applying what Lord Tucker said, and considering merely the construction of the regulation, I entirely agree that the three words " in other cases " which introduce regulation 9 (*b*) make it plain that there is an exception within which the person upon whom the duty of providing a safe means of access must come if he is to escape liability. For these reasons, I agree with the conclusion proposed.

DONOVAN J. I agree, and in deference to the argument of Mr. Durand, I would like to add a few words. If, as I apparently held in 1951,[12] it is for the ship to prove that it was not reasonably practicable to provide a gangway or ship's accommodation

[6] [1944] K.B. 560, 565
[7] [1951] 1 Lloyd's Rep. 414.
[8] Ibid. 416.
[9] [1951] 2 T.L.R. 1226, 1228.
[10] [1944] K.B. 560, 565.
[11] [1954] A.C. 360, 374.
[12] [1951] 1 Lloyd's Rep. 414.

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Donovan J.

ladder, then here there was prima facie a failure on the part of the ship to comply with regulation 9, that is, with the whole regulation, because a ladder provided under regulation 9 (*b*) is enough only if the qualification in regulation 9 (*a*) is shown to apply. A default, therefore, by the ship having prima facie been established in this case, the duty of complying with regulation 9 devolved also on the employers of the persons employed, the defendants in the present case. In these circumstances they must show that in the circumstances of the case the provision of a gangway or ship's accommodation ladder by them was not reasonably practicable. That they failed to do and, in those circumstances, the magistrate, in my opinion, was justified in convicting them.

Appeal dismissed.

Solicitors: *Chalton Hubbard & Co.; Solicitor, Ministry of Labour and National Service.*

J. F. L.

[COURT OF APPEAL.]

C. A.

1956
Oct. 17.

Denning, Hodson and Morris L.JJ.

*LE WITT *v.* BROOKES.

[Plaint No. M. 899.]

Landlord and Tenant — Act of 1954 — *Business premises (Security of tenure)—Costs—Application to county court to settle terms of new tenancy—Terms settled more in accordance with landlord's proposals—Landlord ordered to pay half of tenant's costs—Improper exercise of discretion — Landlord and Tenant Act,* 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 35.

Court of Appeal — Costs below — Jurisdiction to interfere — Faulty analogy by county court judge in exercising discretion.

The tenant of a studio requested the landlord to grant a new lease under the Landlord and Tenant Act, 1954. The landlord was willing to grant a new lease, but, as the parties could not agree on some of the terms, the tenant applied to the county court under section 35 of the Act for the terms to be determined. Before the county court judge the tenant proposed that the rent should be £200, and that the landlord should instal certain electrical power points and enter into a repairing covenant. The landlord proposed a rent of £350, and did not agree to the tenant's other proposals.

The county court judge fixed the rent at £300 and rejected the tenant's other proposals. When dealing with costs, he directed that the landlord should pay one half of the tenant's costs, on the ground that the grant of a new lease at less than the rent proposed by the landlord was analogous to an insufficient payment into court by a defendant. On appeal:—

Held, allowing the appeal, that in such cases the court, in exercising its discretion, should consider, inter alia, the reasonableness or unreasonableness of the offers on each side; that the analogy of a payment into court was inapplicable, and that the proper order was that there should be no costs on either side.

Gold v. *Brighton Corporation* [1956] 1 W.L.R. 1291; [1956] 3 All E.R. 442 applied.

Per Hodson L.J. This is not to say that any hard and fast rule is to be laid down, that in all cases where the court fixes an intermediate figure between counter offers there should be no order as to costs; but it is an indication as to (as I think) a natural practice to follow in a situation like this, which must often arise.

APPEAL from Judge Ralph Thomas, sitting at Marylebone County Court.

The facts are stated in the judgment of Denning L.J.

The cases cited in the arguments are referred to in the judgment.

A. L. J. Lincoln for the landlord.
Peter Benenson for the tenant.

DENNING L.J. Mr. Le Witt was the tenant of Mr. Thomas Cannon Brookes of a studio and room at 22, Holland Park Avenue. That tenancy was determined by notice to quit given by the landlord. The tenant claimed a new lease under the Landlord and Tenant Act, 1954. The landlord said he was willing to grant a new lease, but the parties could not agree on the rent or on the other terms. The tenant put forward a figure of £200 as rent and the landlord put forward a figure of £350 as rent. The tenant also wanted power points put in and a repairing covenant by the landlord. The matter went before the county court judge and he decided the rent was to be £300 a year, no power points to be put in by the landlord and no repairing covenant by him. Having come to that decision, he decided that the landlord was to pay the tenant one half of the tenant's costs. He has written a note for this court in which he states the grounds on which he took that view: "I took the view that as "the respondent had only offered a new lease at a rent of £350 "per annum and I had ordered the grant of a new lease at £300, "the respondent's offer was not a sufficient ground for depriving "the applicant of costs any more than an offer or payment into "court by a defendant of an amount less than that recovered in "an action for a money claim would be."

It seems to me that it is wrong to draw any analogy with a payment into court. It would mean that the landlord, if he wanted to save the costs of the hearing, would have to offer the precise figure of rent which the county court judge afterwards determined to be the right figure, or a lesser sum. That would be quite an unreasonable thing to ask a landlord to do.

It seems to me that in cases of this kind the court should consider the reasonableness or unreasonableness of the offers on each side, just as they could under the rules which were considered in *Gray* v. *Lord Ashburton*.[1] There is no such rule of

[1] [1917] A.C. 26.

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court here, but the same principle should be adopted: the court in exercising its discretion should consider the reasonableness or unreasonableness of the offers amongst other considerations.

We have the very point in the recent case of *Gold* v. *Brighton Corporation.*[2] That was a case where both parties negotiated for a new lease and could not come to terms. It had to be referred to the county court judge on the amount of the rent and other terms. The county court judge took a middle course. This court held that each party should pay his own costs. So also in this case both sides put forward figures which were fairly wide of the mark. They may perhaps have been bargaining figures. At all events, the judge took a middle course and I think in this case, as in *Gold* v. *Brighton Corporation,*[3] there should be no costs on either side in the court below. The judge's reasoning proceeds on the fallacy of equating the landlord's offer with a payment into court, which I think is wrong.

Accordingly, I would allow the appeal.

HODSON L.J. I agree. On April 24 in his application for a new lease, the tenant made various proposals, including a proposal for a rent of £200 inclusive and that the landlord should instal electric power points to enable heating of the premises to be improved. Subsequently at the hearing, he added a request that the landlord should be bound to enter into a repairing covenant. On May 2 the landlord, in his answer to the application, stated that he did not oppose the grant of a new tenancy, but said that if a new tenancy were granted he objected to its being granted on the terms proposed by the tenant. That position continued until the hearing on June 22, when Judge Ralph Thomas, the deputy judge at the Marylebone County Court made the order which has been appealed from: that is to say, there being no opposition to the grant of a new tenancy, he rejected the tenant's application for power points and a repairing covenant and fixed the rent at £300 a year, which was a figure in excess of that proposed by the tenant. During the interval between the entry of the answer and the hearing, namely, by letter of June 11, 1956, the landlord through his solicitors, had written to the tenant's solicitors saying that he was ready to grant a new lease on terms similar in all respects to those in the original lease, save that the rent should be £350 per annum.

At the conclusion of the case the county court judge, before the question of costs had been discussed, stated that the applicant should have his costs as he had succeeded in getting a new tenancy. He had, in saying that, I think, perhaps overlooked the fact that the question of a new tenancy on some terms or other had never been in dispute. When counsel for the landlord drew his attention to that the judge added this: "Owing to

[2] [1956] 1 W.L.R. 1291; [1956] 3 All E.R. 442.

[3] Ibid.

"additional time taken on issues on which applicant has not "succeeded, he is to have only half his taxed costs on Scale III."

The landlord says that that is not a proper exercise of discretion, because the application for a new tenancy not having been opposed, and the only surviving question after all other matters had been disposed of being what was to be the rent, and the landlord having failed in establishing his figure and the tenant having failed in establishing his figure, the county court judge having taken an intermediate figure, the only proper order in the circumstances of this case or the most favourable order for the tenant which could be made was no order as to costs. I think that that is right.

The analogy which the county court judge put forward of payment into court breaks down, because in this case there are really two offers: an offer by the tenant to pay £200 and an offer by the landlord that the tenant should pay £350. There is no true analogy between that case and the case of a defendant who pays a sum of money into court in the hope of saving costs.

I think, therefore, that this appeal as to costs must be allowed, and I agree with my Lord that (although the county court judge did not have the opportunity of seeing the case, because it has only been reported, I gather, since he gave his judgment) the case of *Gold* v. *Brighton Corporation*,[4] in which my Lord and the other members of the court agreed in varying an order as to costs, is a parallel case. This is not to say that any hard and fast rule is to be laid down, that in all cases where the court fixes an intermediate figure between counter offers there should be no order as to costs, but it is an indication as to (as I think) a natural practice to follow in a situation like this, which must often arise.

MORRIS L.J. I agree. The judge, in a note, explained why he had made the order in regard to costs that he in fact made. What he says is that the landlord had put forward a figure for the rent of £350, whereas the award was of £300. So, the judge says that the landlord's offer was not a sufficient ground for depriving the tenant of costs "any more than an offer or pay-"ment into court by a defendant of an amount less than that "recovered in an action for a money claim would be."

If any comparison can in fact be made with a payment into court, then I think there is great force in the submission that in the present case the offer of the tenant must also be looked at as though it were a payment into court. The tenant made an offer of £200 and the figure fixed of £300 was some 50 per cent. up on what the tenant had suggested. The landlord put forward a figure of £350 and the figure fixed of £300 was some 14 per cent. down on what the landlord had suggested. It seems to me that this case cannot be regarded as one in which there was

[4] [1956] 1 W.L.R. 1291.

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the mere exercise of a discretion on the part of the judge but that this is a case where we can interfere, because the judge proceeded, as is shown by the note, on the basis of a faulty analogy.

I agree with the order proposed.

Appeal allowed.

Solicitors: *Cannon Brookes & Odgers; Simon, Haynes, Barlas & Cassels.*

F. R. D.

[PRIVY COUNCIL.]

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* MAHARAJ KRISHAN BHANDARI . . . APPELLANT;

AND

ADVOCATES COMMITTEE . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa—Kenya—Advocate—Professional misconduct—Functions of Advocates Committee—Application of rule of concurrent findings of fact—Standard of proof—Advocates Ordinance, No. 55 *of* 1949 *(Kenya), ss.* 9, 15.

Barrister—Professional misconduct—Misleading court—Failing to disclose earlier judgment. Privy Council—Concurrent findings of fact.

The appellant, an advocate of the Supreme Court of Kenya, was found guilty of professional misconduct and admonished by the Supreme Court on consideration of a report and findings by the Advocates Committee, a body established by the Kenya Advocates Ordinance, 1949, for the purpose, inter alia, of considering and reporting upon charges of professional misconduct against advocates. The substantial charge against the appellant made to the committee was that when acting as counsel in certain proceedings in the Supreme Court he had failed to disclose to the judge a judgment given by another judge in earlier proceedings in connexion with the same matter and client which should properly have been disclosed. From the judgment of the Supreme Court, who found that the appellant by his failure to disclose the judgment had deliberately intended to mislead the court, the appellant appealed to the Court of Appeal for Eastern Africa, who held that there were concurrent findings of fact by the committee and the Supreme Court and that it was impossible to say that the conclusion or inference from the facts of those two tribunals that the appellant never intended to make full disclosure was unjustifiable or unreasonable.

On appeal to the Judicial Committee it was contended, inter alia, that this was not a case of concurrent findings of fact by two lower courts in that the Advocates Committee was not a court empowered to arrive at any determination or give any judgment but only to report if "a prima facie case" was made out (section 9 (3) (iii) of the Advocates Ordinance):—

Held, that although this case did not literally come within the rule with regard to the functions of an appellate court where

† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD TUCKER, MR. L. M. D. DE SILVA.

there were concurrent findings of fact by subordinate courts, all the reasons for the rule applied with equal or even greater force to cases where professional domestic tribunals were established by statute for investigating and finding the facts in cases of alleged misconduct by members of their own profession. The words "prima facie case" in section 9 (3) (iii) of the Ordinance did not have the effect of assimilating the functions of the committee to those of committing magistrates or of in any way relieving them of the duty of determining the facts. There was ample evidence to support the decision of the Supreme Court.

On a charge of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is required, and there should not be condemnation on a mere balance of probabilities.

Judgment of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 39 of 1955) from a judgment of the Court of Appeal for Eastern Africa (Nihill P., Worley V.-P. and Corrie J.) (June 11, 1955) affirming a judgment of the Supreme Court of Kenya (O'Connor C.J. and Bourke J.) (March 22, 1955), which latter court, on consideration of a report laid before it by the Advocates Committee, ordered that the appellant, an advocate practising in Kenya, should be admonished for professional misconduct.

The main charge against the appellant before the committee was that, when acting as counsel in certain proceedings before Hooper J. in the Supreme Court, he had failed to disclose to him a judgment given in earlier proceedings before Cram Ag.-J. which should properly have been disclosed. The appellant's answer was that he had indeed disclosed it so far as he had an opportunity to do so, and would have made even fuller disclosure had he had the opportunity.

The appellant's main complaints before the Board were that he was wrongly found to have failed in disclosure when there was no evidence on which he could be held to have so failed; that a wrong standard of proof was applied; and that it was wrong to find him guilty when he had given explanations which were not disproved and were consistent with his innocence.

The facts and the relevant provisions of the Advocates Ordinance, 1949, appear from the judgment of the Judicial Committee.

1956. Oct. 9, 10, 11. *D. N. Pritt Q.C.* and *J. G. Le Quesne* for the appellant.

D. A. Grant and *A. C. B. Reid* (Scottish Bar, and Crown Counsel in Kenya) for the respondent.

The following cases were cited in argument: *In re a Solicitor* [1]; *In re a Solicitor* [2]; *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*.[3]

[1] [1934] 2 K.B. 463; 50 T.L.R. 561.

[2] [1945] K.B. 368; 61 T.L.R. 299; [1945] 1 All E.R. 445.

[3] [1946] A.C. 508; 62 T.L.R. 549.

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Oct. 11. VISCOUNT SIMONDS. Their Lordships think it right that the appellant should know at once the conclusion to which they have come; it is that they will humbly advise Her Majesty that this appeal should be dismissed and that the appellant must pay the costs. They will put their reasons into writing at a later stage.

Oct. 31. Their Lordships' reasons for dismissing the appeal were delivered by LORD TUCKER. The appellant is an advocate and partner in the firm of Bhandari & Bhandari, practising in Nairobi. He was found guilty of professional misconduct by the Supreme Court of Kenya on consideration of a report and findings by the Advocates Committee, a body established by the Advocates Ordinance for the purpose, inter alia, of considering and reporting upon charges of misconduct against advocates. His appeal to the Court of Appeal for Eastern Africa was dismissed and he now appeals by special leave of that court to Her Majesty in Council.

The facts and circumstances giving rise to the charge against the appellant made to the committee by the acting-registrar of the Supreme Court as a result of a memorandum by Hooper J. are very fully set out in the report of the committee and in the judgment of the Supreme Court, and it will suffice for present purposes to give them in outline and to refer later to the more essential details.

In June, 1954, the appellant's firm, during his absence on holiday in England, filed a declaratory suit, No. 675 of 1954, in the Supreme Court of Kenya against the Attorney-General and the Principal Immigration Officer on behalf of Mrs. Shantaben, w/o J. K. Patel, and her husband Mr. J. K. Patel seeking a declaration that Mrs. Shantaben was not a prohibited immigrant within the meaning of section 5 of the Immigration (Control) Ordinance, 1948, and that her presence in the colony was lawful under a valid temporary employment pass still current and unrevoked, and consequently she was not subject to a deportation order made by the Acting Governor under section 9 of the said Ordinance.

On his return from England the appellant conducted this suit before Cram Ag.-J. It was dismissed on November 18, 1954. The judge held that the suit, which was brought under the Petitions of Right Ordinance, was incompetent and must be dismissed, but he added that he proposed to do what both parties apparently desired, i.e., to consider the case on its merits, the Crown "mistakenly, or otherwise, having waived all objections "to procedure." He held that the temporary employment pass relied on by the plaintiff, dated November 6, 1951, had expired by course of law on her failure to observe her statutory duty in July, 1953, to report to the Immigration Officer that she had left the employment for which the pass had been issued, and that

thereafter her presence in the colony was unlawful and consequently the deportation order dated April 10, 1954, validly made. He embodied a declaration to this effect in his judgment.

It should perhaps here be stated that on leaving her employment in July, 1953, Mrs. Shantaben had married Mr. Patel, a permanent resident in the colony, and he had thereupon applied on her behalf to the Immigration Officer for a dependant pass. On October 24, 1953, the application appears to have been approved by the Immigration Officer, but this decision was rescinded on November 5, 1953, and no dependant pass was ever issued. Nothing turns on this.

On November 29, 1954, the appellant gave notice of appeal from the judgment of Cram Ag.-J. On the same day Mrs. Shantaben swore an affidavit, which had been drafted for her by the appellant, in support of a notice of motion for a writ of certiorari to quash the deportation order or, alternatively, for mandamus to the Immigration Officer to issue a dependant pass. This was the procedure which Cram Ag.-J. had suggested in that part of his judgment which was dealing solely with the procedural aspect as being in his view appropriate.

This affidavit, drafted by the appellant, contained no mention of the proceedings before Cram Ag.-J. or of the notice of appeal from his judgment, but contained the following statements: "I "entered Kenya Colony on July 16, 1951, on a valid temporary "employment pass No. 3146 dated 7.5.51 . . . which said pass is "still valid and current and has been valid and current at all "material times. The said pass has yet not been cancelled. I "enclose the said temporary employment pass and is marked "'A.'" After reference to the deportation order of April 10, 1954, the affidavit in paragraph 10 stated: "I am informed by my "advocates and I verily believe that the said order is not valid "as I am neither a prohibited immigrant nor my presence in "the colony is unlawful."

On December 8, 1954, the appellant appeared before Hooper J. in chambers to apply for a rule nisi, when a question was raised as to whether or not service of the affidavit and notice of motion on the Attorney-General and the Immigration Officer was required and the matter stood over. Later in the day the appellant was informed that the application was ex parte and service not required and he attended again on December 10.

The course of the subsequent proceedings is contained in a memorandum and a supplementary memorandum by Hooper J. which formed the basis of the charge against the appellant before the Advocates Committee. It was agreed at the outset of the proceedings that the facts stated in these memoranda were correct and that the judge was not required to attend and give evidence, subject, however, to the exclusion from the memoranda of any expressions of opinion or inferences.

The agreed facts as appearing in these memoranda are as follows:—On December 10, before the appellant appeared

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before him, the judge had read the papers attached to the notice of motion and the affidavit sworn by Mrs. Shantaben and discovered that it was false in that it stated that the employment pass attached to the application was still current and valid. (The pass showed on its face that it was only valid for three years from date of entry and therefore expired on July 16, 1954.) When the appellant appeared before the judge his attention was drawn to this and he stated that it was a mistake and that he would file a supplementary affidavit to correct it. The judge asked how it was that Mrs. Shantaben was still in the colony since the date of the deportation order. The appellant stated that if the application was adjourned, he would produce correspondence in his possession on this point.

On December 14 a supplementary affidavit was sworn by Mrs. Shantaben. It stated that although the temporary employment pass had expired on July 16, 1954, it was valid and current at the date of the deportation order, which was the material time for the purposes of the application. It expressed regret for the mistake and stated that the other statements in the affidavit were true to the best of her knowledge and belief. Paragraph 4 of the supplementary affidavit was as follows:—

"4. I made representation through my advocates to His "Excellency the Governor against the making of the deportation "order as stated in paragraph 9 of my said affidavit and to the "best of my knowledge and belief His Excellency agreed to "suspend the operation of the said deportation order to allow me "to institute proceedings in this Honourable Court to establish "my right to stay in the colony."

There was still no mention of the proceedings before Cram Ag.-J. and the notice of appeal from his judgment therein.

On December 15 the appellant appeared again before Hooper J., when he explained that he had been unable to find any correspondence on the matter, but stated that if the judge sent for the file in Civil Case 675/54, he would find the whole of the papers relating to the attitude adopted by the Governor in respect of the deportation order. The application was accordingly further adjourned until December 17. Meanwhile the judge sent for the file, wherein he found and perused the judgment of Cram Ag.-J. and his declaration with regard to the invalidity of the temporary employment pass and the validity of the deportation order, as well as the notice of appeal therefrom dated November 29, 1954.

On December 17 the judge asked the appellant for his explanation of these matters. The appellant stated that it was a genuine mistake and he had not intended to mislead.

In his further memorandum, which was dated December 20, 1954, Hooper J. stated that on his first appearance (which seems to relate to December 10) the appellant mentioned incidentally a long judgment of Cram Ag.-J., saying Cram Ag.-J. had told

him or ruled that certiorari or mandamus was the correct procedure. The judge told him he had no time to read the judgement then. He was quite prepared at that time to accept his word in respect of this matter. He added that the appellant never at any time directly or indirectly told him that Cram Ag.-J. had proceeded with the consent of the parties to give judgment in the matter; had ruled against him on all points; that he intended to appeal against the judgment; and had in fact already filed his notice of appeal. He further stated that on December 17 he asked the appellant who had drafted the affidavit of November 29. He replied that he supposed one of his clerks had. He then asked him whether it was not true that he had drafted it himself. The appellant then replied "Yes, I suppose I must have done so." The judge then informed him that he would strike out the motion and record his reasons for so doing.

These memoranda were exhibited to an affidavit by the acting-registrar in support of his application to the Advocates Committee that the appellant be required to answer the allegations contained in the said affidavit.

The relevant provisions of the Advocates Ordinance, 1949, are as follows:—Section 9: "(1) Any application— . . . (*b*) by "any person to strike the name of an advocate off the Roll, or "to require an advocate to answer allegations contained in an "affidavit, shall be made to and heard by the committee in "accordance with rules made under the next succeeding section; "Provided that where, in the opinion of the committee, an "application under paragraph (*b*) of this subsection does not "disclose any prima facie case, the committee may refuse such "application without requiring the advocate to whom the "application relates to answer the allegations and without hearing the applicant; . . .

"(3) On the hearing of an application under paragraph (*b*) "of subsection (1) of this section—(i) the committee shall give "the advocate whose conduct is the subject matter of the application an opportunity to appear before it . . . and shall furnish "him with a copy of any affidavit made in support of the application, and shall give him an opportunity of inspecting any "other relevant document not less than seven days before the "date fixed for the hearing; (ii) the committee on the termination of the hearing shall embody their findings in the form of "a report to the court which shall be signed and filed with the "registrar, and shall be open to inspection by the advocate to "whom the application relates and his advocate (if any) and also "by the applicant, but shall not be open to public inspection; "(iii) if the committee is of the opinion that a prima facie case "for the application, or a prima facie case of any misconduct "on the part of the advocate charged, has been made out, it "shall lay a signed copy of the report before the court, together

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" with the evidence taken and the documents put in evidence " at the hearing; . . ."

" 10 (3). The hearing of an application under section 9 of " this Ordinance shall for the purpose of Chapter XI of the Penal " Code be deemed to be a judicial proceeding."

" 15 (1). The court, after considering the evidence taken " by the committee and the report and having heard the " advocate for the committee and the advocate to whom the " application relates or his advocate, and after taking any " further evidence, if it thinks fit to do so, . . . may admonish the " advocate to whom the application relates and . . . may make " any such order as to removing or striking [his] name from the " Roll, as to suspending him from practice, as to payment by " him of any fine not exceeding ten thousand shillings, as to " the payment by any person of costs and otherwise in relation " to the case as it may think fit.

" (2) Any person aggrieved by a decision or order of the " court under this section may, within 30 days of such decision " or order, appeal therefrom to the Court of Appeal for Eastern " Africa."

The application was duly considered by the Advocates Committee under the above provisions on January 29 and 31, 1955. The committee consisted of Mr. John Whyatt Q.C., Attorney-General (Chairman), Mr. Griffith-Jones Q.C., Solicitor-General, Mr. Mangat Q.C. and Mr. Sarabjee. The applicant and the present appellant were both represented by counsel.

The case for the applicant consisted of the affidavit of the applicant together with the memoranda and other documents exhibited thereto. He also gave evidence producing all the relevant documents and records relating to the Civil Case No. 675 of 1954 and the application for the rule nisi.

For the appellant an affidavit sworn by him on January 12, 1955, was put in and he gave oral evidence supplementing the same and was cross-examined by counsel for the applicant and questioned by members of the committee. In his affidavit the appellant explained the misstatement in the affidavit with regard to the expiration of the pass by the effluxion of time by saying that he honestly thought that at the material date the time limit had not expired, whereas the pass which was exhibited to the affidavit showed the contrary which he had not observed. This aspect of the case, viz., the expiry by effluxion of time, was not eventually relied on in the case against the appellant.

He further stated that he at all times honestly believed that he could pursue his remedy by way of rule nisi in addition to appealing against the judgment of Cram Ag.-J. and notwithstanding that judgment. He further stated that until Hooper J. sternly questioned him on December 17 he was never given an opportunity to bring the facts before him as he had not by then been heard on the merits. He said that it was always his intention to refer so far as was necessary to the proceedings

and judgment in Civil Case No. 675 of 1954 and to satisfy the judge that in spite of that case he was entitled to one or other of the writs he was asking for. He said that at no stage of the proceedings did he intend to hide or not disclose the fact that there had been previous proceedings.

The evidence of the appellant before the committee covers just over 17 pages of the record in the present appeal.

In the course of the hearing counsel for the applicant formulated the charge against the present appellant as follows:— 1. That he in his capacity as the advocate of Mrs. Shantaben in miscellaneous application No. 22 of 1954 drafted, procured her to swear, and filed in court, the affidavit of November 29, 1954, the contents of which were false to his knowledge and filed same in court with the intention of deceiving and misleading the court; and deliberately and wilfully attempted to deceive and mislead the court by such false statements in order to obtain the orders nisi prayed for in the said proceedings and thus had been guilty of disgraceful and dishonourable conduct inconsistent with his duty as an advocate. 2. Alternatively, that he failed to disclose to the court matters which were most material to the above case and thus was guilty of gross negligence amounting to professional misconduct.

After an exhaustive and careful investigation, in which full opportunity was given to the appellant to give his explanation, this committee, having had the great advantage of seeing and hearing the applicant give his evidence and with knowledge of the conditions under which advocates in the colony carry on their practices, found and reported that it was fully established on the evidence that the respondent (the present appellant) intended to deceive and mislead the court and that therefore a prima facie case of disgraceful and dishonourable conduct inconsistent with his duty as an advocate had been made out. With regard to the alternative submission on behalf of the applicant that his failure to disclose constituted gross negligence amounting to professional misconduct the committee reported that if they had not reached the conclusion that the evidence justified a finding of a prima facie case and that disgraceful and dishonourable conduct had been established, they would have had no hesitation in reaching the conclusion that the evidence clearly showed that the respondent had been guilty of gross negligence amounting to professional misconduct.

This report came before the Supreme Court for their consideration on March 7 and 8, 1955. Counsel for the appellant (not being the same as at the hearing by the committee) put in the forefront of his case the submission that there was never any obligation on the part of the appellant to disclose the proceedings before Cram Ag.-J. He said that the former proceedings were civil, whereas the application for prerogative writs was on the criminal side, the parties were different, the judgment of Cram Ag.-J. was not a final judgment and the declaration on

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the merits had not been made by consent of the parties and was only obiter, and finally it was in any event for the opposite party to raise a plea of res judicata. He did, however, submit that if these arguments were wrong, the present appellant did not act dishonourably if he thought they were right, and that in any event he could not have intended to deceive because even if he got his order nisi, the previous proceedings would have been produced by the other side on the hearing of the application to make the rule absolute.

Their Lordships pause at this stage to observe that the main contention is entirely at variance with the frank admission made by counsel for the appellant at the present hearing that there was a clear and undoubted duty on him to make this disclosure before obtaining a rule nisi. His case was that it was not essential to make such disclosure in the affidavit, and that the appellant had in fact made effective disclosure before argument on the merits had begun.

The judgment of the Supreme Court was given on March 22, 1955. The court set out the relevant facts and history of the proceedings at length, they referred to the authorities dealing with the duty to make full disclosure of all relevant facts in ex parte applications, and carefully considered the evidence and affidavits. They stated their conclusions as follows:—"Having "considered all the evidence and affidavits before the Advocates "Committee, and all the arguments in favour of the respondent "addressed to us, we have come, with great reluctance, to the "same conclusion at which the committee arrived, namely, "that the respondent intended to deceive and mislead the court. "We think that the affidavits drawn by the respondent were "deliberately misleading; that the respondent knew his duty "to disclose the Cram judgment, and must have known that "disclosure of that judgment and of the appeal against it would "inevitably result in the dismissal or indefinite postponement "of his application for discretionary prerogative writs; that the "respondent did not suppress mention of the Cram judgment "altogether, but misrepresented its effect and refrained from "making disclosure of its full contents; and that he postponed "until he could postpone no longer giving the judge a reference "which would enable him to discover its true contents. We "think that the respondent may have had some muddle-headed "idea in his mind that he could 'pursue concurrent remedies' "or (as he told Hooper J.) that having failed before one judge "he could apply to another on the lines of an application for "habeas corpus. But we do not believe, and he does not him-"self aver, that the respondent did not know that he was under "a duty to disclose to Hooper J. the existence and the complete "contents of the judgment of Cram Ag.-J. This he refrained from "doing, and we think that the way in which the affidavits are "drawn shows that he did not intend to disclose the full con-"tents of this judgment until he was forced to do so, and that

"the intention to mislead the court was deliberate. This "amounts to professional misconduct."

They accordingly proceeded in all the circumstances of this case to admonish the present appellant.

Appeal was taken to the Court of Appeal for Eastern Africa, where, in addition to the matters previously relied on, it was contended that the Supreme Court had not applied the proper standard of proof required in a proceeding of this nature. The court rejected this contention and held that there being concurrent findings of fact by the committee and the Supreme Court, their functions were similar to those of any appellate court in dealing with appeals where there are concurrent findings of fact by two lower courts. Approaching the case from this angle they said:—"Two tribunals looking at the picture as a "whole have come to the conclusion that the advocate never "intended to make full disclosure to Hooper J. if he could help "it, and we regret that we find it impossible to say that this "conclusion or inference from the facts was unjustifiable or "unreasonable." The appeal was accordingly dismissed.

It was contended on the present appeal that the approach of the Court of Appeal was wrong, and that this was not a case of concurrent findings of fact by two lower courts in that the Advocates Committee was not a court empowered to arrive at any determination or give any judgment but only to report if a prima facie case was made out, being in much the same position as committing magistrates in indictable cases. Alternatively, it was argued that, even if the principle of concurrent findings applied, there was in this case no evidence to support a finding of concealment. It was further submitted that the Court of Appeal had laid down an erroneous standard of proof for such a case as this.

Their Lordships are of opinion that, although this case does not come literally within the well-known rule with regard to the functions of an appellate court where there are concurrent findings of fact by subordinate courts, all the reasons for the rule apply with equal or even greater force to cases where professional domestic tribunals are established by statute for investigating and finding the facts in cases of alleged misconduct by members of their own profession. The Advocates Committee was such a tribunal, and it had had the great advantage of seeing and hearing the appellant giving evidence at length in a case where, the facts being undisputed, the ultimate decision turned upon questions of stupidity, ignorance or deliberate intent. They do not consider that the words "prima facie case" in section 9 (3) (iii) of the Advocates Ordinance have the effect of assimilating the functions of the committee to those of committing magistrates or of in any way relieving them of the duty of determining the facts. It is clear that the committee in fact so acted.

Their Lordships have no doubt that the submission of "no "evidence" cannot be sustained. In their opinion a careful

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review of the whole case affords ample evidence to support the decision of the Supreme Court, and it is impossible to regard the information as to the previous proceedings, extracted piecemeal as it was by the judge's questions, as constituting full and proper disclosure. This would suffice to dispose of the issues of fact, but as in the course of this appeal their Lordships have necessarily had occasion to give careful consideration to the whole of the evidence, they feel it may be more satisfactory to all concerned to state that in so doing they have arrived at the same conclusion as the Supreme Court and would be content to adopt as their own the language of that court, quoted above, in summarizing their decision.

With regard to the onus of proof the Court of Appeal said: "We agree that in every allegation of professional misconduct "involving an element of deceit or moral turpitude a high "standard of proof is called for, and we cannot envisage any "body of professional men sitting in judgment on a colleague "who would be content to condemn on a mere balance of "probabilities." This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee and there is no reason to think that either the committee or the Supreme Court applied any lower standard of proof.

For these reasons their Lordships have humbly advised Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Charles Russell & Co.*

C. C.

[PROBATE, ETC., DIVISION.]

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* SIEVWRIGHT *v.* SIEVWRIGHT.

Husband and Wife — Settlement — Variation — Effect of subsequent events—Maintenance to child—Form of order—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

In 1946, some six years after the parties were married, the wife's father caused certain property to be conveyed to the parties as joint tenants upon trust for sale. That property became the matrimonial home. A decree nisi, pronounced in favour of the wife in January, 1950, was made absolute in November, 1950.

In March, 1951, it was agreed between the parties that the property should be sold and the net proceeds of sale be paid into a bank account in the joint names of their solicitors. In December, 1951, the wife signed an authority directed to the solicitors for both parties to pay out of that bank account £3,000 to herself and a further £3,000 to the husband, and other disbursements relating to costs were made. Some £2,000 remained in the account.

In December, 1955, the wife was given leave to apply "for an "inquiry as to a post-nuptial settlement arising out of the con- "veyance of the property and funds representing the same," and for a variation by cutting out the husband's interests as though he were dead and applying those interests for the exclusive benefit of the child. It was agreed by the parties before the registrar that the £2,000 should be deemed to be part of a post-nuptial settlement created by the conveyance. It was contended for the wife that the £3,000 already paid to the husband and used by him at the time to pay off an overdraft, should form part of the settlement and that he should be ordered to bring back into settlement a sum of £3,000 although the original £3,000 was no longer in his hands.

The registrar held that the husband had not received the £3,000 in any fiduciary or trustee capacity, and could not be required to bring it back into settlement as it no longer existed. He ordered that after provision for costs half of the balance of the £2,000 should be paid to the wife, and that the other half should be held on trust for the child, and made an order for the maintenance of the child "to continue until the child attains the age of eighteen "years."

Upon the wife's application to vary the registrar's report by increasing the amount of maintenance and by directing the husband to refund the sum of £3,000 to be held in certain trusts:—

Held: (1) That the conveyance was a post-nuptial settlement within the meaning of section 25 of the Matrimonial Causes Act, 1950.

(2) That when the parties sold the house and divided the £6,000 they were exercising a power validly given them by the terms of the conveyance which had at that time in no way been determined or diminished.

(3) That having regard to the events which had happened between the date of the decree absolute and the application to vary the settlement the registrar had rightly decided that at the date of the hearing before him the only subject-matter remaining effective under the settlement was the £2,000.

(4) That his order as to the £2,000 should stand, save that the order for maintenance of the child should not be carried so far, but should be in the form of an ordinary order, namely, "until further "order," and that the words "to continue until the child attains "the age of eighteen years" should accordingly be deleted.

APPLICATION by wife to vary the report of the district registrar at Wolverhampton upon an application by the wife to vary a post-nuptial settlement.

The following statement of facts is substantially as set out in the the district registrar's report dated June 11, 1956: On September 3, 1949, the wife filed a petition for dissolution of marriage on the ground of the husband's adultery with a woman named, and she was granted a decree nisi on January 18, 1950, and was given the custody of the only child of the marriage, Linda Louise Sievwright, who was born on November 25, 1946.

The wife did not have the decree made absolute, and it was made absolute on November 20, 1950, on the application of the husband.

The parties were married on September 7, 1940, and by a conveyance dated August 30, 1946, the wife's father caused

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certain property now known as number 16, Wergs Hall Road, Wolverhampton, Stafford, which became the matrimonial home, to be conveyed to the parties as joint tenants upon trust for sale. It was agreed before the registrar that this property was a gift to the parties by the wife's father, although he was not a party to the conveyance.

Considerable correspondence took place between the then solicitors for the wife and the solicitors for the husband, with regard to this property, certain furniture, and the maintenance of the child of the marriage, and on March 13, 1951, the parties signed a document to the effect that the property should be sold and the net proceeds of sale be paid into a bank account in the joint names of the solicitors for the parties, to be retained by them pending settlement of any outstanding questions as to the disposal of furniture and joint matrimonial assets. On December 17, 1951, the wife signed an authority directed to the solicitors for both parties to pay £3,000 to herself and £3,000 to the husband out of the before mentioned bank account, and payment of certain other moneys in connexion with costs. It was agreed that the moneys in this bank account were the proceeds of the sale of the property, which had by then taken place. Until the wife's present solicitors came on the record as her solicitors on November 11, 1955, her solicitors for the purpose of her divorce petition had been her father's solicitors who had also acted in the conveyance of the property in 1946.

On November 24, 1955, a summons was issued and served on the husband's solicitors, whereby the wife applied for leave to file notice of application for variation of settlement notwithstanding she was out of time for so doing, as such a notice to be within time should have been filed not later than January 20, 1951. That application came before the Wolverhampton district registrar on December 19, 1955, when the wife was granted leave, the application for variation to be issued within two months. The costs of that summons were reserved. The application was issued on December 30, 1955, and was directed to the husband, to his solicitors, to the bank holding the joint account before mentioned, to a firm of estate agents holding certain moneys, and to the wife's former solicitors.

The application asked (1) for an inquiry as to a post-nuptial settlement arising out of the conveyance of the said property and funds representing same, which meant ascertaining whether there was a post-nuptial settlement at all, and if so what it consisted of; (2) for a variation of any such settlement, by cutting out the right title and interest of the husband therein as though he had died at the date of the decree absolute and the wife had survived him; and (3) for maintenance of the child of the marriage, and any such order for maintenance would necessarily be linked with any order made in respect of any variation of a post-nuptial settlement.

Appearances to the application were entered by the husband

and by the wife's former solicitors, but the bank, the estate agents and the husband's solicitors did not enter appearances. On May 28, 1956, the application came before the district registrar when the wife and the husband were both represented by counsel but the other respondents to the application did not attend and were not represented.

The district registrar, after stating the facts continued: "The "first question that arose was whether the child of the marriage "should be separately represented, and it was agreed by counsel "for the [wife] and for the [husband] (hereinafter called the "parties) that the child ought to be separately represented on "the consideration of this report by the judge, and accordingly "I directed the [wife's] solicitors to instruct counsel separately "to represent the child."

"Although it was not clear from the application and the "pleadings that the £150 proceeds of the sale of certain furniture "in the hands of the estate agents was claimed to form part of "the post-nuptial settlement, it was agreed between the parties "that this sum should be deemed to be part of the post-nuptial "settlement and should be linked with the £1,790 in the bank, "which it was agreed was a post-nuptial settlement. These two "sums, together with bank interest, now exceed £2,000, and are "hereinafter referred to, for convenience, as 'the £2,000 fund.' "The [wife] asks that the [husband's] share of any post-nuptial "settlement be applied for the exclusive benefit of the child. "I think the [husband's] counsel suggested that the whole of the "post-nuptial settlement should be applied for the child if the "[husband's] share was to be so dealt with.

"Counsel for the [wife] referred me to *Colclough* v. *Colclough "and Fisher* [1] and I see no reason to recommend that the [wife's] "interest in her share in the proceeds of the freehold property "should be curtailed.

"It was contended by counsel for the [wife] that the £3,000 "which the [husband] had received and which it was admitted "by him was part of the proceeds of the sale of the freehold "property should form part of the post-nuptial settlement "whether or not this £3,000 had disappeared and was no longer "in the hands of the [husband], either as money or in the form "of some other asset on the ground that the [husband] had "received it in a fiduciary capacity or as a trustee, and that he "should therefore bring a sum of £3,000 into the post-nuptial "settlement. The [wife's] counsel further contended that if "the [husband] did not receive the £3,000 in any such capacity "as aforesaid, nevertheless if the £3,000 could be traced in the "hands of the [husband] the [wife] was entitled to have it "brought back into the settlement.

"With regard to the first contention, counsel for the "[husband] contended that the [husband] did not receive the

[1] [1933] P. 143; 49 T.L.R. 434.

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" money in a fiduciary capacity or as a trustee, first because the " parties were holding the moneys as joint tenants, secondly " that he received the £3,000 more than two months after the " decree absolute, which was the time within which an applica- " tion should have been made by the [wife] giving notice to the " [husband] that she claimed these moneys to form part of a " post-nuptial settlement. Thirdly he received the moneys with " the agreement of the [wife]. Fourthly that there was no " certainty that this money would be held to be a post-nuptial " settlement, and if it was whether any variation of it would " be made.

" With regard to the second contention, it was agreed that " the £3,000 was part of an item of £3,250 credited to the " [husband's] account at the Wolverhampton Branch of the " Midland Bank Ltd., on January 8, 1952, and thereby con- " verted his overdraft of some £550 into a credit account of " £2,689 4s. 4d. It was further agreed that the sum of £1,999 " paid into the [husband's] account with the Union Bank of " Scotland Ltd., at St. Andrews, represented £2,000 of the said " £3,000, and this was immediately absorbed in reduction of an " overdraft for a larger amount at that bank. It was further " agreed that any part of the £3,000 remaining in the Midland " Bank Ltd. account ultimately disappeared in general expenses, " and that account later in 1952 became overdrawn again.

" Accordingly counsel for the [wife] agreed that he was " unable to trace any part of the £3,000 remaining in the " [husband's] hands either in its original form or converted, or " mixed with any other assets.

" In my view the [husband] first did not receive the £3,000 " in any fiduciary or trustee capacity, and secondly he cannot " be required to bring the £3,000 back into settlement as it no " longer exists, and it is not an asset of the post-nuptial settle- " ment upon which the court can order a variation.

" If this view is correct then the post-nuptial settlement now " consists of ' the £2,000 fund,' and with regard to this I " recommend as follows:—

" (1) That out of ' the £2,000 fund ' the costs of both parties, " including also the costs of representation of the child, be paid " on a solicitor and client basis, relating to this application dated " December 30, 1955, and any costs in connexion therewith sub- " sequent to that date. That there be no order for costs in " respect of the summons dated November 24, 1955.

" (2) That out of the balance one half be ordered to be paid " to the wife, and

" (3) As to the other half, be ordered to be held by trustees, " to be agreed by the parties and if not agreed to be appointed " by the court, to hold the same and the income therefrom upon " trust for the education, benefit and maintenance of the child " of the marriage, with power to advance the capital and income " in whole or in part as the trustees think fit, and to pay any

"balance there may be to the said child on her attaining the "age of 21 years, and in the event of her not attaining the age "of 21 years, then upon trust for the wife.

"With regard to any order for the maintenance of the child, "it appears that her education at a day school, together with "incidental expenses of travelling and so forth, amounts at the "present time to approximately £100 per annum, and I think "that if the post-nuptial settlement is dealt with on the lines "indicated above that it would be reasonable for the [husband] "to pay £200 per annum for the education, and maintenance "of the child, if the whole burden of this should fall upon him. "However, counsel for the [wife], without producing any "authority in support of it, stated that he conceded that in "view of the substantial financial position of both parties his "client might reasonably be expected to contribute towards the "education and maintenance of the child. If that principle is "accepted then I recommend that an order be made for the "[husband] to pay two-thirds of £200 per annum for the main-"tenance of the child, namely, £133 6s. 8d., to continue until "the child attains the age of eighteen years.

"It was agreed that the [husband] had paid only £35 in "respect of the child's maintenance since the date of the decree "absolute, namely, November 20, 1950, but the [wife's] "counsel did not ask for maintenance to be ante-dated; and I "recommend that the order for payment of maintenance be made "to run from the date of this application—namely, December "30, 1955—and that it be ordered to be paid quarterly either to "the [wife] or the child as may be desired."

The wife gave notice by her solicitors that she would apply to vary the registrar's report as follows:

"(1) By increasing the amount of maintenance recommended "to be paid to the child of the marriage of the [wife] and the "[husband] and by directing the same to be paid to the said "child direct;

"(2) By directing the [husband] to refund the sum of £3,000 "and the same to be held upon the trust referred to in para-"graph 3 of the recommendations of the said report.

"(3) In the alternative by directing the [husband] to refund "the sum of £3,000 and the same to be held by trustees with "power to invest the same in shares in the [husband's] com-"pany (R. H. Sievwright & Co. Ltd.) and to hold the same upon "trust for the [husband] for life and the remainder to the said "child."

Armstead Fairweather for the wife.
James Comyn for the husband.
S. E. Williamson for the child.

The following cases were cited in argument: *Prinsep* v.

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Prinsep [1]; *Johnson* v. *Johnson* [2]; *Colclough* v. *Colclough* [3]; *Smith* v. *Smith* [4]; *Halpern* v. *Halpern* [5]; *Jacobs* v. *Jacobs* [6]; *In re Diplock*.[7]

WALLINGTON J. This matter arises upon an application issued on behalf of the petitioning wife, asking for a variation of settlement, which is referred to in detail in the notice of application by cutting out the right title and interest of the husband therein as though he had died at the date of the decree absolute and the wife had survived him, and asking, also, for maintenance for the child of the marriage, Linda Louise Sievwright; there are certain other matters as to costs referred to in the summons.

That application came before the District Registrar in the Wolverhampton District Registry, and upon it Mr. Fairweather appeared for the petitioning wife and Mr. Comyn appeared on behalf of the respondent husband. The matter was gone into at length before the learned registrar and, as a result of the facts and arguments before him, he prepared and issued a report for the purpose of indicating his recommendations to the court. That report is dated June 11, 1956, and it now comes before me for confirmation, with or without variation.

[His Lordship read the registrar's report and continued:] When the registrar dealt with the matter of the £3,000 received by the husband, he held the view that the husband did not receive the £3,000 in any fiduciary or trustee capacity and, secondly, that he could not be required to bring the £3,000 back into settlement as it no longer existed, and that it was not a sum of money in relation to which the court could order a variation of the settlement.

On the second finding of the registrar—namely, that out of the balance one half be ordered to be paid to the wife—the husband has not indicated by any notice either to the wife or the court that he objects to that; therefore, I need not deal with it at all.

The next matter with which I ought to deal is the fact that the registrar, when making an order for maintenance, recommended that that order should continue until the child attained the age of 18 years. I propose, before dealing with the rest of the report, to delete those words from it because, in my opinion, an order for maintenance should not be carried so far, but should be in the form of an ordinary order—namely, "until further "order."

[His Lordship then read the terms of the wife's notice of her application to vary the registrar's report and continued:] A few general observations will lead to the conclusions at which I have

[1] [1929] P. 225; 45 T.L.R. 376.
[2] [1950] P. 23; [1949] 2 All E.R. 573.
[3] [1933] P. 143; 49 T.L.R. 434.
[4] (1945) 61 T.L.R. 568; [1945] W.N. 180; [1945] 2 All E.R. 452.
[5] [1951] P. 204; [1951] 1 T.L.R. 461; [1951] 1 All E.R. 315.
[6] [1943] P. 7; 55 T.L.R. 412; [1942] 2 All E.R. 412.
[7] [1948] Ch. 465; [1948] 2 All E.R. 318.

arrived. First of all, there is no doubt that when the conveyance of the property was executed in 1946 no one had the slightest idea that it would ever figure in any way as a post-nuptial settlement; the conveyance was in the ordinary form to the two parties to the marriage simpliciter, but with a declaration of (a) a trust for sale and for the disposal of proceeds of sale and the net rents and profits for the benefit of the spouses as joint tenants; (b) power of mortgaging and all the powers of an absolute owner.

That state of affairs continued to the day before the decree absolute in this case. So far as the parties were concerned, they were regarding it as an ordinary gift to them by the father of the wife, and they no doubt regarded themselves, at that time, as quite competent to deal with it in any way upon which they could agree. But in fact the petition in this case was filed on September 3, 1949, and that is the date on and from which such events as might take place might have an effect upon the conveyance of the house, which they then jointly held. When the decree absolute was made on November 20, 1950, the wife became entitled, within two months, to apply for a variation of any marriage settlement which there might be.

There is, in my opinion, no doubt that when the decree was made absolute in the divorce proceedings, the conveyance to which I have already referred was within the class of documents which may be the subject of an application to vary on the footing of its being a post-nuptial settlement.

I have to determine whether or not the registrar was wrong when he refrained from making an order in the terms referred to in paragraphs 2 and 3 of the wife's notice of application to vary his report—namely, by directing the husband to refund the sum of £3,000 and the same to be held upon the trust referred to in paragraph 3 of the recommendations of the said report, or, in the alternative, by directing the refund of the £3,000 and to be held in trust by trustees on the security of certain shares owned by the husband in a company called R. H. Sievwright & Co. Ltd., and to hold the same upon trust for the husband for life, and the remainder to the said child.

I think that the registrar was right in taking out of his purview, for the purpose of considering the suggested variation of settlement, the sum of £6,000 altogether. First of all, there was no application on the part of the wife for any variation of settlement within the two months laid down by the rules, as the period within which such an application must be made, if it is to be effectively made. The matter remained in the minds of the parties, and also apparently in the thoughts of their advisers, in the same position as if there had not been a divorce. There is no suggestion by anyone, so far as I have been able to understand, that either of these parties thought that the divorce had altered their rights in relation to the property conveyed to them in effect as joint tenants. In fact, in March, 1951—one year and two months after decree nisi and four months after decree

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absolute—the parties, obviously acting upon that view, signed a document in these terms: "We jointly and severally agree to "the freehold dwellinghouse known as The Bridge House, Wergs "Hall Road, Tettenhall, being sold with vacant possession by "public auction by Messrs. Walker, Barnett & Hill at the first "available opportunity and at a price to be settled by Messrs. "Fowler, Langley and Wright, and Messrs. James F. Addison & "Cooper after consultation with the auctioneers and we under-"take to execute such documents as may be necessary to vest "the house in any purchaser."

Quite plainly, they thought that nothing had happened to change their rights and their mutual interests or their ownership or freedom from any trust up to that time.

"We further agree that the net proceeds of sale shall be paid "into a bank account to be opened in the names of Messrs. "Fowler, Langley and Wright and Messrs. James F. Addison "and Cooper and retained by them pending settlement (either "by mutual agreement or order of the court) of any outstanding "questions as to the disposal of furniture and joint matrimonial "assets"—those outstanding questions were limited to the questions as to the disposal of furniture and joint matrimonial assets—"and that immediately these matters have been settled "the next balance available shall be equally divided between us."

That is the course that they would have been entitled to take if there had not been a divorce, and it is quite plain, as I have said—and I think it desirable to repeat it—that neither they nor their solicitors had the slightest idea that they were doing anything that was wrong or was in any way infringing anyone's rights or creating any breach of trust in relation to the property which was the subject of the conveyance. Probably that state of mind was directly or indirectly caused by the express trust contained in the conveyance. Perhaps I ought to add that I can well understand the words in parenthesis in the second part of the document—that the money shall be retained in the bank pending settlement "either by mutual agreement or order of "the court" of any outstanding questions as to the disposal of furniture and joint matrimonial assets, because, of course, it would have been open to either of them to take proceedings under section 17 of the Married Women's Property Act, 1882, to determine the questions of ownership, and it was therefore agreed that the money should remain in the bank until those matters had been either decided by the court or agreed between the parties.

On December 17, 1951, nine months after the agreement to which I have just referred, the wife and, I suppose, the husband, signed a document in the terms set out below. I am not sure about that. I have not seen a similar one signed by him, but there is no doubt that the document to which I am about to refer was brought into existence by agreement between the parties: "I the undersigned Betty Sievwright at present

" residing at Orton Ridge, Spring Hill, Penn in the County of " Stafford hereby authorise and request out of the monies held " by you in your joint names in an account at Barclay's Bank " Limited, Wolverhampton, in pursuance of an agreement signed " by me on April 9, 1951, to pay the following amounts, namely:

" To myself £3,000.

" To my former husband £3,000.

" To Messrs. Walker, Barnett & Hill in connection with the " sale of White Ladies former Bridge House, Wergs Hall " Road, Tettenhall, £204 18s. 9d.

" To yourself in settlement of legal costs in connection with " the sale of White Ladies, £90 15s. 0d."

This document is addressed to the solicitors in whose joint names the money was paid into the bank and remained there. The reason why there was reference in this document to " an " agreement signed by me on April 9, 1951," (and not " March 13, 1951,") is this. Apparently the date " March 13 " was written in the appropriate place by someone before anyone signed it, but when the husband signed it he wrote on it " 9.4.51.," and apparently that was the date on which it was in fact signed, although it had borne a different date for signature. So this second document quite plainly refers to that document, although the date is different.

When the wife signed that she, in it, said she was signing it in pursuance of the agreement which provided for the disposal of the money in the bank after those other questions had been decided either by themselves, by agreement, or by the court. Accordingly, those two sums were paid out—£3,000 to the wife and £3,000 to the husband.

At the time when they received those moneys the conveyance had ceased to be operative except as a document of title in the hands of the purchaser, the property ceased to be held by the two people as joint tenants, and the court had not found and had not been invited to hold that there existed or had at any time existed a post-nuptial settlement. It may well be that the undistributed portion of the proceeds of sale—namely, " the " £2,000 fund "—remained, as between the spouses, subject to the trust declared in the conveyance for the joint and equal benefit of the spouses.

Nothing further happened until November 24, 1955, five years after the date of the decree absolute on November 20, 1950. In the meantime, the transactions to which I have referred took place. On that date the wife applied for, and obtained on December 19, 1955, leave to file an application for variation.

Mr. Comyn, in his argument before me, submitted that there is no obligation on anyone to apply for variation of settlement merely because there is or may be a settlement. It does not matter what the document is—or what name is applied to it—it is when the application to vary is made that the matter arises for

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the first time and the character of the document falls to be ascertained. Of course, long before this application the document was one which was capable of becoming the subject of an application for a variation order.

I have considered all the facts and circumstances attending this transaction. I do not overlook the fact that the wife has not made any offer to restore the £3,000 that she received so that it might be effectively dealt with by a variation. Nor has the husband put in any counter application for variation by asking that the wife should be directed to do that. The fact, as I see it, is that not until someone acting for the wife in November, 1955, woke up to the fact that maintenance for the child and perhaps some variation in the interest of the child might be fruitful, did any idea enter anyone's mind that this was a transaction which ought to be dealt with by an application such as this.

The registrar, in my view, with all respect to him, was wrong in supposing that he had no jurisdiction to deal with the matter. In fact, however, in my opinion, he has dealt with the application in a practical fashion. The date of the decree absolute is the date upon which the document is first capable of being brought within the machinery of the statute and rules of court which lead to the decision as to the character of the document put forward for variation as a marriage settlement. I am, however, clearly of opinion that in considering whether a document is or is not a marriage settlement which ought to be varied and, if so, what should be the character and extent of the variation, it is impossible to disregard the course of subsequent events and the implications of those events.

In my view it is clear that at the date when the parties sold the house and divided the £6,000 between themselves they were exercising the power given to them to do so—a power which, so far as I can see, had not been in any way determined or diminished.

In my opinion, therefore, the registrar was right in coming to the conclusion that on the day of the hearing before him the only subject-matter remaining effective under the settlement was what he has called "the £2,000 fund." In those circumstances, I am unable to give effect to the wife's application for variation of the registrar's report as contained in paragraphs 2 and 3 of the notice of application, to which I have already referred.

As to the order for maintenance, such an order must, in my view, be until further order and not for a fixed period. Looking at all the circumstances of the case and in the exercise of the discretion of the court upon it, it seems to me that the amount of maintenance ought to be at the rate of £250 per annum and to be paid to the child on the dates and in the proportions recommended by the registrar until further order.

The result is that I confirm the registrar's report, varied as to the amount of maintenance to the child by substituting £250

less tax for the sum of £200 and deleting the words "to continue "until the child attains the age of eighteen years." Neither party made an application as to costs.

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Registrar's report confirmed save as to maintenance for the child.

Solicitors: *Langhams & Letts for Philip Baker & Co., Birmingham; Gregory Rowcliffe & Co. for Fowler, Langley & Wright, Wolverhampton.*

E. J.

[COURT OF APPEAL.]

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Oct. 17, 18.

[Plaint No. L. 1371.]

Denning, Hodson and Morris L.JJ.

Agency — Auctioneer — Commission — Quantum meruit — Commission payable on "sale before auction"—Instructions by mortgagee to auctioneer to sell houses—Mortgage redeemed before date fixed for sale—Sale by mortgagor—"Sale."
Quantum meruit.

Instructions were given by the defendant, who held a second mortgage on five houses, to the plaintiffs, a firm of auctioneers, to sell the houses by auction. The remuneration of the auctioneers was to be in accordance with the terms of the scale of charges issued by the Chartered Auctioneers' and Estate Agents' Institute, and was subject to the following term: "Sale before auction. If a "sale of the property, whether arranged by the auctioneer or not, is "effected between the date of acceptance of instructions and the "date of the auction, commission is payable to the auctioneer on "the same scale as for a sale by auction."

The plaintiffs made all the necessary preparations for a sale, which was arranged to take place on February 16, 1955. On February 15 the mortgagor, the third party, who had previously entered into contracts for the sale of four of the houses, redeemed, so that the sale went off. On a claim by the plaintiffs for a sum representing the scale fees applicable to the agreed reserve prices of the properties, or, alternatively, on a quantum meruit:—

Held, (1) (Morris L.J. dissenting) that no scale fee was payable on a sale made not by the client or an agent of his, but by a third party over whom he had no control;

(2) (per totam curiam) that the plaintiffs were not entitled to remuneration on a quantum meruit.

APPEAL from Judge Daynes, sitting at West London County Court.

In June, 1954, the defendant Abrahams lent £1,150 to the third party Loescher, receiving a second charge on five rent-restricted dwelling-houses at Ruislip which were already mortgaged to the Abbey National Building Society. Notice calling on

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Loescher to redeem by repaying the debt was given on November 26, 1954; and, when that was ignored, Abrahams gave notice of his intention to exercise his power of sale, and on December 31, 1954, he instructed the plaintiffs, a firm of auctioneers, to sell the houses by auction, the agreement between the parties incorporating the scale of charges and terms issued by the Chartered Auctioneers' and Estates Agents' Institute.

The plaintiffs made the necessary preparations to hold an auction sale on February 16, 1955. Early in February Loescher by direct negotiation entered into contracts to sell four of the houses to the sitting tenants, and on February 15 tendered the sum due under the second charge and redeemed it. On the refusal of Abrahams to pay to the plaintiffs anything beyond their out-of-pocket expenses, they took proceedings against him in the county court claiming some £96, representing the scale fee payable on the reserve prices at the proposed sale, and alternatively claiming on a quantum meruit. The defendant brought in Loescher as third party; he acknowledged liability to pay to the defendant any sums which the defendant might be ordered to pay to the plaintiffs, and substantially undertook the conduct of the defence.

The county court judge gave judgment for the plaintiffs. The third party appealed.

B. J. H. Clauson for the third party.

John Stocker for the plaintiffs.

[The defendant did not appeal, but after the delivery of the judgments was given extended time to give notice of appeal, and was treated as having given such notice.]

Case cited in argument not referred to in the judgments: *Boots* v. *E. Christopher & Co.*[1]

DENNING L.J. This is a troublesome and difficult case. It is a claim by auctioneers for commission on the sale of five houses in Ruislip: 31, Hartland Drive; 18, Flamborough Road; 3, Salcombe Waye; 82, Dawlish Drive; and 1, Tiverton Road. Those houses were owned by a freeholder, Mr. Loescher. He had mortgaged them by a first mortgage to the Abbey National Building Society. He had also mortgaged them by a second mortgage to a Mr. Abrahams. The second mortgagee in due course called in his money, £1,150, but the mortgagor, Mr. Loescher, did not pay on that demand. So the second mortgagee, Mr. Abrahams, decided to put the property up for sale under his power of sale. He had notified the first mortgagees, the Abbey National Building Society, what he was doing. The second mortgagee put the houses into the hands of auctioneers, John Meacock & Co. He took the auctioneers' advice on the best way to realize these

[1] [1952] 1 K.B. 89; [1951] 2 T.L.R. 1169; [1951] 2 All E.R. 1045.

properties. One way would be to put them up to auction, in which case they would probably be bought by someone as an investment. In that way the sale might produce three or four thousand pounds, which would be enough to cover the first and second mortgages and leave perhaps a little over for the mortgagor. That was one way of disposing of them. Another way was to negotiate with the sitting tenants. The houses were rent restricted, and the sitting tenants would probably pay more than other people who would only buy the houses as an investment.

In these circumstances the auctioneers, Messrs. Meacock & Co., advised the second mortgagee that the best way to sell these houses was to put them up for auction; because, if they were put up for auction, it would bring the sitting tenants up to the mark. They would want to buy the houses instead of having them sold over their heads. The second mortgagee instructed the auctioneers to act accordingly. They did so. They made arrangements to put the freehold up to auction, and meanwhile negotiated with the sitting tenants for a sale to the sitting tenants.

The auction was fixed for February 16, 1955. But before the auction took place, the mortgagor, Mr. Loescher, got busy. He, of course, had power to sell the freehold. He negotiated with the sitting tenants, and he did in fact make contracts to sell four of these houses to the sitting tenants. The second mortgagee, when he learned about this, said he was not going to call off the auction, because he did not know whether the sitting tenants would be able to implement the purchases. He instructed the auctioneers to go on with the auction. But a day or two before the auction was to be held, the mortgagor, Mr. Loescher, from some source or other, got enough money to redeem the mortgage. He paid off the mortgage on February 15, the very day before the date fixed for the auction. That meant, of course, the auction could not go on; the mortgage debt had been paid off; the mortgagee's power of sale had gone altogether. The auction was cancelled accordingly.

Some weeks later the mortgagor, Mr. Loescher, agreed to sell the fifth house to the sitting tenant. Four of the houses have since been conveyed to the sitting tenants. The fifth has apparently still to be conveyed.

The auctioneers, Messrs. Meacock & Co., now claim against the second mortgagee, who instructed them, the scale commission. The second mortgagee agrees that he is bound to pay them their out-of-pocket expenses which they have incurred in and about the auction; but he says he is not liable to pay the commission, because the sale by auction (for which he gave instructions) did not take place. He has brought in the mortgagor as a third party. The second mortgagee says: "If I am "liable to pay commission to the auctioneers, I am entitled to "recover it over from the original mortgagor." The mortgagor

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agrees that if the second mortgagee is liable to pay the commission, he ought to indemnify him. So the real contest here is between the auctioneers and the mortgagor; that is how it has been fought out before us.

The case turns on the scale of professional charges issued by the professional body, the Chartered Auctioneers' and Estate Agents' Institute. When the second mortgagee through his solicitors instructed the auctioneers to do this work, the auctioneers made it clear that the terms on which they did the work were to be in accordance with the terms of the Auctioneers' and Estate Agents' Institute. That is a very well-known scale which is printed in such places as the the Solicitors' Diary. The second mortgagee's solicitors no doubt knew all about those terms and accepted them.

The relevant section is headed: "Sales of Freehold Property "and Ground Leases." It deals first with sales by "Private "Treaty.—Negotiating a sale by private contract"; and then with sales "By Auction, including the preparation of particulars "and advising as to reserves:— . . ." The commission on all such sales is stated to be: "5 per cent. on the first £300; 2½ per "cent. on the next £4,700," and so on.

Then there is this important clause: "Sale before Auction. "If a sale of the property, whether arranged by the auctioneer "or not, is effected between the date of acceptance of instruc- "tions and the date of the auction, commission is payable to the "auctioneer on the same scale as for a sale by auction." The object of this clause is quite plain. It is to cover the case where a client instructs auctioneers to sell a property for him by auction, and then, before the auction actually takes place, the client sells the property himself. In such a case the client must still pay full commission to the auctioneer, for the very good reason that the auctioneers' work in putting up the property, advertising it, and so on, may well have been one of the causes why the client was able to sell the house himself. The clause clearly covers a sale by the client before the auction: and I think it would also cover a sale with his concurrence. But the auctioneers seek here to extend it to a sale by a third person. It covers, they say, a sale by the mortgagor without the consent of the second mortgagee.

I must say that I think the people who framed this clause had not in mind at all the case of mortgagee and mortgagor; they had in mind the simple case of a client selling the property himself. It seems to me to be an unnatural construction of this clause to say that it also applies if someone else—someone other than the client—sells the property.

Suppose, for instance, the first mortgagees, the Abbey National, had sold the property before the auction. They had ample power to do so, and I can imagine several circumstances in which they might have thought it desirable to do so. Would the auctioneers in that event be entitled to claim full commission

from the second mortgagee? Clearly not. So, also, if the mortgagor sells.

Mr. Stocker asked us to give a wide construction to this clause: but I do not think we should do so. It must be remembered that it is a clause put in by the auctioneers for their own benefit, in which they stipulate that, although they have not done all the work that was contemplated, nevertheless they are to have full commission. For instance, in this case they have not had to hold an auction at all. I can visualize cases where they may have done nothing beyond accepting instructions. Suppose a client gives them instructions one day and sells himself the next, before they have done anything. Nevertheless they stipulate for full commission irrespective of the amount of work they have done. Such a stipulation should, I think, be given its natural meaning and not be extended so as to be given a wide unnatural meaning.

I am strengthened in this view by the observations of Harman J. in an unreported case of *Murad* v. *Hearts of Oak Benefit Society*,[1] on November 4, 1955. Although he did not actually decide the point, he expressed a view on this clause. He said: "I think that this 'sale before auction' clause only "deals with a sale by the vendor, that is to say, the mortgagee "in this action, and does not provide for the rare cases where "there is redemption between the two dates." I find myself in agreement with that expression of opinion. I do not think that this clause covers a sale by a third person without the consent of the client.

Mr. Stocker next urged that there ought to be a reasonable remuneration for the auctioneers. He suggested that they ought to recover on a quantum meruit or else damages. I have anxiously considered whether we could give effect to some such claim, because this is a case where it seems to me hard that the auctioneer, who has done much work, should not get some reward; but, nevertheless, it is to be remembered that auctioneers, like estate agents, stipulate for a high commission if the sale is actually completed by the client or on his behalf. They do not stipulate for a reasonable remuneration if it fails to go through. They take their chance on it. This is borne out by several instances which we put to Mr. Stocker in the course of the argument in which it is quite plain that the auctioneers would not be entitled to a quantum meruit. Suppose, for instance, that the client, the second mortgagee, had changed his mind about selling and had withdrawn the instructions before the auction. In that case the auctioneer would not be entitled to commission; he would not be entitled to any sum on a quantum meruit; he would only be entitled to his out-of-pocket expenses. Suppose, again, that the mortgagor should redeem the property before the date of the auction and not resell at all. The auctioneers will have done much work, but they cannot claim

[1] Unreported.

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commission under this scale at all or any sum on a quantum meruit. Suppose the mortgagor redeems the mortgage and does not sell before the auction date, but sells afterwards, again the auctioneers cannot recover anything except their out-of-pocket expenses. So there are many cases where the auctioneers have done much work but can recover nothing under this clause and where the law cannot help them. I sometimes think it would be a good thing if auctioneers and estate agents, in case a sale did not go through, stipulated for a reasonable remuneration for their time and labour; but I suppose that would not be good business. They always claim to be entitled to full commission, and by so doing take their chance on the sale going through to completion.

It is worth noticing that the auctioneers in this case do not claim commission on the sale price to the sitting tenants: for the simple reason that they do not know the price at which the mortgagor sold. Moreover, one of the contracts of sale took place after the proposed date of auction, so the clause does not cover it on any view. The auctioneers in this action only claim commission on the original reserve price which they proposed as a reserve for the auction. That is nothing more nor less than a claim to a quantum meruit, and I cannot see that a quantum meruit can be substantiated.

On the true interpretation of the clause I have come to the conclusion that the auctioneers have not brought themselves within it.

Therefore, I think this appeal should be allowed and that judgment should be entered for the defendant.

HODSON L.J. This is an appeal by a third party from an order of Judge Daynes made at the West London County Court on June 29, 1956. The third party, Mr. Loescher, had agreed to indemnify the defendant, Mr. Abrahams, against a claim by John Meacock & Co., a firm of auctioneers, for commission; and the dispute, therefore, to be decided is that between the plaintiffs and the defendant Mr. Abrahams, although the battle has been fought on his behalf by the third party. The facts, shortly stated, were that Mr. Loescher owned five houses in Ruislip subject to mortgages in favour of the Abbey National Building Society. On June 29, 1954, Mr. Abrahams lent Mr. Loescher £1,150, and got a second charge on the property, which was executed on September 25, 1954. Notice calling upon Mr. Loescher to redeem the charge by repaying the advance was given on November 26, 1954. No notice was taken of that. Notice of Mr. Abrahams' intention to exercise his power to sell was given on December 6, 1954. This was likewise ignored; and the plaintiffs, the auctioneers, were instructed on December 31, 1954, to put the five properties up for sale by public auction on February 16, 1955. The contract is evidenced by a letter which the plaintiffs wrote to Mr. Abrahams on January 4, 1955, relating

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to the arrangements for the auction. The only matter to which I need refer is that the letter is headed: "Terms in accordance "with the scale of the Chartered Auctioneers' and Estate Agents' "Institute."

The first point which arises on this appeal is on the construction of one of the terms, because the property was never sold by auction, since before February 16, namely, on February 15, Loescher redeemed the charges and paid the £1,150, he having previously entered into contracts for sale of four of the properties, and indeed he subsequently entered into a contract for the sale of the fifth property. After the date when the auction should have taken place, the first four contracts were completed, though the last contract has not been completed. The plaintiffs are claiming commission for sale before the auction on the ground that Loescher, the third party, sold the houses, and the plaintiffs rely upon part of term 10: "Sale before Auction. If a sale of "the property, whether arranged by the auctioneer or not, is "effected between the date of the acceptance of instructions and "the date of the auction, commission is payable to the auctioneer "on the same scale as for a sale by auction." The defendant refused to pay the commission because there had not been any sale by him, and the contention is that the word "sale" in the term which I have read is not limited in any way and includes any sale effected by anybody. That to my mind is rather a startling proposition, and, although I am naturally very hesitant in differing on a question of construction from Judge Daynes, especially as I anticipate that Morris L.J. is going shortly to express a similar opinion, yet to my mind it is clear that the word "sale" in this term can only refer to a sale effected for the client. The defendant was the client, and he was the man who, through his solicitors, instructed the auctioneers, and in the surrounding circumstances against which this term must be construed, I can construe it in no other way. A client instructing auctioneers to sell property for him agrees to pay commission on the sale for him, and not, in my opinion, if the sale takes place by some other person who may have the power to sell.

In so far as one can get any assistance from the document itself, namely, the Chartered Auctioneers' and Estate Agents' Institute charges generally, counsel has been able to point out that in two places the word "vendor" is used—one in the early part of term 10, which is headed "Sales of Freehold Property "and Ground Leases"; and is followed by provision (a): "Private Treaty.—Negotiating a sale by private contract, or "introducing a person able, ready and willing to purchase on "terms authorized by the vendor." Similarly, in term 11, which deals with sales by auction of furniture, trade stocks and chattels on the vendor's premises, the word "vendor" is similarly used.

I must confess I find it impossible to arrive at any other conclusion but that on the true construction of this document

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the word "sale" refers to sale by the client. My Lord has already expressed the same view, and the same view for this purpose in similar circumstances was expressed, although tentatively, by Harman J. in *Murad* v. *Hearts of Oak Benefit Society*,[2] where a sale was effected before auction and the judge found, in effect, that there was a redemption by the mortgagor, instructions having been given for the sale of property by a mortgagee. Harman J. said: "This was a friendly "arrangement whereby it was decided to do it in this rather "odd way; I do not think it matters why it was done in that "way. In effect this was the mortgagor coming along with the "mortgage money in his hands and saying: 'Here is £110,000; "'I will put it down, and you will deal with the property "'according to my directions,' and that is what the mortgagees "did." The sale was to have taken place by auction but redemption took place first. After referring to the submissions of counsel in the case, the judge continued: "It is submitted "to me that it"—that is to say, the clause which I have read —term 10 of the scale charges—"applied to the case of a sale "by mortgagees and that so long as a sale of the property shall "be effected, it did not matter by whom it is effected." That is precisely the submission which appealed to the judge in this case. "If that be right, and the mortgagee puts property in "the hands of the auctioneer and the mortgage is redeemed "before the sale, then, although there can be no sale, the "mortgagee will still be bound to pay commission. I feel a "great deal of doubt about that, but I need not decide it. I "think that this sale before auction clause only deals with a "sale by the vendor, that is to say, the mortgagee in this "action, before the auction and does not provide for the rare "cases where there is redemption between the two dates. That "I need not decide."

So that this is merely a tentative expression of opinion, but one arrived at after careful consideration. The reason why Harman J. did not need to express a firm opinion upon the construction of this term was that he decided that under the provisions of the particular contract the terms of this sale were not applicable at all.

Judge Daynes gave reasons for the view which he took. He said that the purpose of the clause was to prevent people doing the auctioneer out of payment for his work, and he thought that the people who framed the clause were aiming at a sale by anyone; and he gave certain instances which impressed him as being cases where the auctioneer, if the contrary view were taken, would lose his commission unfairly; where, for instance, "A wife could sell and get her husband to come in as vendor. "A tenant could sell; but he would have to get in the landlord's "interest before completion. A partner could sell and attempt

[2] Unreported.

" to do the auctioneer out of commission by getting his partner " to assume the character of vendor."

I should have thought that in cases such as those envisaged by the judge the courts ought to be able to protect the auctioneers by ascertaining the true facts; where, in truth and in fact, the sale was by an agent of the vendor, there would be no question but that the auctioneer would be entitled to his commission.

The alternative way in which the claim has been put—and often is put in this class of case where there is difficulty in complying with the express terms of the contract—is upon a quantum meruit. We have had put before us, I think, every argument which could be put, supported by the correspondence showing the late date at which the defendant withdrew his instructions for the auction, and showing that, so far as he could, he confirmed the instructions and insisted, almost to the very last, that the auction should go forward. He was naturally apprehensive lest Mr. Loescher should be unable to redeem. The defendant's solicitors, no doubt, were of opinion that there was no reason to withdraw the instructions and they should let the auction go forward until in fact redemption took place and the matter was taken out of theid hands compulsorily. Of course, once the debt had been redeemed, they had nothing to sell. Notwithstanding the attraction of the argument that after all the plaintiffs have done their work, or a substantial part of their work, and it is hard on them that they should not be paid because the auction never took place, yet I feel that this class of case is in pari materia with estate agents cases where a professional man enters into a contract on which he is only to be paid commission, usually based on a percentage rate. If commission is to be paid on the happening of an event, there being a specific contract which goes off, he cannot claim a quantum meruit.

We were referred to *Luxor (Eastbourne) Ltd.* v. *Cooper*,[3] and to the speeches of Lord Russell of Killowen and Lord Wright. Although that was an estate agents case while this is an auctioneers case, I think that what the learned Lords said is relevant. Lord Russell said[4]: " As to the claim on a quantum " meruit, I do not see how this can be justified in the face of " the express provision for remuneration which the contract " contains. This must necessarily exclude such a claim, unless " it can (upon the facts of a particular case) be based upon a " contract subsequent to the original contract, and arising from " some conduct on the part of the principal."

Stopping there, an attempt was made by Mr. Stocker to set up some subsequent contract; and he relies specifically on a letter of February 11, 1955, in which, five days before the date on which the auction was fixed, the defendant's solicitors wrote to the plaintiffs, the auctioneers, and concluded their letter by

[3] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33.

[4] [1941] A.C. 108, 125.

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this paragraph: "We would add that Mr. Loescher has entered "into contracts with some of the sitting tenants but there "is no evidence that the necessary finance will be available and "we have, therefore, informed Mr. Loescher's solicitors that "none of these properties will be withdrawn from the auction."

To my mind, the writing of that letter did not alter the position which existed already, that at any time before the auction the client would be able to withdraw the property from the sale.

Lord Wright, in the same case, dealt with the quantum meruit claim in some more detail[5]: "It has been said in some "cases that the claim may be based on quantum meruit on the "principles expounded in the notes to *Cutter* v. *Powell*,[6] accord- "ing to which the special contract is treated as rescinded and "the agent thereupon becomes entitled to claim a partial "recompense for what he has done. Such a claim is in the "nature of a quasi-contractual claim. It is properly made in "cases of contracts for work and labour and the like, where the "employer, who has got the benefit of part performance but "before full completion has repudiated the contract, may be "sued either for damages for breach or for restitution in respect "of the value of the part performance which he has received. "Such cases are, however, obviously different from the present "case. The man who engages a plumber to do some work to "his house to be paid for by a lump sum thereby promises "(inter alia) to give the plumber the necessary facilities to do "the work so far as rests on him. That is the employers' part "necessarily involved in the engagement. In the case of the "commission agent, to whom payment is dependent on com- "pletion or the like condition, the principal does not promise "that he will complete the contract for reasons which I have "explained. His only promise is that he will pay commission "if the contract is completed. There is no promise to pay a "reasonable remuneration if the principal revokes the authority "to the agent. And it is a further objection to a claim on a "quantum meruit that the employer has not obtained any "benefit. The agent has earned nothing until the event "materializes." The last two sentences are material to this case, because where there is a case where the employer has got no advantage from what the auctioneers have done, there is no room for a claim on quantum meruit.

For those reasons, as well as those which my Lord has given, I think that this appeal must be allowed and judgment entered for the third party.

MORRIS L.J. In this case I do not find myself sharing the views which my Lords have expressed in regard to the construction of the scale of charges. I need hardly say that

[5] [1941] A.C. 108, 140.

[6] (1795) 6 Term Rep. 320; 2 Sm. L.C. 9 (4th ed.) 16.

it is with great diffidence that I venture to express a differing opinion.

When Mr. Abrahams, who had a second charge on the property in question, decided to exercise his power of sale, he instructed his solicitors to consult the plaintiffs in this action, the auctioneers, and the solicitors wrote a letter on December 15, asking the auctioneers for their guidance as to the best way to proceed. They said: "Would you kindly consider whether it "would be in our client's interests to attempt to sell these "properties by public auction or by private treaty, and, if by "private treaty, whether the properties might be offered to the "sitting tenants, who, we believe, are weekly tenants." The advice of the auctioneers was that the best way to proceed was to have a public auction, but they said that in regard to the sitting tenants their experience was that if a date of auction was fixed, then arrangements with the sitting tenants might be facilitated. The auctioneers said in their letter of December 20: "Again, the question of sitting tenants is, from our considerable "experience, a somewhat protracted process unless an auction is "impending when we always use the lever that unless terms are "agreed and contracts exchanged no individual property may be "withdrawn from auction." They then explain that if an auction were arranged, there would naturally be a good many out-of-pocket expenses, but they said they would fix a figure as the maximum sum payable in respect of the out-of-pocket expenses.

That advice having been considered, instructions were given on behalf of the mortgagee to the auctioneers to proceed. They said, on December 30: "On the above basis, will you please "arrange a sale by public auction of these properties. The sooner "the sale can take place the better," and so on. On January 4, 1955, the auctioneers wrote and said that they had arranged for the auction to take place on Wednesday, February 16, at the George Hotel, Ruislip, and they sent two copies of the proof auction particulars. On that letter—and, indeed, I think on all the letters written by the auctioneers—was a heading: "Terms "in accordance with scale of Chartered Auctioneers' Institute." It has been common ground in the action that the contract made between Mr. Abrahams and the auctioneers was a contract that incorporated the scale of the Chartered Auctioneers' Institute. The result, therefore, is that the auctioneers are entitled to succeed if they can bring themselves within the words recorded in this scale.

Now, it seems to me that once instructions to sell by auction are accepted, certain work is done for which it is contemplated that payment will be made when the auction takes place. Arrangements have to be made for the actual holding of the auction; publicity has to be arranged; advertisements have to be inserted; auction particulars have to be prepared, and also the general conditions of sale; and further, there must be advice as to the reserve price to be fixed. In the present case reserve

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prices had to be fixed in regard to each one of the five properties. The parties, therefore, once instructions are given for the holding of an auction, look forward to the holding of the auction. But, of course, it is contemplated, particularly in a case such as the present, that, although an auction is advertised, there might be sales to the tenants of the properties to be sold. In the present case, that was very much in mind, and the auctioneers wrote letters to the sitting tenants suggesting that they should buy their properties. The fixing of a date had a certain persuasive effect with the tenants in urging them to make up their minds speedily: they might not wish to have the properties sold to a stranger when they had the opportunity themselves to acquire the properties. If there were sales to the sitting tenants, then, under the terms and conditions recorded in the scale of fees, it might be that commission would be payable as on a sale by private treaty, for paragraph 10 (a) provides: "Private Treaty.—"Negotiating a sale by private contract, or introducing a person "able, ready and willing to purchase on terms authorized by the "vendor." At all events, if there had been sales by Mr. Abrahams to the sitting tenants arranged by the auctioneers, there would have been no doubt that the auctioneers would have earned their commission. They would either have earned their commission under the words which I have just read, or certainly under the words which are immediately referred to in this litigation.

My Lords have referred to the wording of clause 10 of this scale of fees, and I do not re-read the various provisions. One is, however, under the heading: "Non-Sale": "In the event of "non-sale at the auction, a fee, the amount of which is a matter "of arrangement, is payable." The case there being provided for is where everything proceeds and an auction takes place, but there is no sale. The parties have agreed that in that contingency a fee, the amount of which is a matter of arrangement, should be payable. It seems to me that that denotes that the intention is that there will be payment for the auctioneers once the somewhat intensive work involved in preparation for an auction has been performed.

But then it might be that there would be a sale of the property before the date of an auction, and if that were so, an auctioneer would be deprived of his remuneration unless the contract made some provision for that situation. So there is the provision under the heading "Sale before Auction," and it reads: "If a sale of "the property, whether arranged by the auctioneer or not, is "effected between the date of acceptance of instructions and "the date of the auction, commission is payable to the auctioneer "on the same scale as for a sale by auction."

It seems to me that in the ordinary case the only person who could sell would be the person who had first given instructions for the sale to take place; but if that person is a mortgagee, then the situation might arise as in the present case. The possibility

that the mortgagor might sell is one known to the mortgagee when he enters into his contract with the auctioneers. If he had wanted to have a modification of the language of the contract, he could have asked for it. It is the selling of property before auction that normally prevents an auction taking place; but whether before auction the property is sold by the mortgagee or sold by the mortgagor, the effect is the same so far as the auctioneers are concerned.

The language of these words is very wide. It may well be that the framers of this language did not apply their minds to this particular case, but it seems to me that we must interpret these words according to their ordinary meaning, and these words, as it seems to me, are very wide.

The county court judge, in the course of his judgment, said this: "It is argued that this does not apply because the sale "that was effected was made not by the mortgagee but by the "mortgagor, though in substance the mortgagee's interest was "greater than the mortgagor's. There is nothing which states "expressly by whom the sale must be made. Anyone can sell "land taking the risk of being unable to make a title before "completion. A wife could sell and get her husband to come in "as vendor. A tenant could sell; but he would have to get in "the landlord's interest before completion. A partner could sell "and attempt to do the auctioneer out of commission by getting "his partner to assume the character of vendor. If 'sale' is "limited to a sale by the person who instructed the auctioneer "there would be a number of holes through which vendors could "slip out of the network of the liability for commission." And then later on the judge said: "As a matter of language the "word 'sale' is wide enough to cover a sale by anyone, wide "enough to cover a sale by the mortgagor. Mr. Clauson, who "argued attractively on behalf of a client whose conduct has not "been wholly attractive, says that I should read into the clause "after the word 'sale' the words 'by the vendor.' There might "be cases where the purpose of the clause pointed to a restrictive "interpretation. Here it is the other way about. The purpose "of the clause is to prevent people doing the auctioneer out of "payment for his work. The people who framed the clause were "aiming at a sale by anyone. There is no reason to apply a "restrictive interpretation."

It may be difficult to decide what the framers of these words had exactly in mind. It may well be, as I have said, that they did not apply their minds to the present position; but we have only the words of the contract. The judge said that Mr. Clauson had submitted to him that there should be read into the clause after the word "sale" the words "by the vendor." I see no reason for reading in those words. But I think that Mr. Clauson put his submission not only in that way, or perhaps he put it only in an alternative way: he says that as a matter of interpretation, but not of reading into the clause, the clause should

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be read as denoting a sale of the property only by the person who as vendor has given instructions to the auctioneer for a sale.

It seems to me, however, that the purpose of the clause was to ensure that the auctioneer should not be deprived of payment for his work, once he has accepted instructions from someone in a position to give those instructions, and the work done in preparing for an auction is rather different from the work that might be done in a case where there is merely an invitation to agents to find a purchaser. If the property is sold before auction, it is but reasonable and fair that the auctioneer should be paid, and the language, as it seems to me, is wide enough to refer to a sale by anyone entitled to sell the freehold. I see no reason to read in any words of limitation, and I see no reason to give the wide words a restricted meaning, when by doing so the apparent purpose of the words and of this clause as it affects the auctioneer would be defeated.

For those reasons, on the main question I have come to the conclusion that the judge was correct in his judgment. I may add that I have further diffidence in differing from my Lords when I find that Harman J., though not deciding the point, has expressed his opinion as shown in the judgment to which we have been referred.

I would only add a word in regard to the alternative case advanced by Mr. Stocker, that is to say, on the basis of a quantum meruit. Mr. Stocker pointed to the course of the business in this case, and showed that at a time after the auctioneers had been in touch with the tenants, and after it was known that the mortgagor was also negotiating with the tenants, the mortgagee wrote to the auctioneers a letter, the effect of which was to confirm his instructions; and, as Mr. Stocker submits, to say that he would not revoke his instructions and would take the risk of redemption. Mr. Stocker submits that there can be implied a promise to pay what should be reasonable. Persuasive, if I may say so, as those submissions were, I do not find myself in agreement with them. It seems to me that the work done by the auctioneers was done all the time on the basis of the contract that was first made, and if they have done work that is not covered by the terms of payment, then I think they fail. But, as in my judgment the position is covered by the express terms of the contract, I am of opinion that the auctioneers were entitled to succeed.

Appeal allowed.

Solicitors: *Lieberman, Leigh & Co.; Keene, Marsland & Co.*

F. R. D.

[CHANCERY DIVISION.]

* *In re* 34, BRUTON STREET, WESTMINSTER.

1956 *Oct.* 17, 18, 31.

[1955 M. 4207.]

Vaisey J.

War Damage—Cost of works payment—Preparatory remedial work—Amount payable by War Damage Commission—War damage confined to front wall of house—Rebuilding of flank walls prior to rebuilding of front wall required by district surveyor pursuant to provisions of by-laws and London Building Acts—Whether cost of reinstating flank walls formed part of proper cost of works payable by commission—War Damage Act, 1943 (6 & 7 *Geo.* 6, *c.* 21), *s.* 8.

A house, which was some two hundred years old, forming part of a continuous row of buildings sustained war damage on two occasions, namely, in September, 1940, and again in July, 1944. In 1948 two dangerous structure notices were served by the London County Council in respect of the property under the London Building Acts (Amendment) Act, 1939, the first relating to the front wall of the property and the other to the chimney breasts in the wall abutting on to a neighbouring house. The front wall of the house was so damaged that it required to be entirely rebuilt.

In order to comply with the requirements of the London Building Acts and the various by-laws thereunder the owners were obliged by the district surveyor to have the party walls rebuilt to a considerable extent before rebuilding the front wall. The War Damage Commission determined that the proper cost of making good the war damage was confined to the cost of rebuilding the front wall for although the commission recognized "that the age "and condition of the flank . . . walls (which was not in the view of "the commission due to war damage) was such as to occasion the "requirements imposed by the district surveyor they have taken "the view that the cost of conforming with such requirements "does not form part of the proper cost payable by the commission "as a payment of cost of works."

On appeal by the owners of the house:—

Held, that the cost of conforming with the district surveyor's requirements formed part of the proper cost of works executed for the making good of the war damage to the property in question.

In re 36, 38, 40 and 42 Jamaica Street, Stepney [1947] Ch. 409; 63 T.L.R. 281; [1947] 1 All E.R. 754 applied.

Per curiam: As a general rule any preparatory remedial work which has to be done before the war damage can be made good is work for which the proper cost can be claimed as part of the war damage itself. I say "as a general rule" because the principle is one that must be applied on common-sense lines and could not be used to warrant the expenditure of a very large sum to prepare the way for the making good of the war damage properly so called at a comparatively trifling cost.

ORIGINATING MOTION.

The applicants, Massey Estates Ltd., were owners in fee simple of No. 34, Bruton Street, London, W.1, which between 1940 and 1944 suffered war damage. At the dates on which the property sustained war damage it was let by Samuel Estates Ltd. to A.P.B. Nominees Ltd. for a term of 63 years from May 8,

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1925, and sublet by the latter company to Warwick Wright Ltd. for a term of 21 years from October 15, 1926. The applicants were the successors in title to A.P.B. Nominees Ltd.

The property in question was part of a continuous row of buildings and consisted of a basement, ground floor, and four upper floors. It had a back addition of five storeys and was estimated to be about two hundred years old. The front wall of the property was bonded to the flank or party wall abutting on No. 35, Bruton Street, above a point at about the middle of the third storey. Many years before the second world war tie rods had been installed passing from the front to the rear of the building at the second, third and fourth floor levels and tying in the front wall of the property.

The War Damage Commission ("the commission") was notified in October, 1940, by Warwick Wright Ltd., and in March, 1941, by A.P.B. Nominees Ltd., that the property had sustained war damage. The commission was further notified in August, 1944, by Warwick Wright Ltd., that the property had again sustained war damage.

On April 21, 1948, the London County Council served a dangerous structure notice, under the London Building Acts (Amendment) Act, 1939, in respect of the front elevation of the property, in the following terms: "Take down, repair or otherwise secure the brickwork and stucco on the front elevation where fractured loose and defective and do any further work incidental to or rendered necessary in consequence of the foregoing."

On September 4, 1948, the London County Council served a further dangerous structure notice under the said Act in respect of the rear elevation of the property and the chimney breasts on the flank wall abutting on No. 35, Bruton Street. The notice required the taking down and repair of the portions of the property specified in the notice and also required to be done "any further work rendered necessary in consequence of the foregoing."

The property being within the City of Westminster, it was the duty of the district surveyor of that city to see that the applicants duly complied with the terms of the notices. In consequence of their condition on the pulling down of the front wall the district surveyor required that the flank walls, which acted as buttresses to the front wall, be cut back and rebuilt to an average depth of seven feet in respect of the party wall between Nos. 33 and 34, and to a greater extent in respect of the party wall between Nos. 34 and 35. In a statutory declaration dated March, 1954, the district surveyor stated that "the pulling down of the party wall [between Nos. 34 and 35] became part and parcel of the work required to (sic) the front wall."

On December 7, 1950, a claim for a cost of works payment was sent to the commission by the applicants' predecessors in

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title. The parties being unable to agree as to the extent of the war damage, it was eventually agreed that this question should be referred to one of the commission's deputy commissioners for advice, on the footing that such advice should be accepted as final by the parties. A revised specification was prepared on behalf of the owners for this purpose. This specification claimed (inter alia) as war damage the rebuilding from first-floor level of the party wall between the property and 33, Bruton Street, to an average depth of seven feet from the front wall, and the rebuilding from first-floor level of the party wall between the property and 35, Bruton Street, from the front wall to a depth of five feet from the back wall.

The matter was duly referred to one of the commission's deputy commissioners, who inspected the property and reported to the commission by a letter dated August 12, 1953. The commission formally determined the claims for a cost of works payment by the applicants by a letter dated November 25, 1955.

By paragraph 10 of their statement of case the commission stated that "in the commission's view it would have been "physically possible to rebuild the front wall of the premises "together with a short return at each end, tying in to the "original flank walls, without rebuilding the flank walls to the "extent to which they have been rebuilt . . . If the work had "been carried out in this way the physical condition of the "property would certainly have been no worse than it was "before the war damage occurred. The commission recognize "that the age and condition of the flank and back walls (which "was not in the view of the commission due to war damage) was "such as to occasion the requirements imposed by the district "surveyor, but they have taken the view that the cost of con-"forming with such requirements does not form part of the "proper cost payable by the commission as a payment of cost "of works."

The applicants thereupon appealed by way of originating motion for the following relief, pursuant to section 32 of the War Damage Act, 1943, namely, an order that a determination by the War Damage Commission be varied and that the commission had wrongfully excluded from their determination the payment of an amount equal to the proper cost of the works executed to the party walls of the property in question in respect of which a claim was lodged with the commission.

The question of law on which the applicants desired to appeal was whether the works aforesaid were works executed for the making good of war damage within the meaning of section 8 of the War Damage Act, 1943.[1]

[1] War Damage Act, 1943, s. 8: "(1) Subject to the provisions of "this Part of this Act, the amount "of a payment of cost of works shall "be computed as provided by sub-"sections (2) to (4) of this section. "(2) If the war damage is made "good by reinstating the heredita-"ment in the form in which it existed "immediately before the occurrence "of the damage, the amount of the "payment shall be an amount equal

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The grounds of appeal were: (i) that an award dated August 12, 1953, by one the commission's deputy commissioners, and adopted by the commission for the purpose of their determination, was erroneous in law; (ii) that having regard to the provisions of the London Building Acts and the powers exercised thereunder by the district surveyor for Westminster, the applicants could not lawfully have made good the damage determined by the commission to be war damage without at the same time executing the said works.

R. E. Megarry Q.C. and *D. G. H. Frank* for the appellants. *Michael Rowe Q.C.* and *Denys Buckley* for the commission.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

October 31. Vaisey J. read the following judgment: The appellants on this motion are Massey Estates Ltd., who are the lessee owners of the property in question. They hold it for the residue of a term of 63 years expiring on May 8, 1988. The property is No. 34, Bruton Street, London, W.1, which is administratively in the City of Westminster, and consists of a house in a terrace or continuous row of buildings with houses numbered 33 and 35 in the said street on either side of it. It sustained war damage on two occasions: once in September, 1940, and again in July, 1944. This was duly notified to the respondents, the War Damage Commission, in accordance with the relevant provisions of the War Damage Act, 1943. On December 7, 1950, a claim for a "cost of works" payment was sent to the respondents by the appellants' predecessors in title, and it is admitted that this is in fact a "cost of works" case.

The house was an old one, being some two hundred years old,

"to the proper cost of the works executed for the making good thereof; Provided that if the reinstatement of any part of the hereditament could have been omitted without detracting from the value of the hereditament, or the omission thereof would have increased its value, the amount of the payment shall be reduced to what it would have been if that part had not been reinstated.

"In this Part of this Act the expression 'the permissible amount' means, in relation to a payment of cost of works, the amount that is payable by virtue of this subsection or that would have been payable if this subsection had had effect in relation to the payment.

"(3) If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount.

"(4) The preceding provisions of this section shall have effect subject to the provisions of the Third Schedule to this Act as to deductions in respect of the value of materials, of failure to take steps to minimise war damage, of physical changes not directly attributable to war damage occurring between the occurrence and the making good of war damage, and of the cost of works which contribute to the making good of war damage occurring on two or more occasions."

rather frail and not very solidly constructed. In the year 1948 dangerous structure notices were served by the London County Council in respect of the property under the London Building Acts (Amendment) Act, 1939, the first relating to the front wall of the property and the other to the chimney breasts in the wall abutting on No. 33, Bruton Street, and other matters. What, in fact, had happened was that the front wall of the house was so damaged as to necessitate its being entirely rebuilt. It is not disputed that the cost of such rebuilding is work which had to be executed for the making good of the war damage within the meaning of those words in section 8 (2) of the War Damage Act, 1943.

The question is as to the cost of reinstating the flank walls of the house which were required to act as buttresses to the front wall. It is admitted that such flank walls themselves had not suffered war damage. I gather that the party wall between Nos. 34 and 33 had to be cut back and rebuilt to an average depth of seven feet while the party wall between Nos. 34 and 35 had to be similarly cut down and rebuilt to a somewhat greater depth.

I think that my decision here depends on the view which I take of two pieces of evidence, the first being a statutory declaration dated March 19, 1954, by Mr. L. A. D. Shiner, who at the relevant time was district surveyor to the City of Westminster, the other being paragraph 10 of the respondents' own statement of case.

Mr. Shiner's declaration tells me that, if the party wall had been in sound condition he would, in normal circumstances, have asked for the new front wall to be block-bonded into it, but that when the front wall was taken down the party wall was found to be in a dangerous condition so that he was not prepared to accept block-bonding into the loose brickwork of it. Then he said this: "The pulling down of the party wall became part "and parcel of the work required to the front wall." That referred, apparently, to the party wall between Nos. 34 and 35. As regards the other wall, the position was not so serious. He further stated that no part of either party wall was demolished except so far as was necessary.

Turning now to the respondents' statement of case I refer to paragraph 10, which consists of three sentences, of which the first runs as follows: "In the commission's view it would have "been physically possible to rebuild the front wall of the "premises together with a short return at each end, tying in to "the original flank walls, without rebuilding the flank walls to "the extent to which they have been rebuilt by the appellants." Now, I read that sentence as indicating that what is there suggested was physically possible was not possible as a practical proposition, or, in other words, it was in a true sense impossible.

The second sentence runs thus: "If the work had been "carried out in this way, the physical condition of the property

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"would certainly have been no worse than it was before the war "damage occurred." I understand that sentence to be raising the kind of point which was discussed and decided in the *Jamaica Street* case,[1] to which I will refer hereafter.

The third sentence states: "The commission recognize that "the age and condition of the flank and back walls (which was "not in the view of the commission due to war damage) was "such as to occasion the requirements imposed by the district "surveyor but they have taken the view that the cost of con-"forming with such requirements does not form part of the "proper cost payable by the commission as a payment of cost "of works." Now in that sentence the word "occasion" is, in my judgment, equivalent in meaning to "justify" or even to "necessitate." The law, as I understand it, is that as a general rule any preparatory remedial work which has to be done before the war damage can be made good is work for which the proper cost can be claimed as part of the war damage itself. I say "as a general rule" because the principle is one that must be applied on common-sense lines and could not be used to warrant the expenditure of a very large sum to prepare the way for the making good of the war damage properly so called at a comparatively trifling cost. Here the amount allowed was £3,600, whereas the amount claimed was £7,800. These are approximate figures.

This exact point arose in an unreported decision of my own in *In re Nos. 6 and 8, Halton Terrace, Sevenoaks*,[2] in which I gave judgment on January 22, 1953. There the premises had suffered some war damage which could be repaired at a cost of £109 7s. 0d., but in order to enable such repair to be carried out other repair estimated to cost £306 12s. 6d. had to be effected prior to or concurrently with the carrying out of the first mentioned repair. I held in that case that the £306 12s. 6d. as well as the £109 7s. 0d. could be recovered as part of the proper cost although admittedly the larger sum was laid out in putting right what was not directly and in itself war damage at all. I held that the more expensive work was ancillary to or part of the main but less expensive work, and I discussed the signification of the word "impossible" in terms which it is not necessary to repeat here.

I think that the case is also covered by that of *In re 36, 38, 40 and 42, Jamaica Street, Stepney*,[3] which is a decision of the Court of Appeal. It will be sufficient if I read the headnote: "The blast from a bomb dropped by an enemy aeroplane "structurally damaged the front walls of four houses and the "walls which were previously in a bad condition had to be "rebuilt in whole or in part. The War Damage Commission "decided that as the walls were previously in a bad state, the

[1] [1947] Ch. 158, 409; 62 T.L.R. 658; [1947] 1 All E.R. 754. 758; 63 T.L.R. 281; [1946] 2 All E.R.

[2] Unreported.

[3] [1947] Ch. 409.

" proportion of the cost of the work to be borne by them as " being attributable to war damage was in each case 40 per cent., " afterwards reduced to 33⅓ per cent." Then it was held (affirming my own decision reported in the same volume of the reports [4]) " that in the absence of any evidence that the walls " would have fallen down within any reasonable distance of time, " if they had been uninjured by enemy action, the commission " were responsible for the whole cost of the work, since the " damage making necessary the rebuilding was the ' direct result ' " of enemy action within section 1 (1) of the War Damage Act, " 1943. The question whether in some other case there could " be evidence to justify an apportionment of the cost of work " must be kept open." The concluding words of the judgment of Cohen L.J. in that case gave a warning against injudicious applications of the principle.[5] They do not, I think, affect the present case.

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Now the work which was done here was done in the way that it was done by reason of the provisions of the London Building Acts, the relevant by-laws, and the requirements of the district surveyor thereunder, and so far as I can see they could not have been done otherwise nor more cheaply without infringing the London Building Acts. The conclusion of the respondents as set out in the final sentence of paragraph 10 of their statement of case is, in my judgment, wrong in point of law.

I hold that the cost of conforming with the district surveyor's requirements does form part of the proper cost of works executed for the making good of the war damage to No. 34, Bruton Street, and I will so declare. The respondents must pay the costs of the appellants.

Declaration accordingly.

Solicitors: *Debenham & Co.; Treasury Solicitor.*

J. A. G.

[4] [1947] Ch. 158. [5] [1947] Ch. 409, 419.

[CHANCERY DIVISION.]

*G. H. CHAMBERS (NORTHIAM FARMS) LTD. *v.* WATMOUGH (INSPECTOR OF TAXES).

1956 *June* 26.

Vaisey J.

Revenue—Income tax—Annual allowance—Abatement for machinery—Farm—Car used partly for business and partly for pleasure—Choice of car dictated by personal preference—Allowance reduced—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 289.

A private company carrying on the business of a fruit farm bought in 1952 a second-hand Bentley car for approximately £7,000, which was used in connexion with the farm, and also for the private motoring of the managing director who held a controlling interest in the company. It was agreed that one-twelfth

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of the annual mileage covered was attributable to the latter purpose, and that the gross capital allowance of £1,749 should be pro tanto abated by £145 15s. The general commissioners held that the allowance should be further abated by £1,020 5s., on the ground that the purchase of such a car was, in part at least, dictated by considerations of the personal choice of the managing director and not of the company's business:—

Held, that there was ample evidence on which the commissioners could come to their conclusion and that their finding should not be disturbed.

Kempster v. *McKenzie* (1952) 33 T.C. 193 distinguished.

APPEAL from the Commissioners for the General Purposes of the Income Tax.

The case stated provided so far as material: At a meeting of the Lower South Aylesford Commissioners held on February 9, 1955, G. H. Chambers (Northiam Farms) Ltd. appealed against an assessment made under Schedule D for the year 1953–1954 on the company's profits as farmers.

The parties were in agreement as to the amount of the assessment but the question before the commissioners was the amount of the annual allowance to be made to the company under the Income Tax Act, 1952 s. 289,[1] in respect of a car used in the company's business; namely, what abatement was to be made of the amount of the annual allowance due to the company under section 289 in respect of a Bentley motor-car which was purchased in circumstances hereafter set out.

The company carried on business as fruit farmers at Northiam Farm, Horsmonden, Kent, where it farmed some 75 acres. The farm surrounded the private house of Mr. G. H. Chambers.

The company made up its accounts to January 31 each year.

Mr. G. H. Chambers was managing director of the company and his shareholding in the company gave him virtual control of it.

On May 17, 1952, during the accounting year ended January 31, 1953, the company purchased the Bentley car for £6,995.

The Bentley was used in part for the purposes of the company's business and in part for Mr. Chambers' private motoring, and it was agreed that Mr. Chambers' use of the Bentley for the purposes of his private motoring accounted for one-twelfth of the mileage covered. It was accordingly conceded that the annual allowance aforesaid should be abated to

[1] Income Tax Act, 1952, s. 289: "(1) An annual allowance may be made in respect of any machinery or plant in charging the profits or gains of a trade for any year of assessment notwithstanding that the machinery or plant is also used in that year for purposes other than those of the trade, but where, in the basis period for any year of assessment, machinery or plant is used for purposes other than those of the trade, the annual allowance to be made in respect thereof shall be so much only of the allowance that otherwise would be made as may be just and reasonable having regard to all the relevant circumstances of the case and, in particular, to the extent of the use for the said other purposes during the said basis period."

the extent of one-twelfth of the amount thereof which would otherwise have been due, and the question before the commissioners was whether that allowance should be abated to any, and if so what, further extent.

The Bentley was produced for the inspection of the commissioners. It was, at the time of its purchase, a second-hand car. It had a special Mulliner saloon body expensively upholstered and fitted, which, in a new car, would have cost £2,500 extra.

Mr. Chambers gave the following evidence before the commissioners, which, subject to their comments made below, they accepted: (1) It was necessary for the company to have a car for the purposes of its business. It had previously owned a Humber car, purchased in 1949. (2) The Bentley was used to travel to and from shows and demonstrations and to fetch spare parts. Only small parts could be carried in it, however, owing to its delicate upholstery. The total mileage it had done each year since its purchase was between seven and eight thousand miles, mainly on short journeys to and from Maidstone, which was some 14 miles from Northiam Farm. (3) Mr. Chambers was the sole driver of the Bentley and personally worked all day on the farm. (4) His wife owned a Hillman car, the whole of the expenses of which were borne by her. The Hillman was used on the company's business to the extent of one-third of an estimated mileage of 15,000. (5) The Humber which the company had previously owned had cost a considerable sum to maintain, and to avoid this expense the company had bought the Bentley to replace it. In the opinion of Mr. Chambers the most expensive machinery was the best in the long run.

While the commissioners accepted that this consideration did induce the company to buy the Bentley, they thought that its purchase was dictated not by this consideration alone but also by the consideration of Mr. Chambers' personal choice or preference, which bore no relation to the requirements of the company's business, and that the Bentley was not a car of the kind that would have been bought had its purchase been dictated by consideration of the requirements of the company's business alone.

It was contended on behalf of the company: (a) That the company's Humber car had to be replaced after three years' use to avoid constant maintenance expenses. (b) That the Hillman was used when Mrs. Chambers had to go on company business and when Mr. Chambers went to the village of Horsmonden on company business. (c) That choice of the Bentley car in question was not unreasonable, and that the capital allowance to which the company was entitled should be abated only by the agreed one-twelfth for private running. (d) That the company was accordingly entitled to a total allowance of £1,603 5s. for 1953–1954 computed as follows: Gross capital allowance as agreed, £1,749; less one-twelfth for private running, £145 15s. (e) That it would be wrong in law to make any further deduction from the

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net figure of £1,603 5s. on the grounds of personal choice or otherwise in view of the decision in *Kempster* v. *McKenzie*.[2]

It was contended on behalf of the Crown: (1) That the Bentley must be taken to have been purchased out of regard, in part at least, of considerations of Mr. Chambers' personal choice and not of the requirements of the company's business. (2) That this was a relevant circumstance to be taken into account in determining what was for the purposes of the Income Tax Act, 1952, s. 289, a just and reasonable allowance in the circumstances of the case under appeal. (3) That, accordingly, the allowance due under the Income Tax Act, 1952, s. 289, should be abated beyond the amount agreed upon as aforesaid, by an amount which should be such amount as should appear to the commissioners to be a just and reasonable amount having regard to the circumstances mentioned in the preceding subparagraph.

Having considered the evidence advanced and the arguments of the parties, and having inspected the car in question, the commissioners found that the capital allowance should be abated by something more than the agreed proportion for private running, and determined the allowance due for 1953–1954 at £583, calculated as follows: Gross capital allowance as agreed, £1,749; abatement for personal choice, £1,020 5s., and disallowance for private running, £145 15s., making a total allowance of £583.

Patrick Brennan for the taxpayer.
John Senter Q.C. and *Sir Reginald Hills* for the Crown.

Cases cited in argument not referred to in the judgment: *Scottish Shire Line Ltd.* v. *Lethem*[3]; *Holder* v. *Inland Revenue Commissioners*[4]; *Margrett* v. *Lowestoft Water and Gas Co.*[5]; *Tomkins* v. *Tomkins*.[6]

VAISEY J., having stated the facts, continued: Section 289 looks like a self-contained section not referring to allowances under other sections but containing, so to speak, a complete direction to the tax officials as to what they may do in respect of machinery and plant. It reads: "An annual allowance may be "made in respect of any machinery or plant in charging the "profits or gains of a trade for any year of assessment notwithstanding that the machinery or plant is also used in that year "for purposes other than those of the trade, . . ." Pausing there, I think that the reference to "purposes other than those of the "trade" does not refer exclusively or perhaps at all to user by the trader and not by third parties. Then the section goes on: "but where, in the basis period for any year of assessment,

[2] (1952) 33 T.C. 193.
[3] (1912) 6 T.C. 91; 1912 S.C. 1108.
[4] [1932] A.C. 624; 48 T.L.R. 365; 16 T.C. 540.
[5] (1935) 19 T.C. 481.
[6] [1948] P. 170; 64 T.L.R. 106; [1948] 1 All E.R. 237.

" machinery or plant is used for purposes other than those of the " trade "—in my judgment, that means used by anyone, the trader or anyone else—" for purposes other than those of the " trade, the annual allowance to be made in respect thereof " shall be so much only of the allowance that otherwise would " be made as may be just and reasonable, having regard to all " the relevant circumstances of the case and, in particular, to the " extent of the use for the said other purposes during the said " basis period." " Having regard to all the relevant circum- " stances of the case " is about as wide an expression as it is possible to imagine. In arriving at what is " just and reason- " able " everything has to be looked at which concerns or touches or is related to the matter in question. I cannot see that the commissioners in the present case have not had regard to " all " the relevant circumstances of the case," nor can I come to the conclusion that they have had regard to circumstances which were not relevant. I think that they have directed their minds in the proper direction; that is to say, by having regard to the relevant circumstances they have come to the conclusion that it is " just and reasonable " that the amount of abatement which can be claimed by the company under this section is the sum of £583 and no more. It may be—when it is a question of quantum it is never easy to arrive at exactitude—that either the commissioners or other persons would have fixed a larger or smaller sum. In fact, it is almost impossible to imagine that anyone can say what is a normal sum at which to arrive. I cannot for myself see that this figure of £583 was otherwise than a right sum to be assessed as " just and reasonable " under the provisions of section 289.

It is a queer case because I should have thought it was almost res ipsa loquitur that it would be unreasonable to buy a Bentley for £7,000 for the purposes of the trade of a fruit farmer. I should have thought that mere statement by itself would have at once aroused suspicion as to the propriety of the expenditure, and justified the necessity for going into the reasons for and objections to such a purchase when the question of taxation has to be considered. Here, I think that the commissioners have properly found that there was in this case such an element of " personal " choice " or preference (which is a curious expression—whether it was invented by Danckwerts J. in the case to which I am just going to refer, I do not know) as to justify their taking it into consideration. What is meant by that expression is that the car would not have been bought by anyone who, in considering the question of its purchase, was directing his mind, solely and exclusively, to the necessities of the trader or of the trade as such.

The case to which I have been referring is *Kempster* v. *McKenzie (Inspector of Taxes)*.[1] I will read the headnote. " The appellant K. bought a car for use in connexion with his

[1] (1952) 33 T.C. 193.

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G. H. CHAMBERS (NORTHIAM FARMS) LTD. v. WATMOUGH (INSPECTOR OF TAXES).

Vaisey J.

"farming business and also for private purposes. It was agreed "that, on a mileage basis, the car was used as to six-sevenths "for business and one-seventh for private purposes. On appeal "before the General Commissioners against an assessment to "income tax made on him for the year 1949–1950 in respect of "his farming profits, K. contended that the full initial and "annual allowances in respect of the car for that year should be "abated only by one-seventh for private running. On behalf of "the Crown it was contended that personal choice of the type "of car bought was a relevant circumstance to which regard "should be had in determining what initial and annual allow-"ances should be made, and that in the circumstances of the "case the allowances should first be reduced by one-fifth on that "account. The commissioners held that the allowances should "first be reduced by one-seventh for personal choice, and that "one-seventh of the allowances as so reduced should then be "disallowed for private running." Danckwerts J. held "that "there was no evidence to justify the determination of the com-"missioners that an abatement should be made for personal "choice."

The judgment of Danckwerts J. in a case similar to the present turns out to have a very vital difference in its facts. He stated in the course of his judgment[2]: "In other words it is a matter "which is committed for the decision of the commissioners but "which depends upon circumstances, and it is not until they "have found the circumstances and reached a decision on the "facts that the decision is committed to the commissioners. I do "not think that it is really disputed on behalf of the respondent, "but it is contended that the circumstances were in fact found and "the commissioners accordingly rightly applied the requirements "of that paragraph. It is also argued on behalf of the appellant "that there is no evidence which would justify the commissioners "in reaching a conclusion that the appellant bought this sort of "car by reason of some special ground or consideration applicable "only to himself personally, and therefore there was no evidence "upon which the commissioners could reach a conclusion "requiring this further deduction which they have made." Later Danckwerts J. said[3]: "Now if the commissioners had reached "the conclusion upon matters of fact in respect of which there "was evidence before them on which they could reach such a "conclusion, there would, of course, be no right to interfere with "their decision, but as it seems to me there is no evidence upon "which they were justified either in holding or in inferring that "the choice of the kind of car made by the appellant in this "case was dictated otherwise than by his requirements for the "purposes of his farming business. It appears that he wanted "a car which was to travel along roads and not necessarily one "which would be driven about the rough farmland and that it "was for the purposes of his business that he chose this particular

[2] 33 T.C. 193, 197. [3] Ibid. 199.

" car. It does not appear, on the evidence, to have been an " extravagant purchase, having regard to the cost of a second-" hand car of sufficiently recent vintage to be an economic " proposition and it does not appear to have been an unreasonable " purchase having regard to the evidence which appears in the " findings of fact as to the availability " . . . of another car. I need not read that. He says[4]: " I find it impossible to see " what evidence there was which justified the commissioners in " reaching the conclusion that this was a purchase dictated wholly " or partly by the personal choice of the appellant which, it was " suggested, might be due to a desire to impress the persons who " saw him drive about in it or any other alien and outside " consideration of that sort."

The present case differs from that case in the vital and material respect that, whereas there was no evidence there on which the commissioners could have found this element of personal choice (which was suggested to but not accepted by Danckwerts J.), in this case, in my judgment, there is ample evidence of it. I think it is almost an inference which hardly requires any evidence to support it. That is contrary to the *Kempster* case,[5] where Danckwerts J. found that it was not an extravagant purchase. There was evidence that a list of available cars was produced to the commissioners in this case. I have not seen the list but I should have thought that the purchase of this car for a sum of nearly £7,000 was a most extravagant purchase. I should have thought it was not as Danckwerts J. found in the case before him, a purchase which was made entirely having regard to the requirements of the farming business. Whether the commissioners have given rather a high figure or rather a low figure in the amount they have fixed with regard to the matter of personal choice I do not know; but I am quite sure of one thing, that I do not myself regard it as in any way unreasonable. They, having heard the evidence and considered the arguments and seen the car, came to a conclusion, and I think that the conclusion which they reached is one that it is quite impossible for me to disturb.

In the result, this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Evan Davies & Co. for Stevens & Graves, Maidstone; Solicitor of Inland Revenue.*

I. G. R. M.

[4] 33 T.C. 193, 200.

[5] Ibid. 193.

[CHANCERY DIVISION.]

1956
Oct. 17.

Upjohn J.

* *In re* HAYWARD, DECD.
KERROD *v.* HAYWARD AND ANOTHER.

[1955 H. 1726.]

Advancement—Portion, by way of—Intestacy—"By way of advancement"—Nomination of substantial sum by intestate father to middle-aged son in forces—Distribution of father's estate—Whether "by way of advancement"—Administration of Estates Act, 1925 (15 & 16 *Geo.* 5, *c.* 23), *s.* 47 (1) (ii) (iii).

An intestate died in 1949, having, in 1946, made nominations amounting to £507 13s. 5d. in favour of his elder son, who was then middle-aged and serving in the forces. The value of the estate was about £1,780. In an administration action, the question was raised whether the elder son's executors ought, in the administration of the intestate's estate, to bring into account the £507 13s. 5d. as having been paid to the elder son "by way of advancement" within the meaning of section 47 (1) (iii) of the Administration of Estates Act, 1925 [1]:—

Held, that though the sum in question was quite large when compared with the total assets of the estate at the time when the nominations were made, it was not sufficiently large by itself to raise the presumption of advancement, having regard to the age of the son and to the absence of evidence as to the purposes for which the nomination was made.

In re Livesey [1953] 1 W.L.R. 1114; [1953] 2 All E.R. 723 questioned.

Taylor v. *Taylor* (1875) L.R. 20 Eq. 155 and *In re Scott* [1903] 1 Ch. 1 considered.

ADMINISTRATION ACTION asking for accounts and an inquiry and for payment into court by the defendant to the action of the sum found due on the taking of the accounts, coming up for further consideration.

On October 31, 1946, Frank Charles Hayward (hereinafter called "the intestate") nominated in favour of his elder son,

[1] Administration of Estates Act, 1925, s. 47 (1): "Where under this "Part of this Act the residuary "estate of an intestate, or any part "thereof, is directed to be held on "the statutory trusts for the issue of "the intestate, the same shall be "held upon the following trusts, "namely:— . . . (ii) The statutory "power of advancement . . . shall "apply . . . (iii) Where the pro-"perty held on the statutory trusts "for issue is divisible into shares, "then any money or property which, "by way of advancement or on the "marriage of a child of the intestate, "has been paid to such child by the "intestate or settled by the intestate "for the benefit of such child "(including any life or less interest "and including property coven-"anted to be paid or settled) shall, "subject to any contrary intention "expressed or appearing from the "circumstances of the case, be taken "as being so paid or settled in or "towards satisfaction of the share of "such child or the share which such "child would have taken if living at "the death of the intestate, and shall "be brought into account, at a valua-"tion (the value to be reckoned as at "the death of the intestate), in "accordance with the requirements "of the personal representatives . . ."

Frank Cyril Hayward, £315 15s. 6d. National Savings Certificates standing in the intestate's name and, on November 21, 1946, he further nominated in his favour £191 11s. 7d. standing to the intestate's credit in the Post Office Savings Bank. The elder son was at the time middle-aged and serving in the forces.

On December 11, 1949, the intestate died, having by his will left all his property to his wife, who predeceased him. He was survived by the elder son and a younger son, who was the defendant to these proceedings and he had not revoked the nominations, so that the nominated sums vested in the elder son. On April 13, 1950, the elder son applied for a grant of administration with the will annexed, but the younger son entered a caveat thereto. On August 11, 1951, the elder son died and, on November 22, 1951, administration to the intestate's estate was granted to the younger son.

By originating summons dated May 19, 1955, the plaintiffs, who were the elder son's executors and had received the nominated sums, commenced an action for the administration of the intestate's estate. On July 18, 1955, an order was made for accounts and an inquiry and, on July 9, 1956, the master made his certificate, certifying that the intestate's only property was £1,779 8s. 1d., and that that amount was due from the defendant. The question arose whether, in the distribution of the intestate's estate, the sum of £507 13s. 5d., being the amount of the Savings Certificates and the Post Office Savings Bank account which had been nominated, ought to be brought into account by the elder son's estate; and it was on that issue that the matter now came before the court on further consideration. The elder son's executors, the plaintiffs, contended that the sums in question ought not so to be brought into account and accordingly asked that the defendant be ordered to make payment into court without taking them into account.

E. F. R. Whitehead for the plaintiffs.

Reginald Charles Hayward, the younger son, in person.

Cases cited in argument not referred to in the judgment: *Rumboll* v. *Rumboll* [2]; *Finch* v. *Finch* [3]; *Murless* v. *Franklin* [4]; *In re Roberts* [5]; *In re Englebach's Estate* [6]; *In re Priest.* [7]

UPJOHN J. This application raises a point of some interest. It arises on the further consideration of an action begun in this court on May 19, 1955. The question is whether certain sums belonging to an intestate, Frank Charles Hayward, in the Post Office Savings Bank and in National Savings, which were nominated by him to his elder son, ought to be taken into account as an advancement in the administration of his estate.

[2] (1761) 2 Eden 15.
[3] (1808) 15 Ves. 43.
[4] (1818) 1 Swan. 13.
[5] [1946] Ch. 1; 61 T.L.R. 572.
[6] [1924] 2 Ch. 348.
[7] [1944] Ch. 58; 60 T.L.R. 145; [1944] 1 All E.R. 51.

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HAYWARD, DECD., *In re.*

Upjohn J.

The intestate died on December 11, 1949, leaving two sons. The elder was Frank Cyril Hayward, who died on August 11, 1951, and the plaintiffs in this action are his executors. The defendant is the younger son, and he has appeared in person before me. Letters of administration to the intestate were granted to him on November 22, 1951. On July 18, 1955, an order was made for the administration of the estate, directing the usual accounts and inquiries. The master duly certified the results of those accounts and inquiries by a certificate dated July 9, 1956.

The defendant appeared before me on the hearing of the further consideration and objected to that certificate. The certificate found that the debts had been paid and that the only property of the intestate consisted of the sum of £1,779 due from the defendant and the defendant took objection to that. He would, of course, be entitled to half of that himself as one of the next-of-kin. He had a number of objections and he aired them all before the master.

His principal objection was that to proceed in this matter by way of originating summons was misconceived, an objection which I overruled. He had a number of complaints about the conduct of his brother, and those also I disallowed.

But, looking at the papers, it appeared to me there was a genuine point which, in justice to the defendant, I should deal with, although he had not given any notice to move to discharge the certificate. Nevertheless, I am quite satisfied (and indeed it is not in dispute) that the point which I am about to mention was argued before the master. He did not certify it specially, I have no doubt, for the reason that the defendant was so keen to preserve his position that the whole proceedings were misconceived that he was unwilling to have any lesser point put into the certificate. However, I have treated him as having moved to vary the certificate.

The point is this. By nomination on October 31, 1946, the intestate nominated National Savings certificates of the value of £315 15s. 6d. standing in his name, in favour of his elder son, and on November 21, 1946, he nominated the sum of £191 17s. 11d. standing in his credit in the Post Office Savings Bank again in favour of his elder son. Under the relevant statutory provisions, those respective sums, the nominations not having been revoked, vested in the elder son on the death of the intestate and did not become part of his estate.

The question is: should those sums, amounting in the aggregate to £507 13s. 5d., be brought into account by the estate of the elder son in the distribution of the estate? That depends on section 47 (1) (iii) of the Administration of Estates Act, 1925. That is in these terms: [His Lordship read paragraph (iii) and continued:] I apprehend that to come within that section the property which is nominated must be by way of advancement or on marriage (which does not arise) or settled for the benefit of

such child. In the circumstances of this case, I must, therefore, find something in the nature of an advancement if the property is to be brought into account.

Mr. Whitehead, for the plaintiffs, submitted that the nominated sums were not capable of being an advancement. The matter stood over in order that the authorities might be further looked into, because Mr. Whitehead naturally was not prepared to deal with the matter on the earlier hearing for it did not arise on the certificate. As a result of his further researches, he admits that the nomination of sums such as we have here are capable of being an advancement within the meaning of the sub-section which I have just read; but he submits on the evidence here that it is not such an advancement.

There is no evidence on the matter except that these sums were nominated by the intestate to the elder son on the dates that I have mentioned in 1946 and the elder son was then in the forces. The sums so nominated amounted to about £500 or just over £500. When the deceased died some three years later his net estate was found to amount to a sum of £1,700 or a little more.

In the recent decision of Roxburgh J. in *In re Livesey*,[1] he held that no presumption of advancement could arise merely by the fact of the size of the sums advanced, and he held there must be positive evidence of it. With all respect to that decision, it seems to me inconsistent with two earlier authorities which, from the report of the case, do not seem to have been cited to Roxburgh J.

The first one is *Taylor* v. *Taylor*,[2] and I can usefully read a part of the judgment of Sir George Jessel M.R., who says[3]: "I have always understood that an advancement by way "of portion is something given by the parent to establish the "child in life, or to make what is called a provision for him— "not a mere casual payment of this kind. You may make the "provision by way of marriage portion on the marriage of the "child. You may make it on putting him into a profession or "business in a variety of ways: you may pay for a commission, "you may buy him the goodwill of a business and give him "stock-in-trade; all these things I understand to be portions or "provisions. Again, if in the absence of evidence you find a "father giving a large sum to a child in one payment, there is "a presumption that that is intended to start him in life or "make a provision for him; but if a small sum is so given you "may require evidence to show the purpose. But I do not think "that these words 'by portion' are to be disregarded, nor is "the word 'advancement' to be disregarded. It is not every "payment made to a child which is to be regarded as an advance-"ment, or advancement by way of portion. In every case to

[1] [1953] 1 W.L.R. 1114; [1953] 2 All E.R. 723.

[2] (1875) L.R. 20 Eq. 155.

[3] Ibid. 157.

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"which I have been referred there has either been a settlement "itself, or the purpose for which the payment was made has "been shown to be that which every one would recognize as "being for establishing the child or making a provision for the "child."

Then, in *In re Scott*,[4] Vaughan Williams L.J. made some further observations on the question of the rule against double portions, and there again he pointed out that the gift of a large sum of money may bear "so much the characteristics of a "portion that, in the absence of anything to rebut the conclu- "sion, we ought, I think, to assume that the first of the "presumptions mentioned by Bowen L.J. applies."

I propose to approach this case on the footing that in the case of large sums it may be that that is alone sufficient to raise the presumption of an advancement. The question is what has happened in this case? Mr. Hayward argued the case extremely well. He has cited to me a number of authorities and I found his argument of assistance. But it is fair to him to point out that a number of authorities to which he referred me used the word advancement in another sense: that is to say, whether a sum of money paid by a parent to a child is by way of advancement, or whether the child held the money from the parent as on a resulting trust. When any payment is made by a parent to a child there may be a presumption of advancement in that sense, but that type of advancement is not the advancement with which we are now concerned, which is an advancement by way of portion, the general nature and characteristics of which have been sufficiently described in the passage I have read from the judgment of Sir George Jessel M.R.

I think that this is a difficult and borderline case. The sum of £500 is not by itself a large sum. It is, however, quite large compared to what, I must assume, where the total assets of the intestate at the time when he made his nomination. At that time the son was in middle age and, in the absence of some evidence as to the nature of the purposes for which these nominations were made, I do not think that the sum is sufficiently large by itself to raise the presumption of advancement, although I regard it as rather a borderline case as the intestate was himself a man of no great wealth.

However, in the result, in my judgment, this sum does not have to be brought into account by the plaintiffs as part of the estate of the elder brother.

There being no other point outstanding, it follows that the master's certificate must stand, and therefore I must make the order asked for upon the further consideration.

Order accordingly.

Solicitors: *H. W. & S. Patey.*

K. R. A. H.

[4] [1903] 1 Ch. 1, 10.

[COURTS-MARTIAL APPEAL COURT.]

* REGINA *v.* LACEY.

C.-M. A. C.

1956
July 24.

Lord Goddard C.J., Ormerod and Ashworth JJ.

Military Law — Appeal from court-martial — Petition to appropriate authority — Time limit for petition — Whether time limit can be extended—Courts-Martial (Appeals) Act, 1951 (14 & 15 *Geo.* 6, *c.* 46), *s.* 3 (1) (2)—*Courts-Martial Appeal Rules*, 1952 (*S.I.* 1952, *No.* 194), *r.* 6 (1) (*b*), *as substituted by the Courts-Martial Appeal (Amendment) Rules*, 1954 (*S.I.* 1954, *No.* 1557), *r.* 2.

The applicant, a senior aircraftman, was convicted before a court-martial of obtaining money by false pretences. His petition to the Air Ministry to quash his conviction was rejected on the ground that it was two days out of time:—

Held, that there was no provision either in the Courts-Martial (Appeals) Act, 1951,[1] or in the rules[2] made thereunder, which would permit the court to extend the time for presenting a petition.

Per curiam. Whether or not it would be desirable to have a rule prescribing a period subject to the right of the court to extend it, was a matter of policy, which might be considered by the appropriate authority.

APPLICATION for leave to appeal against conviction.

The applicant, Albert James Lacey, a senior aircraftman serving in the Royal Air Force, was convicted before a court-martial at Lichfield of obtaining money by false pretences. He petitioned the Air Ministry to quash his conviction. The petition was rejected on the ground that it was two days outside the time limit laid down for the presentation of such a petition by the Courts-Martial (Appeals) Act, 1951, s. 3, and the Courts-Martial Appeal Rules, 1952, r. 6 (1) (*b*), as substituted by the Courts-Martial Appeal (Amendment) Rules, 1954, r. 2. The matter was brought before the court by the direction of Lord Goddard

[1] Courts-Martial (Appeals) Act, 1951, s. 3: "(1) Subject to the following provisions of this Part of this Act, a person convicted by a court-martial may, with the leave of the court, appeal to the court against his conviction. (2) Except in the case of a conviction involving sentence of death, the right conferred by the foregoing subsection on a person convicted by a court-martial shall not be exercisable— (*a*) unless, within such period as may be prescribed, he presents to the appropriate authority a petition praying that his conviction be quashed . . ."

[2] Courts-Martial Appeal Rules, 1952, r. 6 (1), as substituted by the Courts-Martial Appeal (Amendment) Rules, 1954, r. 2: "The period within which a person convicted by a court-martial . . . must, as a condition precedent to his exercise of his right of appeal, present, under s. 3 (2) (*a*) of the Act, to the appropriate authority a petition praying that his conviction be quashed shall be . . . (*b*) in the case of a conviction by an army or air force court-martial: (i) 40 days next following that on which the finding of the court-martial was promulgated, if the court-martial was held in the United Kingdom; and (ii) 60 days next following that on which the finding of the court-martial was promulgated in any other case."

[Reported by D. TRAFFORD OWEN, Esq., Barrister-at-Law.]

C.-M. A. C. 1956

REGINA v. LACEY.

C.J., in order that the court might have the opportunity of considering the question of the extension of the time limit.

The applicant did not appear and was not represented.

LORD GODDARD C.J. The applicant, Albert James Lacey, a senior aircraftman, was convicted before a court-martial at Lichfield in February of this year of obtaining money by false pretences, and was sentenced to be reduced to the ranks and serve 84 days' detention. He sent a petition to the Air Ministry, who refused to accept it on the ground that it was out of time. The question then arose: what was to be done? The Air Ministry said: "This petition is of no value as a petition under "the Courts-Martial (Appeals) Act, 1951," but they accepted it as a petition for the exercise of the royal prerogative. I thought that the best course was to have the matter brought before the court in order that we could consider whether or not the Air Ministry were right in the view they took. There is no question that the petition was presented two days out of time, and it does not appear that there is any power to extend the time.

[His Lordship read the Courts-Martial (Appeals) Act, 1951, s. 3 (1) and (2) and the rules made thereunder and continued:]

There is no provision either in the Act or the rules for extending the time and there is a very good reason for this, because these matters should not be left indefinitely undecided. Whether or not it would be desirable to have a rule prescribing a period subject to the right of the court to extend it, is a matter of policy which may be considered by the appropriate authority. We can only say here that the applicant cannot apply for leave to appeal because he did not comply with the conditions precedent which the Act lays down, that is, that he must present his petition within the prescribed time. The court comes to this decision without any real reluctance in this matter, because it is obvious that there is no ground for interfering with this conviction. The applicant's only objection to the conviction is that he says the offence had been condoned by an officer who had power to condone. It is perfectly true that the Army Act provides that an offence may be condoned, but it is equally clear that in this case the offence had not been condoned. The officer whom the applicant says had condoned the offence had no power, nor did he purport to do so.

For these reasons, even if we could have extended the time, it is quite clear we should not have given leave to appeal because there is no ground for it. Therefore, we dismiss this application, and say that the Air Ministry were right in refusing to accept the petition as a petition under the Act.

Application dismissed.

[COURTS-MARTIAL APPEAL COURT.]

* REGINA *v.* JENNINGS.

C.-M. A. C.

1956
July 30.

Pilcher, Ormerod and Ashworth JJ.

Military Law—Civil offence—Procedural provision—Civil offence committed in Germany — Driving without due care and attention — Failure to give warning of prosecution in accordance with Road Traffic Act, 1930 — *Army Act, s.* 41 (5) — *Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 12, 21.

The appellant was charged before a court-martial in Germany, under section 41 (5) of the Army Act,[1] with the commission in Germany of the civil offence of driving without due care and attention contrary to section 12 of the Road Traffic Act, 1930. He entered a plea in bar on the ground that he had not been warned of the intended prosecution within 14 days of the commission of the offence as required by section 21 of the Road Traffic Act, 1930[2]:—

Held, that section 21 of the Road Traffic Act, 1930, was a procedural section, and, accordingly, the court-martial was entitled to convict even though the procedure provided for by that section had not been complied with.

APPEAL against conviction.

On March 10, 1956, the appellant, Warrant Officer Arthur John Jennings, while serving in the army in Germany, was court-martialled and charged under section 41 (5) of the Army Act with

[1] Army Act, s. 41: "Subject to "such regulations for the purpose "of preventing interference with the "jurisdiction of the civil courts as "are in this Act after mentioned, "every person who, whilst he is a "subject to military law, shall com-"mit any of the offences in this "section mentioned shall be deemed "to be guilty of an offence against "military law, and if charged under "this section with any such offence "(in this Act referred to as a civil "offence) shall be liable to be tried "by court-martial, and on conviction "to be punished as follows; . . . "(5) If he is convicted of any offence "not before in this section particu-"larly specified, which when com-"mitted in England is punishable "by the law of England, be liable, "whether the offence is committed in "England or elsewhere, either to "suffer such punishment as might be "awarded to him in pursuance of "this Act in respect of an act to the "prejudice of good order and military "discipline, or to suffer any punish-"ment assigned for such offence by "the law of England."

[2] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for "an offence under any of the pro-"visions of this Part of this Act "relating respectively to the maxi-"mum speed at which motor vehicles "may be driven, to reckless or "dangerous driving, and to careless "driving he shall not be convicted "unless either—(*a*) he was warned "at the time the offence was com-"mitted that the question of prose-"cuting him for an offence under "some one or other of the provisions "aforesaid would be taken into con-"sideration; or (*b*) within fourteen "days of the commission of the "offence a summons for the offence "was served on him; or (*c*) within "the said fourteen days a notice of "the intended prosecution specifying "the nature of the alleged offence "and the time and place where it is "alleged to have been committed was "served on or sent by registered post "to him or the person registered as "the owner of the vehicle at the time "of the commission of the offence: ". . ."

[Reported by D. TRAFFORD OWEN, Esq., Barrister-at-Law.]

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driving without due care and attention contrary to section 12 of the Road Traffic Act, 1930. He entered a plea in bar contending that the court-martial had no power to punish him, because the military authorities had failed to give him warning of the intended prosecution within 14 days of the commission of the offence as required by section 21 of the Road Traffic Act, 1930. He was convicted and fined £15, which was subsequently reduced by the confirming authority to £10. He appealed.

Melford Stevenson Q.C. and *David Lloyd* for the appellant.
Sir Harry Hylton-Foster Q.C., *S.-G.*, and *E. Garth Moore* for the Crown.

No cases were cited in argument.

PILCHER J., delivering the judgment of the court, stated the facts, read section 21 of the Road Traffic Act, 1930, and section 41 of the Army Act, and continued: The appellant took the point at the court-martial by way of what was called a plea in bar that he could not be convicted and punished in respect of this civil offence. It was quite clear, and it is not now in question, that a civil offence of careless driving had been committed; that the appellant had not received a warning that he would be prosecuted, and that no summons had been issued, because no summons could be issued in Germany, nor had the appellant received within 14 days of the commission of the offence a notice of the intended proceedings by court-martial. That contention was rejected at the court-martial, and it is against his conviction by the court-martial that he now appeals.

Mr. Stevenson, on behalf of the appellant, put the matter quite shortly. He said that under section 41 of the Army Act a court-martial can convict only of offences which are punishable by the law of England. This offence was not punishable by the law of England because there was a failure to give the appellant the appropriate warning and notice provided for by section 21 of the Road Traffic Act, 1930; consequently, it was not competent to the court-martial to convict him under section 41.

The Solicitor-General submitted, on the other hand, that section 21 was only a procedural section. There is no question here that the appellant was guilty of the offence of careless driving, and that under section 113 of the Road Traffic Act, 1930, he would under the civil law have been liable to have been fined in respect of a first offence a sum not exceeding £20. But, he says, all that section 41 does is to make a person who is guilty of a civil offence guilty of a military offence; section 21 is merely a procedural section which applies here in England, but is quite inapplicable to a soldier serving abroad. He says, further, that it is in fact not an offence under the Road Traffic Act, 1930, to drive carelessly in Germany. None the less, the authorities are enabled by section 41 to invoke the provisions

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of the Road Traffic Act, 1930. Section 41 (5) of the Army Act specifically states that if a soldier is convicted of any offence, not being an offence already mentioned in that section, which when committed in England is punishable by the law of England, then he shall be liable, whether the offence is committed in England or elsewhere, either to suffer such punishment as may be awarded to him in pursuance of the Army Act in respect of an act to the prejudice of good order and military discipline, " or to " suffer any punishment assigned for such offence by the law of " England," which, in this case with regard to a first offence, is a fine not exceeding £20. The Solicitor-General submits, with some force, that the offence here being careless driving, it is an offence punishable by the law of England, and that it is idle to say that a man who has clearly committed the offence of careless driving under the Road Traffic Act, 1930, has not committed the offence until one or other of the provisions of section 21 has been complied with, the section being purely procedural.

In the opinion of the court the submission of the Solicitor-General is correct, and section 21 is a procedural section. Consequently, in spite of the fact that the procedure provided for by that section was not carried out in this case, the court-martial was entitled to convict the accused in respect of the offence of which he was guilty. The appeal, therefore, will be dismissed.

Appeal dismissed.

Solicitors: *Lomer & Wheater; Director of Army Legal Services.*

[COURT OF CRIMINAL APPEAL.]

* PRACTICE NOTE (INDICTMENTS).

C. C. A.
1956
Nov. 12.
Lord Goddard C.J., Hallett and McNair JJ.

Criminal Law—Practice—Indictment—Drafting and inspection.

LORD GODDARD C.J. The Attorney-General has informed the court that some diversity of practice exists with regard to the settling of indictments and affording inspection of them before trial. It is desirable that the practice both at assizes and sessions should be uniform and also that an accused person should, when practicable, be informed before trial of any charges included in the indictment additional to or varying from those on which he has been committed. Accordingly, the court in collaboration with the Attorney-General has prepared a practice note, which should be followed by those whose duty it is to prepare indictments.

(1) The prosecution are entitled to require that the terms of an indictment should be settled by counsel. Clerks of assize and of the peace can require it to be settled by counsel when they think fit. The necessity and cost of employing counsel will be a

C. C. A. 1956

PRACTICE NOTE (INDICTMENTS).

matter for the taxing officer. (2) Where an indictment or draft indictment settled but not signed contains counts which differ materially from or are additional to the charges on which the accused was committed for trial, the clerk of assize or clerk of the peace shall, except where the indictment has been settled by counsel for the prosecution, notify the prosecution and the accused of the fact and, where the indictment has been settled by counsel for the prosecution, notify the accused of the fact as soon as may be. (3) On or after commission day at assizes or the day before the sessions open at the Central Criminal Court or at quarter sessions or earlier at the discretion of the clerk of assize or clerk of the peace, facilities shall be given to the prosecution and to the accused to inspect the indictment or the draft indictment if the indictment has not then been signed. If on those days the indictment is not drafted, such facilities shall be given as soon as possible.

C. J. E.

[PROBATE, ETC., DIVISION.]

1956 *Nov.* 13.

*PRACTICE DIRECTION (EVIDENCE).

Husband and Wife—Practice (in matrimonial causes)—Evidence—Proof of entry of birth—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940/*L.*27), *r.* 25 (1) (*c*).

Where it is necessary to prove the original entry in a register of births, and the petitioner cannot without undue expense or inconvenience travel to inspect the register, the registrars of the Divorce Registry will give favourable consideration to an application under Matrimonial Causes Rules, 1950, r. 25 (1) (*c*),[1] for leave to prove the entry by production of a photograph certified by the superintendent registrar or registrar of births and deaths.

B. LONG,
Senior Registrar.

Principal Probate Registry.
November 13, 1956.

[1] Matrimonial Causes Rules, 1950, r. 25: "(1) Subject to the provisions "of the Supreme Court of Judicature "(Consolidation) Act, 1925, and of "the Act and this rule, the witnesses "at the trial of any matrimonial "cause shall be examined viva voce "and in open court:

"Provided that a judge or registrar "may—. . . (*c*) order that evidence "of any particular facts to be "specified in the order shall be "given at the trial by statement on "oath of information and belief, or "by production of documents or "entries in books, or by copies of "documents or entries, or otherwise "as the judge or registrar may "direct."

[HOUSE OF LORDS.]

* CANADIAN PACIFIC STEAMSHIPS LTD. . PETITIONER; H. L. (E.)†

AND

1956
Nov. 15.

BRYERS . . . . . RESPONDENT.

PETITION [1] for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Bryers* v. *Canadian Pacific Steamships Ltd.*[2]

The APPEAL COMMITTEE allowed the petition.

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* BLACKBURN . . . . . PETITIONER;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

PETITION for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Ex parte Blackburn*.[3]

The APPEAL COMMITTEE dismissed the petition.

F. C.

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† *Present:* VISCOUNT SIMONDS, LORD TUCKER and LORD SOMERVELL OF HARROW.

[1] On October 17, 1956, Viscount Kilmuir L.C. announced in the Appeal Committee that, as from the beginning of the present Parliamentary Session, petitions for leave to appeal would be heard in public unless the Appeal Committee should decide otherwise.

[2] [1956] 3 W.L.R. 776; [1956] 3 All E.R. 560.

[3] [1956] 1 W.L.R. 1193; [1956] 3 All E.R. 334.

[COURT OF APPEAL.]

* MAXTED *v.* MAXTED.

C. A.

1956
Nov. 5.

PRACTICE NOTE.

Denning, Hodson and Morris L.JJ.

Husband and Wife—Practice—Notice of appeal—Petition for divorce on ground of presumption of death of respondent — Petition dismissed—Notice of appeal to be served by advertisement.

APPLICATION ex parte.

A wife presented a petition under section 16 of the Matrimonial Causes Act, 1950, to have it presumed that her husband

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was dead and to have the marriage dissolved. The husband disappeared in 1940, when the parties were living at Alnwick; though he had been advertised for, the wife had heard nothing of him since. Notice of the petition was directed to be inserted in one national and one local newspaper. At the hearing, the petition was dismissed. The petitioner desired to appeal.

John C. Mortimer for the petitioner. There appears to be no precedent regarding the service or issue of a notice of appeal in such a case, and the directions of the court are sought as to what should be done. The petitioner is in receipt of legal aid.

DENNING L.J. Apparently the practice is for an advertisement to be issued giving notice of the proceedings of this court. We think that there should be service by advertisement, and that in this case one advertisement in the local newspaper will be sufficient. Any details as to the nature of the advertisement will be determined by the registrar.

Order accordingly.

Solicitors: *Woodcock, Ryland & Co. for Wade & Son, Alnwick.*

F. R. D.

[CHANCERY DIVISION.]

1956
Oct. 23, 31.
Upjohn J.

* ROBERTSON *v.* CILIA.

[1956 R. 467.]

Mortgage — Practice — Summons for possession — Adjournment — Payments of instalments in arrear—Arrears of instalments paid before hearing—Right to repay by instalments lapsed—Power of court to adjourn hearing generally—R.S.C., Ord. 5, *r.* 5A, *and Practice direction under R.S.C., Ord.* 55, *r.* 5A.

A mortgagee applied by summons to the court for an order for possession of the mortgaged property on the ground that payment of the instalments was in arrear. The mortgagor made an application for the case to stand over generally. After certain interlocutory proceedings, the summons was adjourned into court in order that it might be determined to what extent the court had power to stand over generally a summons of this nature. At the time of the hearing all arrears of instalments due under the mortgage had been paid up, but the right to repay by instalments had lapsed and it was admitted that, owing to general credit restrictions, the mortgagor would not be in a position to redeem within any foreseen time:—

Held, (1) the court had an inherent power to direct any matter brought before it to stand over for such period as should be thought proper, but (2) that in the present case an order for possession should be made, as the mortgagee was entitled to possession; and

in those circumstances there was no power to stand the matter over generally without the consent of the mortgagee, nor would it be a reasonable exercise of the power to stand it over for a period when there was no prospect that the mortgagor would be in a position to make an acceptable offer.

Hinckley and South Leicestershire Permanent Benefit Building Society v. *Freeman* [1941] Ch. 32; 57 T.L.R. 71; [1940] 4 All E.R. 212 applied.

ADJOURNED SUMMONS.

By a legal charge dated January 12, 1953, and made between the defendant Emanuel Cilia, as borrower, of the one part, and the plaintiff Mary Robertson, as lender, of the other part, a piece of land, together with the dwelling-house erected thereon and known as No. 145, Lancing Road, Orpington, together with the right of way and subject to the restrictions and stipulations in the legal charge more particularly mentioned was charged by the defendant as borrower with the payment to the plaintiff, the lender, of £1,360 then advanced by the plaintiff to the defendant with interest thereon at the rate of £5 per cent. per annum in accordance with the covenant therein contained.

By clause 6 it was provided: "If the borrower shall perform "and observe all the covenants and conditions herein (other than "the covenant for repayment on the 12th day of February next) "the lender will accept payment of principal and interest by "annual payments of £111 payable by equal calendar monthly "payments of £9 5s. 0d. on the 12th day of each month such "annual payments of £111 to be first applied in satisfaction of "a year's interest on the principal sum outstanding after deduc-"tion of income tax and the balance in reduction of principal "(such year's interest to be calculated on the 12th day of "January, 1954, on the sum of £1,360 and on January 12 in "subsequent years on the principal sum outstanding immediately "after the last previous payment on account of principal) and "so long as such payments are made on the due date the lender "will not enforce the security hereby constituted."

In 1954, the mortgagor having fallen into arrear with payment of his instalments, the mortgagee gave notice calling in the mortgage money, and, the mortgagor being still in default, a summons was (in conformity with the Rules of the Supreme Court as altered in 1936 [1]) ultimately taken out in May, 1956, by the

[1] R.S.C., Ord. 5, r. 5A: "Every "action in which there is a claim for "payment of principal money or "interest secured by any mortgage or "charge upon real or leasehold pro-"perty or a claim for possession of "any such property forming a "security for payment to the plaintiff "of any principal money or interest "shall be assigned to the Chancery "Division . . ."

By a practice direction, in respect of an application by originating summons for possession, under R.S.C., Ord. 55, r. 5A (Annual Practice, 1956, p. 1125): "When posses-"sion is sought and the defendant is "in arrear with any instalments due "under the mortgage or charge and "the Master is of opinion that the "defendant ought to be given an "opportunity to pay off the arrears, "the Master may adjourn the sum-"mons on such terms as he thinks "fit . . ."

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mortgagee for an order that the mortgagor should forthwith deliver up to the mortgagee possession of the property comprised in the legal charge.

The mortgagor was desirous that the matter should stand over generally and the summons was (after certain interlocutory proceedings, which are sufficiently referred to in the judgment) adjourned into court for argument. At the hearing, all arrears of instalments having been paid up, the application was made for a direction that the matter should stand over generally, and the question before the court was whether the court had power so to direct.

G. C. Raffety for the plaintiff.
S. W. Templeman for the defendant.

Cases cited in argument not referred to in the judgment: *Redditch Benefit Building Society* v. *Roberts* [2]; *Air Ministry* v. *Harris*.[3]

Cur. adv. vult.

October 31. UPJOHN J. This summons is concerned with the question of the right of a mortgagee to possession of the mortgaged premises. The plaintiff mortgagee and the defendant mortgagor entered into a legal charge, dated January 12, 1953, on No. 145, Lancing Road, Orpington, in the County of Kent, to secure payment of £1,360 with interest at 5 per cent. per annum.

I need refer to only a few of the clauses in the legal charge. By clause 1 the defendant (therein called "the borrower") covenanted to pay to the plaintiff (therein called "the lender") £1,360 with interest at 5 per cent. on February 12, 1953. Clause 2 contained a charge by way of legal mortgage on the premises, and there followed a number of clauses familiar in a mortgage deed. Clause 6 was in these terms: [His Lordship read clause 6 and continued:] There was no attornment clause.

The defendant, for reasons which will presently appear, soon fell into arrear with payment of his instalments, no instalments being paid after August 11, 1953, until January 29, 1954. Thereafter instalments were paid and some arrears paid off, but the plaintiff gave notice calling in the mortgage money on June 10, 1954, when the defendant was £13 15s. 0d. in arrear with his instalments. Matters, however, drifted on and the plaintiff gave another notice calling in the mortgage on February 17, 1956, when the defendant was some £49 in arrear. It is not disputed that,

[2] [1940] Ch. 415, 420; [1940] 1 All E.R. 342.

[3] [1951] W.N. 518; [1951] 2 All E.R. 862.

at latest when the defendant made default in the autumn of 1953, the protection granted by clause 6 to the defendant lapsed and the plaintiff became entitled at law to call in the principal money to enforce her security, and enter into possession of the mortgaged premises.

In view of the long continued default from September 1953 to January 1954, inclusive, I need not consider whether in clause 6 time was strictly of the essence, nor do I propose to express any opinion on Mr. Raffety's point that the plaintiff could by virtue of her estate in the premises at law enter into possession from the moment the mortgage was executed notwithstanding clause 6, it being plain, for the reason I have mentioned, that she was at law entitled to do so long before this summons for possession was issued on May 17, 1956.

The summons came before me in chambers in July 1956, when the defendant appeared before me in person with a sad story that he had regularly paid the monthly instalments to his wife for her to pay to the plaintiff or her solicitors, and she, without his knowledge, until he made inquiry when the summons was served on him, failed to pay over many of the instalments. That story is accepted as true by the plaintiff, although, of course, she was entirely ignorant of this trouble until the defendant told the master about it when the summons first came before him.

Before me the defendant offered to pay up all arrears, and, on terms that he paid punctually all future instalments, and in addition £5 a month on account of arrears until all were paid off, I stood the matter over generally with liberty to restore on default by the defendant. The plaintiff did not appear by counsel and took no point that I could not in a proper case stand the case over generally on terms if I thought fit, although her solicitors did press for an order for possession.

Later on, counsel applied for the matter to be reheard, and, as no order had been drawn up, I adjourned the summons into court for argument. That was in July, and when the matter came before me for hearing last week, I was told that in fact the defendant has now paid up all arrears of instalments down to and including October 12 last.

Mr. Raffety submits that this court has no right, without the consent of the plaintiff, to stand over the summons generally, even on terms, and notwithstanding that all arrears have now been paid up he submits that he is entitled to an order for possession. That raises a challenge to the order which I was minded to make in chambers, which followed what I am told is a very frequent practice by masters in the Chancery Division. On the other hand, Mr. Raffety would not object to an order for an adjournment for a fixed period of two or even three months if the

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defendant wanted time to make arrangements to pay off the whole amount due under the mortgage; but Mr. Templeman frankly admits that such an adjournment would be of no use to the defendant, for inquiry has shown that, as a result of financial conditions now operating, usually described as the credit squeeze, it is impossible to obtain a loan to pay off an existing mortgage.

Before the Rules of the Supreme Court were altered in 1936, it is quite clear that the plaintiff could have proceeded in the Queen's Bench Division and obtained an order for possession as of course, but, in that year, the Rules were altered by the introduction of Order 5, r. 5A, and Order 55, r. 5A, and a practice direction was given in these terms by the judges of the Chancery Division: "When possession is sought and the defendant is in "arrear with any instalments due under the mortgage or charge "and the Master is of opinion that the defendant ought to be "given an opportunity to pay off the arrears, the Master may "adjourn the summons on such terms as he thinks fit."

Both sides relied on *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman*.[1] The claim there made on behalf of the plaintiff was that under the terms of the mortgage and in the events which had happened the plaintiff was entitled to an immediate order for possession, and it was argued that the court had no power to order any adjournment to give the defendant an opportunity of paying off the arrears. That raised a question of some general importance and, as the defendant did not appear, the Crown appeared as amicus curiae. Farwell J. said this in his judgment: "It is a novel proposition to me that this court "has not power to adjourn any matter on any proper ground. "No doubt the court would not arbitrarily postpone the hearing "of a matter indefinitely, because to do so might lead to defeating "justice altogether; and a mere arbitrary refusal to hear a "particular case is not a course which any judge would take or "which would ever become a recognized thing. But to say that "the court has not inherent power to direct that any matter "which comes before it should stand over for a period if the "court thinks that that is the proper way to deal with the matter, "is an entirely novel proposition to me."

This passage was cited with approval by Romer L.J. in the Court of Appeal in *In re Yates' Settlement Trusts*.[2] It is equally clear from Farwell J.'s judgment in *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman*[3] that he recognized that if the plaintiff establishes a right to possession he must get it. He said this: "but if the

[1] [1941] Ch. 32, 38; 57 T.L.R. 71; [1940] 4 All E.R. 212.

[2] [1954] 1 W.L.R. 564, 568; [1954] 1 All E.R. 619.

[3] [1941] Ch. 32, 37.

" plaintiff proves that he is entitled to his order and that he is " in fact in the position of a mortgagee who is entitled to posses- " sion, he, of course, will get possession and there is nothing in " the Rules which can alter the right of the mortgagee—which " he had both before the Judicature Act and after the Judicature " Act, and which in my judgment he still has—to possession in " proper circumstances." At the end of his judgment the judge referred the matter back to chambers with a direction to the master that if he was satisfied that none of the instalments had been paid during the last three months the master should make an order for possession.

Mr. Templeman argued, with some force, that this showed by necessary implication that, if it had been proved before the master that some or possibly all instalments due had been paid, Farwell J. would have granted a further adjournment. With all respect to that argument, I do not think that implication can be extracted from the judge's judgment. He was concerned, and concerned solely, with the suggestion that there was no power in the court to adjourn at all. He never considered, for it was not before him, what would be the position if the plaintiff was still pressing for possession although it was proved that all arrears of instalments had been paid. That is the problem which I have to consider.

In this case the plaintiff has clearly established the fact that the mortgage is presently enforceable. She is plainly entitled to repayment of the whole loan and interest outstanding, and for that purpose to realization of her security in order to repay herself the moneys due and in aid of her realization to possession of the mortgaged premises.

It seems to me clear, having heard argument on it, that the order which I was minded to make cannot without the consent of the plaintiff be right. I have no right to stand the matter over generally without the consent of the plaintiff, although all arrears of instalments have been paid up, even on terms as to punctual payment in the future. That is so for two reasons. First, if I were to do so, I should be forcing the parties to an agreement which they have never made, namely, to compel the plaintiff to accept repayment by instalments, although the defendant's right to do so has long since lapsed. The Judges' Direction of 1936 was not and could not have been intended to give the court power to do that. Secondly, if I were to do so, I should, so it seems to me, be postponing indefinitely the right of the plaintiff to have her case for possession tried on terms which I have no power to impose. That would amount to an arbitrary refusal to hear this case.

Mr. Templeman, realizing his difficulty in supporting a claim to an indefinite adjournment, submitted that, as I had power to adjourn the matter for a fixed period, I should do so for one

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year, in the hope that the credit squeeze would by then have lessened and the defendant would be thereby enabled to pay off the loan. He drew my attention to many facts in evidence, namely, that the defendant will be turned out of the premises where he has been resident for 19 years, and of which he was formerly a tenant of the plaintiff with the protection of the Rent Restriction Acts; that he was persuaded by the plaintiff to purchase the property and that his misfortune is due to his wife's peccadilloes. On the other hand, he urges, with some justification, on the evidence, that the plaintiff herself is a victim of the credit squeeze and is pursuing her remedies only because her bankers, who are sub-mortgagees, are pressing for reduction of her overdraft. If I grant a long adjournment he says that the only effect will be that the bank will be compelled to permit the plaintiff to continue her overdraft.

That is an appeal to hardship, and if I had the right to refuse relief to a mortgagee on the ground that greater hardship would be caused to the mortgagor I might well refuse to make an order for possession in this case, but Parliament has not thought right to give the court power to interfere between mortgagor and mortgagee on that ground.

No doubt I have power to adjourn this matter for a reasonable period to give the mortgagor an opportunity of making some offer acceptable to the mortgagee and if necessary trying to find means of discharging the loan altogether. That was the whole object of the alteration in 1936; namely, to prevent a mortgagee turning a mortgagor out of possession almost literally overnight without giving him an opportunity to meet and try to satisfy his creditor.

In the circumstances of this case, however, the defendant has no acceptable proposition to put forward. It cannot, in my judgment, be a reasonable exercise of my discretion to adjourn the hearing for as long as one year in the mere hope that the financial position of the country will ease and that the defendant will be able to find someone able and willing to lend him money to discharge the plaintiff's mortgage. An order for possession must go.

There will, therefore, be an order for possession two months after service of the order.

Solicitors: *Lewis W. Taylor & Co.; Dowding & Dowding, Orpington, Kent.*

J. L. D.

[CHANCERY DIVISION.]

* GATEHOUSE *v.* VISE (INSPECTOR OF TAXES).

1956
Oct. 25, 26, 30;
Nov. 8.

Danckwerts J.

Revenue—Income tax—Schedule A—Assessment on landlord or tenant—Flats forming part of single house or building—Method of assessment—Whether assessment on tenant or landlord—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. A*, *No. VII*, *rr.* 8 (*c*), 12.

Rule 8 (*c*) of No. VII of Schedule A to the Income Tax Act, 1918, provides: "The assessment and charge shall be made upon the "landlord in respect of—. . . (*c*) any house or building let in "different apartments or tenements, and occupied by two or more "persons severally. Any such house or building shall be assessed "and charged as one entire house or tenement."

Rule 12 provides: "Where a house is divided into distinct "properties, and occupied by distinct owners or their respective "tenants, such properties shall be separately assessed and charged "on the respective occupiers thereof."

The taxpayer, who was the tenant of a flat in Knightsbridge, appealed against an assessment on him as occupier for the year 1951–1952 under Schedule A to the Income Tax Act, 1918, in the sum of £201. The ground floor of the property in question comprised four garages. On the first floor there were five flats, of which the taxpayer occupied flat No. 3. There was no means of communication through the garages to the first floor. The only means in which access could be obtained to the flats was by one of two common staircases and along a balcony, on which the front door of each flat opened. The landlords were responsible for the repair of the balcony and staircases. Under the terms of the lease relating to the flat in question the lessee paid the sum of £2,750, and agreed to pay the annual sum of £1 payable on June 24 in each year for a term of 22 years from December 25, 1950 (less the last three days).

The taxpayer claimed that under the rules relating to Schedule A the assessment should have been made not on him but on the landlords. The general commissioners found that the flat was part of a single house or building but accepted the contention of the inspector of taxes that rule 12 of No. VII of Schedule A applied, and, accordingly, they confirmed the assessment.

On appeal by the taxpayer:—

Held, that the assessment should have been made on the landlords under rule 8 (*c*), the language of which fitted the case, and that, accordingly, the appeal should be allowed.

Attorney-General v. *Mutual Tontine Westminster Chambers Association Ltd.* (1876) 1 Ex.D. 469 applied.

APPEAL from the Commissioners for the General Purposes of the Income Tax.

At a meeting of the commissioners held on November 4, 1954, Robert Alexander Gatehouse (hereinafter called "the "appellant") appealed against an assessment for the year 1951–1952 made upon him as the occupier of No. 3, Kinnerton Yard, London, S.W.1, under Schedule A to the Income Tax Act, 1918, in the sum of £201. There were also before the commissioners appeals by the occupiers of Nos. 1, 2, 4 and 5, Kinnerton Yard in respect of similar assessments made upon them as occupiers

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of their respective flats; but it had been agreed between the parties that the appeal of the appellant should alone be argued before the commissioners and that the decision in his case should govern the remaining appeals.

The following facts appear from the case stated: By a lease dated February 20, 1951, two individuals on behalf of Kinnerton Estate Co. Ltd., lessors of the premises, in consideration of the sum of £2,750 and an annual rent of £1, demised to Mrs. Helen Grace Gatehouse the flat, No. 3, Kinnerton Yard, for a term of 22¼ years from December 25, 1950 (less the last three days). The lessee covenanted with the landlords as follows:—

"1. To pay the rents hereinbefore reserved at the times and "in manner aforesaid without any deduction whatsoever except "for Landlords Property Tax.

"2. To pay discharge and perform the land tax (if any) sewers "rates main drainage rates and all other taxes charges rates "duties assessments impositions outgoings and obligations what-"soever which now are or which shall at any time during the "said term be taxed charged rated assessed and imposed upon "the said demised premises or any part thereof or upon the "landlord or the tenant in respect thereof (Landlords Property "Tax only excepted) And in particular will pay to the landlords "on demand the proportion of water rate payable in respect of "the demised premises. . . .

The landlords covenanted with the lessee:—

"(1) To pay the rent reserved by the lessee under which the "landlords hold the said premises and to perform and observe "the lessee's covenants and conditions therein mentioned so "far as the same ought not to be performed by the lessee under "this present lease. . . ."

The case stated continued: The appellant gave evidence before us as follows and we accepted it:—(a) He is the occupier of No. 3, Kinnerton Yard, the subject-matter of the appeal. (b) The property known as Kinnerton Yard was built to the order of one person. The ground floor comprises four garages. The first floor comprises five flats known as Nos. 1, 2, 3, 4 and 5, Kinnerton Yard. There is no means of communication through the garages to the first floor. (c) The only manner in which access can be obtained to the flats is by one of the two common staircases and by proceeding along the balcony onto which the front door of each flat opens. It is impossible to distinguish from outside where one flat begins and another ends. The roof is a flat slab covering all the flats and there is nothing to tell where the roof of one flat begins and another ends. To light the staircases and balcony there are three wall lights which are maintained by the landlords, who are responsible for the repair of the balcony and staircases. (d) The entrance to the garages and flats is by a common approach from Kinnerton Street through a narrow opening between two buildings into Kinnerton Yard.

which is covered with tarmac. The yard slopes down from all sides to a central drain for car washing.

The appellant's mother, Mrs. Helen Grace Gatehouse, is the lessee referred to in the lease of February 20, 1951. But it was agreed that the appellant was in fact in occupation and paid the rent and that for the purposes of this case the appellant would be regarded and treated in the same way as though he had been the lessee named in the lease in lieu of his mother, the said Helen Grace Gatehouse. It was further agreed between the appellant and the respondent for the purposes of the present case that the said lease to the appellant's mother took effect on the basis that Alan Higham Wright and Harold Vivian Maltby, the persons named in the said lease as the landlords, had entered into the said lease on behalf of Kinnerton Estate Company Limited.

It was contended on behalf of the appellant that the five flats, Numbers 1, 2, 3, 4 and 5, Kinnerton Yard (or alternatively the said flats together with the garages on the ground floor), comprised a building let in different tenements and that the said flats were at all relevant times occupied by two or more persons severally and consequently that an assessment for the year 1951–1952 in respect of the said flats or the said flats together with the said garages should have been made on the landlord under rule 8 (c) of No. VII, Schedule A, Income Tax Act, 1918, and that the assessment on the appellant should be discharged.

It was contended on behalf of the respondent:—(1) That each of the flats on the first floor, numbered respectively 1 to 5, Kinnerton Yard, constitutes a separate house separately assessable for the purpose of income tax, Schedule A, and the appellant is properly assessed as the occupier of No. 3. (2) Alternatively, that notwithstanding a decision that the said flats together constitute a single house or building, or form part of a single house or building:—(a) The occupation by the appellant of No. 3 at a rent which is less than the rack rent confers upon him a benefit of part of the annual value of that property, which benefit is chargeable to income tax under the charging provisions of Schedule A as "property" and represents his income for tax purposes. (b) Since the remaining tenants possess similar benefits which are similarly chargeable, the house is divided into distinct properties and occupied by distinct owners within the meaning of the Income Tax Act, 1918, Schedule A, No. VII, rule 12, which in these circumstances excludes the operation of Schedule A, No. VII, rule 8. (c) The appellant is therefore properly assessed and charged in respect of No. 3, Kinnerton Yard, as occupier.

The commissioners found that No. 3, Kinnerton Yard was part of a single house or building, but they accepted the alternative contention of the Crown and accordingly confirmed the assessment.

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The question for the opinion of the court was whether, in view of their finding that No. 3, Kinnerton Yard was part of a single house or building, the commissioners were entitled to conclude that the building was a house divided into distinct properties and occupied by distinct owners or their respective tenants so that the assessment in respect of No. 3, Kinnerton Yard was properly made upon the appellant.

F. N. Bucher Q.C. and *H. H. Monroe* for the taxpayer.
Cyril King Q.C. and *Sir Reginald Hills* for the Crown.

The following cases, not referred to in the judgment, were cited in argument: *Towle* (*Inspector of Taxes*) v. *Improved Dwellings Co. Ltd.*[1]; *Johnstone* (*Inspector of Taxes*) v. *Consolidated London Properties*[2]; *Shanks* v. *Inland Revenue Commissioners*[3]; *Inland Revenue Commissioners* v. *Miller*[4]; *Rossdale* v. *Fryer*[5]; *Moore* v. *Drughorn*[6]; *Egyptian House Properties* v. *Maynards Ltd.*[7]; *Chapman* v. *Royal Bank of Scotland.*[8]

Cur. adv. vult.

Nov. 8. DANCKWERTS J. read the following judgment: This is an appeal by a tenant of a flat, No. 3, Kinnerton Yard, London, S.W.1, against an assessment on him as occupier for the year 1951–1952 under Schedule A to the Income Tax Act, 1918, in the sum of £201.

The ground floor of Kinnerton Yard comprises four garages. On the first floor there are five flats known as Nos. 1, 2, 3, 4 and 5, Kinnerton Yard. There is no means of communication through the garages to the first floor. The only means by which access can be obtained to the flats is by one of two common staircases and along a balcony on which the front door of each flat opens. The landlords are responsible for the repair of the balcony and staircases, and the maintenance of three wall lights which light them.

The appellant is in occupation of flat No. 3, and it was agreed that he should be treated for the purposes of the case as if he were the lessee named in a lease dated February 20, 1951, by two individuals on behalf of Kinnerton Estate Co. Ltd. to his mother, Mrs. Helen Grace Gatehouse. Under the terms of the said lease the lessee paid the sum of £2,750 and agreed to pay the annual sum of £1 payable on June 24 in each year for a term of 22 years and one quarter from December 25, 1950 (less the last three days).

[1] [1931] 1 K.B. 263; 47 T.L.R. 74; 17 T.C. 231.
[2] (1932) 17 T.C. 266, 270.
[3] [1929] 1 K.B. 342; 45 T.L.R. 28; 14 T.C. 249.
[4] [1930] A.C. 222; 46 T.L.R. 207, sub nom. *Miller* (*Lady*) v. *Inland Revenue Commissioners*, 15 T.C. 25.
[5] [1922] 2 K.B. 303; 38 T.L.R. 445.
[6] [1922] 2 K.B. 492.
[7] [1934] Ch. 681; 50 T.L.R. 367.
[8] (1881) 7 Q.B.D. 136; 1 T.C. 363.

The appellant claims that under the rules relating to Schedule A the assessment should have been made not upon him but upon the landlords. The general commissioners upheld the assessment on the appellant. The general commissioners found that No. 3, Kinnerton Yard is part of a single house or building but they accepted the contention of the Inland Revenue that the building is a house divided into distinct properties occupied by distinct owners or their respective tenants, so that the assessment in respect of No. 3, Kinnerton Yard was held by the commissioners to have been properly made upon the appellant.

The appellant appeals against this decision of the commissioners. It would not appear to make any appreciable difference to the Inland Revenue whether they recover the tax from the tenant or from his landlords. The person really interested to oppose the appeal would appear to be the landlords, who are not party to these proceedings. But I suppose that the Inland Revenue regard the matter as being one of principle in some way or other. The matter is of importance to the tenant because, if he is assessable in a sum of £201, he cannot deduct it from the rent of £1 payable to his landlords.

In essence, as it seems to me, the case depends on which of two rules in the rules applicable to Schedule A, Case VII, "Rules "as to Persons chargeable," applies. These rules are: rule 8, which provides: "The assessment and charge shall be made "upon the landlord in respect of—. . . (*c*) any house or building "let in different apartments or tenements, and occupied by two "or more persons severally. Any such house or building shall "be assessed and charged as one entire house or tenement"; and rule 12, which provides: "Where a house is divided into distinct "properties, and occupied by distinct owners or their respective "tenants, such properties shall be separately assessed and charged "on the respective occupiers thereof."

The inspector of taxes has applied rule 12 to the present case and has assessed the tenant as the occupier of flat No. 3. The commissioners found that No. 3 is part of a single house or building, but accepted the contentions of the inspector of taxes as to the application of rule 12, and accordingly confirmed the assessment.

For the purposes of the argument before me it was accepted by both sides that the block of flats, consisting of Nos. 1 to 5, constituted a "house," so on that matter I understand that the finding of the commissioners is not disputed. But the difficulty of the question that remains may be appreciated if I say that it appears to me that to an untutored mind either rule might in its language seem to be applicable.

Mr. Bucher and Mr. King, with their precise knowledge and industry, led me through a considerable paper-chase, amid the early statutes relating to inhabited house duty and income tax. It was an interesting journey and I hope they will not think that I am lacking in appreciation, or apprehension, of their arguments

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if I say that I do not propose to retrace the same route more than I can help.

Shortly, it appears that rule 8 (*c*) had precursors in the statutes dealing with inhabited house duty (which seems to make decisions on that duty material upon the true construction of that rule), but the equivalent of rule 8 (*c*) is not to be found in the statutes relating to income tax till the Act of 1853 (section 36). On the other hand, the precursors of rule 12 (and of sub-rules (*a*) and (*b*) of rule 8) were to be found in the Income Tax Act, 1842.

In 1875 there came before the Court of Exchequer the case of *Attorney-General* v. *Mutual Tontine Westminster Chambers Association Ltd.*[1] Westminster Chambers consisted of several blocks, and each block was divided into different tenements or suites of rooms which were quite distinct, and had an open door leading on to the common staircase. The street door was locked at night and there was a resident porter living in his own quarters. The association had power by statute to demise or sell any suite separately, and the suites were let as chambers, offices or residences. The majority of the Court of Exchequer thought that for the purposes of inhabited house duty the association must be assessed as occupiers of each block treated as one dwelling-house, under a rule which is the equivalent of rule 8 (*c*); and that the respective tenants of the different suites should not be assessed under another rule, which is the equivalent of rule 12. Kelly C.B., who dissented, however, thought that the latter was the appropriate rule. In other words, the majority thought that the sets of chambers were let in different tenements and were not distinct properties within the meaning of the other rule.

In the Court of Appeal[2] the Master of the Rolls (Sir George Jessel), Lord Coleridge C.J. and Pollock B. unanimously rejected the view of Kelly C.B. and affirmed the view of Cleasby and Bramwell BB. in the court below. Sir George Jessel said this[3]: "It is necessary now to read the 14th rule: . . ." (i.e., now rule 12): "'. . . 'Where any dwelling house shall be divided into "'different tenements being distinct properties, every such tene-"'ment shall be subject to the same duties as if the same was "'an entire house, which duty shall be paid by the occupiers "'thereof respectively.' It has been suggested that that rule "applied to the present case. But the point, I think, is very "plain indeed—'different tenements being distinct properties' ". . . What is the meaning of 'distinct properties'? Here, "again, you must apply the same rules of construction. 'Divided "'into different tenements in distinct ownerships,' is the primary "meaning. Are these distinct ownerships? It is plain they are "not, because there is only one landlord and one tenant for each "of the tenements; there is a direct letting from the landlord, "the owner, to the one tenant below him. If the tenements "had been sold to different people, and there had been several

[1] (1875) L.R. 10 Ex. 305.
[2] (1876) 1 Ex.D. 469.
[3] Ibid. 480.

" demises, it would have been a different thing; there would then " have been different landlords, and perhaps intermediate tenants, " and I do not say what our decision would have been; but that " is not the case here; it is a mere letting; it is not within the " 14th rule, because in no sense can there be distinct properties, " there being but one landlord throughout."

It is interesting to compare the wording of the former 14th rule (on which Sir George Jessel was commenting) with the present rule 12. The words of the present rule " Where a house is divided " into distinct properties, and occupied by distinct owners or their " respective tenants " closely resembles the phrases which Sir George Jessel used in construing the 14th rule, which he held did not apply to the blocks of suites or chambers under his consideration.

The criticism of Sir George Jessel's language (in reference to the word " house "), which is to be found in Lord Halsbury's speech in *Grant* v. *Langston*,[4] does not seem to touch the passage which I have quoted, and the other legal Lords merely distinguished the two cases on questions of fact.

In *Farmer* v. *Cotton's Trustees*[5] Sir George Jessel's view is repeated by Lord Parker of Waddington, who says of the *Westminster Chambers* case[6]: " In that case the tenements in " question were tenements consisting of more than a single room. " They were, however, the property of one owner, and therefore " not distinct properties within the 14th rule of the Act of 1808." It is, I think, unnecessary to go through the other cases to which Mr. Bucher referred me.

On behalf of the inspector of taxes Mr. Cyril King based his arguments to a large extent on contentions as to the principle of the Income Tax Acts in respect of Schedule A, and referred me to certain cases which he said showed that the tax was intended to fall on the occupier who enjoyed the property in the land as of right. Mr. Bucher, in reply, suggested that while inhabited house duty was plainly occupational in its nature, Schedule A income tax was more in the nature of a tax on property, referring to the common phrase in leases " Landlord's Property Tax " excepted."

It is quite true that in section 1 of the Income Tax Act, 1918, the charge on property is in contrast with the charge on profits or gains, and Schedule A begins by imposing tax " in respect of the " property in all lands, tenements, hereditaments, and heritages " in the United Kingdom, for every twenty shillings of the annual " value thereof." The annual value comes in, of course, because income tax is not a tax on capital but on income. But it always is rather a discouraging pursuit to endeavour to find consistent principles in the statutes relating to income tax. The rules which I have to construe are found in the group called " Rules as to

[4] [1900] A.C. 383, 391; 4 T.C. 205.

[5] [1915] A.C. 922, 936.

[6] 1 Ex.D. 469.

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"Persons chargeable," and I think that the only clearly discernible principle may be that of enabling the tax to be charged on the largest numbers of persons with the least exertion on the part of the officials entrusted with the duty of collecting the tax. This view finds authority in the observations of Lord Halsbury in *London and Westminster Bank* v. *Smith.*[7]

It seems to me that the present case is really governed by the *Westminster Chambers* case [8] and the other decisions to which I have been referred. The assessment should have been made on the landlords under rule 8 (*c*), the words of which fit the case. It has been made under the wrong rule and ought to be discharged, and the appeal should be allowed.

Appeal allowed.

Solicitors: *Alexander Rubens & Co.; Solicitor of Inland Revenue.*

J. A. G.

[7] (1901) 4 T.C. 503, 518. [8] 1 Ex.D. 469.

[PROBATE, ETC., DIVISION.]

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Nov. 21.

Karminski J.

* IN THE ESTATE OF THOMAS, DECD.

PRACTICE NOTE.

Probate—Administration—Former administrator—Grant of administration terminated by order of the court—Former administrator liable to render inventory and account under the Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 25.

For the purpose of requiring a former administrator to give an inventory of and account for the estate of the deceased there is no distinction between a grant terminated by an order of the court in a probate action and one which has been terminated by a cessate grant, and an order under section 25 of the Administration of Estates Act, 1925, may be made against him, although he is no longer a personal representative, as well in the former circumstances as in the latter.

MOTION to commit.

On August 14, 1951, the defendant, James Mark Thomas, obtained a grant of letters of administration of the estate of his brother, Percy James Thomas, deceased. He paid some legacies under a will of the deceased dated December 26, 1950, and the funeral expenses. On February 22, 1956, at the conclusion of a probate action Davies J. pronounced in favour of the will, revoked the grant of August 14, 1951, and granted letters of administration with the will annexed to the plaintiff, a sister of the deceased.

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The defendant failed to make an inventory of the estate and render an account of his administration, and a summons was taken out under section 25 of the Administration of Estates Act, 1925,[1] requiring him to do so. An order to that effect was made by Mr. Registrar Wilkinson on October 8, 1956.

The defendant failed to comply with the order and the plaintiff applied to have him committed for contempt of court.

Connolly Gage for the plaintiff.

The defendant appeared in person.

In the course of the hearing Karminski J. asked counsel for the plaintiff whether, in his submission, the court had power to make orders such as that of October 8, 1956, in the circumstances of the present case:—

Connolly Gage. Mr. Registrar Wilkinson was persuaded that the court had power to order the defendant to exhibit an inventory and an account of the estate although he was no longer a personal representative.

KARMINSKI J. My attention has already been drawn to the authorities.[2] As far as I know this course has never been followed before except in the case of a cessate grant. The fact that there are no authorities upon this very point may be merely because it has been taken for granted since *Taylor* v. *Newton*[3] that this is the right practice. There is authority as far as cessate grants are concerned.

Connolly Gage. It is submitted that the procedure which has been adopted is correct and was actuated in the matter, rightly, by the fact that this was a method which seemed to involve this small estate in the least expenditure. The two alternative modes of procedure by an action for an account or an administrative action are both exceedingly expensive.

KARMINSKI J. I have looked at the authorities and the text-books[2] and have come to the conclusion that the court has power in cases of this kind. There is no distinction for this purpose between a grant which has been terminated by a cessate grant and a grant of this kind which has been terminated by the court in a probate action.

[His Lordship then adjourned the matter for a fortnight for the defendant to exhibit an inventory and account of the estate.]

Solicitors: *Piesse & Sons.*

E. J.

[1] Administration of Estates Act, 1925, s. 25: "The personal representative of a deceased person shall, when lawfully required so to do, exhibit on oath in the court, a true and perfect inventory and account of the real and personal estate of the deceased, and the court shall have power as heretofore to require personal representatives to bring in inventories."

[2] Mortimer, Probate, 2nd ed., p. 501; Tristram & Coote, Probate Practice, 20th ed., p. 446; *Taylor* v. *Newton* (1752) 1 Lee 15.

[3] (1752) 1 Lee 15.

END OF VOLUME 1.